036 SCSL-2003-01-I (636-1640) 636

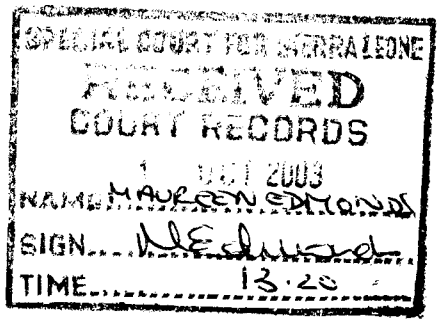
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, QC, President
Judge Emmanuel O. Ayoola
Judge Gelaga King
Judge Renate Winter
Judge .....

Registrar: Mr Robin Vincent

Date filed: 14 October 2003



THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

CASE NO. SCSL – 2003 – 01 – I

PROSECUTION RULE 72(G) (ii) RESPONSE RELATING TO THE DEFENCE MOTION TO QUASH THE INDICTMENT

Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Walter Marcus-Jones, Senior Appellate Counsel
Mr Christopher Staker, Senior Appellate Counsel
Mr Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:
Mr Terence Terry

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

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

CASE NO. SCSL – 2003 – 01 – I

PROSECUTION RULE 72(G) (ii) RESPONSE RELATING TO THE DEFENCE MOTION TO QUASH THE INDICTMENT

I. INTRODUCTION

1. On 23 July 2003, a motion was filed on behalf of the Accused Charles Ghankay Taylor (the "**Accused**") entitled "Applicant's Motion Made Under Protest and Without Waiving of Immunity Accorded to a Head of State President Charles Ghankay Taylor Requesting that the Trial Chamber Do Quash the Said Approved Indictment of 7th March 2003 of Judge Bankole Thompson and that the Aforesaid Purported Warrant of Arrest and Order for Transfer and Detention of the Same Date Issued by Judge Bankole Thompson of the Special Court for Sierra Leone and All Other Consequential and Related Order(s) Granted Thereafter by Either the Said Judge Bankole Thompson or Judge Pierre Boutet on 12th June 2003 Against the Person of the Said President Charles Ghankay Taylor Be Declared Null and Void, Invalid at Their Inception and that They Be Accordingly Cancelled and/or Set Aside as a Matter of Law" (the "**Defence Motion**").[1]

---

[1] Registry page numbers ("**RP**") 65-112.

2. On 28 July 2003, the Prosecution filed a response thereto (the "**Prosecution Response**").[2]

3. The Defence Motion purported to be filed not only on behalf of the Accused, but also on behalf of the Government of the Republic of Liberia. The Prosecution Response argued that the Republic of Liberia is not a party to these proceedings and has no right to file motions in proceedings before the Special Court. Accordingly, the Prosecution Response submitted that all parts of the Defence Motion in so far as it related to the motion of the Republic of Liberia should be struck out.[3]

4. The Prosecution Response also argued that the Defence Motion should be rejected as premature, since the initial appearance of the Accused has not yet been held.[4] The Prosecution argued that the Defence Motion was not a preliminary motion under Rule 72, but a motion under Rule 73. In accordance with the wording of Rule 73(A), motions under that Rule may only be brought "after the initial appearance of the accused".[5] The Prosecution argued furthermore that even if the Defence Motion were to be characterised as a preliminary motion under Rule 72, preliminary motions can in any event only be brought after the initial appearance of the accused.[6]

5. In the event only that the Chamber rejected these submissions and decided to rule on the substance of the Defence Motion, the Prosecution Response set out the Prosecution's response to the arguments in the Defence Motion.[7]

6. On 30 July 2003, the Defence filed a reply to the Prosecution response (the "**Defence Reply**").[8]

---

2 "Prosecution Response to the Defence Motion to Quash the Indictment against Charles Ghankay Taylor", filed on behalf of the Prosecution on 28 July 2003 (RP 113-254).
3 *Ibid.*, para. 3.
4 *Ibid.*, paras. 5-9.
5 *Ibid.*, paras. 5-7.
6 *Ibid.*, para. 8.
7 *Ibid.*, paras. 9-19.
8 "Applicants Reply to Prosecution Response to Applicant's Motion Made Under Protest and Without Waiving of Immunity Accorded to a Head of State President Charles Ghankay Taylor Requesting that the Trial Chamber Do Quash the Said Approved Indictment of 7th March 2003 of Judge Bankole Thompson and that the Aforesaid Purported Warrant of Arrest and Order for Transfer and Detention of the Same Date Issued by Judge Bankole Thompson of the Special Court for Sierra Leone and All Other

7. On 19 September 2003, the Trial Chamber issued an order (the "**Referral Order**"), in which the Trial Chamber said that the Defence Motion "is deemed to have been filed as a preliminary motion pursuant to Rule 72 of the Rules of Procedure and Evidence", and in which the Trial Chamber considered that the Defence Motion "objects to the jurisdiction of 'the Special Court' to try 'the Accused' on all the charges contained in the Indictment".[9] On that basis, the Trial Chamber referred the Defence Motion to the Appeals Chamber for determination, pursuant to Rule 72(E) of the Rules of Procedure and Evidence (the "**Rules**").[10] The Trial Chamber also found that the Government of the Republic of Liberia has no *locus standi* to file such a preliminary motion or to be a party to such a motion.

8. On 1 October 2003, the Defence filed additional submissions pursuant to Rule 72(G) (i) (the "**Defence Rule 72(G) Submissions**").[11] The Prosecution files this response thereto, pursuant to Rule 72(G) (ii).

II. ARGUMENT

A. THE ALLEGED VIOLATION OF HEAD OF STATE IMMUNITY

9. The arguments relating to the alleged violation of head of State immunity are dealt with in pages 1-8 of the Defence Motion, paragraphs 10-18 of the Prosecution Response, pages 2-8 of the Defence Reply, and pages 1-3 and 6-8 of the Defence Rule 72(G) Submissions.

Consequential and Related Order(s) Granted Thereafter by Either the Said Judge Bankole Thompson or Judge Pierre Boutet on 12th June 2003 Against the Person of the Said President Charles Ghankay Taylor Be Declared Null and Void, Invalid at Their Inception and that They Be Accordingly Cancelled and/or Set Aside as a Matter of Law", filed on behalf of the Defence on 30 July 2003 (RP 255-265).

[9] *Order Pursuant to Rule 72(E)—Defence Motion to Quash the Indictment and to Declare the Warrant of Arrest and All Other Consequential Orders Null and Void*, 19 September 2003, RP 272-275.

[10] *Ibid.*

[11] "Additional Submissions for and on Behalf of the Applicant Herein Charles Ghankay Taylor Pursuant to Rule 72 G (i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone Having Regard to the Order Dated the 19th September 2003 of the Trial Chamber of the Special Court for Sierra Leone Duly Signed by the Presiding Judge Bankole Thompson Pursuant to Rule 72(E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone", filed on behalf of the Accused on 1 October 2003 (RP 373-391).

10. The Indictment in this case was approved by the designated Judge in accordance with Rule 47(E) of the Rules on 7 March 2003. Upon the approval of the Indictment, the Accused had the status of an accused before the Special Court for Sierra Leone (Rule 47(H) (ii)).

11. It is not disputed that at the time that the Indictment was approved (and indeed, at the time that the Special Court was established, and at the time that the investigations of the Office the Prosecutor in relation to the Accused were commenced), the Accused was the President of the Republic of Liberia. It is also not disputed that the Accused continued in office as President of the Republic of Liberia at the time that the Defence Motion, the Prosecution Response and the Defence Reply were filed.

12. On 11 August 2003, the Accused ceased to be the President of the Republic of Liberia. As far as the Prosecution is aware, he no longer holds any official position in the Republic of Liberia, nor in any other State. To the best of the Prosecution's knowledge and belief, he is presently residing in Nigeria.

13. The Defence Motion essentially challenges the entirety of the proceedings against the Accused before the Special Court, on the basis of an alleged violation of his immunity under international law as a head of State.

14. The Defence Reply draws a distinction between two categories of immunities, namely "function immunities" and "personal immunities".[12] The Defence Reply also states that the Accused in this case relies on the second category, i.e., the "personal immunities" of a head of State.[13] According to the Defence, this category of immunities "comes to an end after cessation of the official functions of the State agent".[14] The Defence Reply goes on to state that:

> "as long as a State official who may also invoke personal OR diplomatic immunity is in office while he is discharging his official functions, he always enjoys personal immunity. In addition he enjoys functional immunity subject to one exception namely in the case of perpetration of

---

12 Defence Reply, p. 3.
13 Defence Reply, pp. 3-4.
14 Defence Reply, p. 4.

> international crimes. Nonetheless it is submitted that the personal immunity prevails even in the case of the alleged commission of international crimes, with the consequence that the State official may be prosecuted for such crimes only after leaving office".[15]

15. While the Defence Reply is not entirely clear, it would seem to acknowledge that there is at present no bar to the indictment and prosecution of the Accused by the Special Court for crimes under international law since he is no longer a head of State, even if the acts with which he was charged were committed while he was in office. However, if the Prosecution understands the Defence Reply correctly, it argues that because the Indictment in this case was issued against the Accused while he was still the President of the Republic of Liberia, that indictment and all consequential orders were "null and void at their inception".[16] Thus, although the argument in the Defence Reply is not entirely clear (and the Defence Rule 72(G) Submissions are similarly unclear on this point), it may be that it is the Defence position that the Accused could now be indicted and prosecuted by the Special Court, but that a new indictment would have to be issued for this to occur.

16. However, regardless of whether this is in fact the Defence argument, the Prosecution position remains that the Accused had no immunity from the jurisdiction of the Special Court at the time that the Indictment was approved or at any time thereafter, and that the Indictment and all consequential orders are legal and effective. Thus, there can be no question of any need to issue a new indictment.

17. Both the Prosecution and the Defence invoke the judgement of the International Court of Justice in the *Yerodia* case[17] as central to their arguments. This case concerned the immunities of a Minister for Foreign Affairs, rather than a Head of State, although the Prosecution submits that nothing material turns on that in these proceedings.[18]

18. The Prosecution notes that the judgement of the International Court of Justice has attracted some criticism on the ground that it takes a broad view of the immunities of

---

15 Defence Reply, para. 4.

16 Defence Reply, para. 4.

17 *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, 14 February 2002 (the "***Yerodia* case").

18 See para. 25 below.

a Minister for Foreign Affairs (and by extension, other high ranking State officials) that would prevent national courts from trying the former head of another State for crimes under international law committed while in office.[19] The Prosecution notes also that the Special Court is not bound by decisions of the International Court of Justice.[20] However, the Prosecution submits that because its position is wholly consistent with the *Yerodia* case, there is therefore no need to consider whether the International Court of Justice was overly broad in its definition of the scope of such immunities.

19. The International Court of Justice held in the *Yerodia* case that a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction, and that there is no exception to this immunity even when a Minister for Foreign Affairs is suspected of having committed war crimes or crimes against humanity.[21] This is the aspect of the *Yerodia* case on which the Defence relies.

20. However, in that case, the International Court of Justice also expressly held that this did not mean that a Minister for Foreign Affairs who perpetrated international crimes enjoyed impunity, and went on to enumerate a number of circumstances in which a Minister for Foreign Affairs could be prosecuted for international crimes. In identifying one of these circumstances, the International Court of Justice stated that

---

[19] See, e.g., P. Gaeta, "*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The Hissène Habré Case" (2003) 1 *Journal of International Criminal Justice* 186, at 189 ("The view set forth by the [International] Court [of Justice] has raised criticism among scholars, who argue that customary international law allows for an exception to the rule of *ratione materiae* immunity in the context of international crimes. According to those commentators, national case law and other instances of international practice clearly show that this exception is firmly established in customary international law and applies to *any State organ*, including former high-ranking State officials such as former Heads of State and Government" (footnote omitted)) and 192 ("... the Court's dictum on *ratione materiae* immunities, if accepted by States as authoritatively stating the existing law, could bring to a standstill the recent trend in State practice to call former senior political officials and dictators to account for egregious violations of human rights that constitute international crimes. This dictum could therefore weaken or seriously dilute the practical importance of the landmark decision of the House of Lords in *Pinochet* and its enormous effects in the struggle against impunity." (footnote omitted)).

[20] *Cf.*, e.g., *Prosecutor v. Delalic et al. (Celebici case), Judgment*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, para.24 (footnote omitted) ("However, this Tribunal is an autonomous international judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion").

[21] See Prosecution Response, para. 10, *Yerodia* case, paras. 54, 56-57.

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before international criminal courts where they have jurisdiction, and gave as examples the International Criminal Tribunal for the Former Yugoslavia (the "**ICTY**"), the International Criminal Tribunal for Rwanda (the "**ICTR**") and the International Criminal Court (the "**ICC**").[22] For the reasons given in the Prosecution Response, the Prosecution submits that the Special Court is an international criminal court of the type referred to in this part of the *Yerodia* case, and that the Special Court has jurisdiction over the crimes charged in the Indictment.

21. There is thus no merit to the Defence's suggestion that the Prosecution does not give the *Yerodia* case "the respect it deserves".[23] The Prosecution argues that its position is *consistent* with the *Yerodia* case.

22. In the light of the *Yerodia* case, the Prosecution submits that any authorities on the question whether a head of State can be held accountable by the courts *of another State* are immaterial to the issue before the Appeals Chamber in this instance.[24] For the reasons given in the Prosecution Response, the Special Court is not a court of a State, but an international court of the type referred to in the *Yerodia* case. For the same reason, it is unnecessary for the purposes of these proceedings to consider the international law principles governing the immunities of diplomats and other State agents before the courts *of other States*, which are dealt with by the Defence.[25]

23. Indeed, the Defence appears to acknowledge that the Special Court is an international court, and not a national court of Sierra Leone.[26] The Defence Reply appears to argue that the rules of the various international criminal courts that have existed since the Second World War are not of general application, but are each specific to the court or tribunal in question, and that so far there has not evolved a "full-fledged corpus of

---

22 Prosecution Response, para. 11, *Yerodia* case, para. 61 - 65.

23 Defence Reply, p. 5.

24 *Cf.*, Defence Reply, pp. 5-6.

25 See Defence Reply, pp. 3-4, referring to certain alleged immunities of diplomatic agents or any *de jure* or *de facto* State agent. The Prosecution does not concede the correctness of the Defence's analysis, but it is unnecessary to deal with these issues in this case.

26 See Defence Reply, p. 7.

generally applicable international procedural rules".[27] However, the Prosecution is not relying on specific procedural rules of any other international court or tribunal. Article 6(2) of the Statute of the Special Court expressly states that "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment". The Special Court is an international court of the kind referred to in the *Yerodia* case. Accordingly, no head of State immunity operates to bar proceedings against the Accused in the Special Court.

24. While on the one hand apparently accepting that the Special Court is an international court, the Accused at the same time argues that "the Special Court for Sierra Leone either by its statute OR otherwise can hardly claim to be vested with powers to enable it to exercise judicial power of the international community in so far as an incumbent Head of State OR High Officials are concerned".[28] However, the Defence gives no justification at all for this claim, and the Prosecution relies on the submissions in the Prosecution Response for the proposition that the Special Court is exercising the judicial power of the international community. Furthermore, Article 6(2) of the Special Court Statute clearly does envisage that the Special Court has the power to try a head of State.

25. The Defence also argues that the *Yerodia* case dealt solely with the position of a Minister for Foreign Affairs, and not with the position of a head of State.[29] The Prosecution submits that it seems somewhat inconsistent for the Defence to rely on the *Yerodia* case on the one hand and, on the other hand, to distinguish it on the grounds that it did not deal with the position of a head of State. In any event, the Prosecution submits that the Defence has cited no authority and presented no argument in support of the proposition that for present purposes the position of a head of State is materially different to that of a Minister for Foreign Affairs. The Statute of the Special Court,[30] like that of the Statutes of the International Criminal Court

---

27 *Ibid.*
28 Defence Reply, p. 8.
29 Defence Reply, pp. 6-7.
30 Statute of the Special Court, Article 6(2).

("**ICC**"),[31] the ICTY[32] and ICTR,[33] states expressly that the position of an accused as *head of State* does not relieve the accused of criminal responsibility nor mitigate punishment.

26. The Defence Rule 72(G) Submissions begin with certain arguments relating to the different meanings that the word "jurisdiction" may have.[34] The Prosecution does not concede the correctness of the Defence submissions on the different meanings of the word, but submits that this analysis is wholly immaterial to the issues before the Appeals Chamber in these proceedings.[35] The Prosecution does not dispute that the Special Court has no power to enlarge its jurisdiction in the strict sense (i.e., it cannot enlarge its jurisdiction *ratione materiae*, *ratione temporis* and *ratione loci*).[36] Thus, for instance, it could not expand its jurisdiction by seeking to try crimes committed prior to 30 November 1996,[37] or by seeking to try a person for responsibility for crimes that were not committed in the territory of Sierra Leone,[38] or by seeking to try a person for responsibility for substantive crimes other than those enumerated in Articles 2-5 of the Special Court Statute. Nor does the Prosecution take issue with the proposition that the Special Court *does* have the power to alter its practice, subject to the Rules and to the doctrine of precedent.[39] However, neither of these propositions are material to the issue whether a person can be tried by the Special Court in relation to crimes committed at the time that the person was a head of State.

27. The Defence Rule 72(G) Submissions argue further that the decision of the Judge to approve the Indictment and to issue the warrant for the arrest of the Accused was given *per incuriam*, since the judgement of the International Court of Justice in the

---

31 Statute of the ICC, Article 27(1).

32 Statute of the ICTY, Article 7(2) reproduced in Annex 4 of the Prosecution's Response.

33 Statute of the ICTR, Article 6(2) reproduced in Annex 5 of the Prosecution's Response. See Prosecution Response, para. 12, referring also to the Nuremberg and Tokyo Tribunals.

34 Defence Rule 72(G) Submissions, pp. 1-3.

35 The Defence Rule 72(G) Submissions, at p. 2, cites a case from a national jurisdiction, but the Defence has provided no copy of this case, contrary to the practice requirements of the Special Court. The Prosecution is therefore unable to comment on this case, although for the reasons given, the Prosecution submits that it is also immaterial to the issues before the Appeals Chamber in these proceedings.

36 *Cf.* Defence Rule 72(G) Submissions, p. 2.

37 See Statute, Article 1(1).

38 See Statute, Article 1(1).

39 *Cf.* Defence Rule 72(G) Submissions, p. 2.

Yerodia case had not been brought to his attention.[40] However, for the reasons given above, the prosecution of the Accused by the Special Court in these proceedings is not inconsistent with the *Yerodia* case. Furthermore, a Judge considering an indictment submitted for approval under Rule 47 is only required, at that stage, to be satisfied of the matters referred to in Rule 47(E), i.e., (i) that the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court, and (ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment. If satisfied of those two matters, Rule 47(E) *requires* the Judge to approve the indictment. Other issues, such as the argument raised by the Defence in relation to head of State immunity, are required by the Rules to be raised by a party at a later stage, in *inter partes* proceedings.

B. THE ALLEGED VIOLATION OF THE TERRITORIAL SOVEREIGNTY OF GHANA

28. The arguments relating to the alleged violation of the territorial sovereignty of Ghana are dealt with in pages 8-9 of the Defence Motion, paragraph 19 of the Prosecution Response, page 8 of the Defence Reply, and page 7 of the Defence Rule 72(G) Submissions.

29. The Defence maintains its position that the "attempt to serve the approved indictment and purported Warrant of Arrest on President Charles Ghankay Taylor without the proper legal authority is in flagrant disregard of the territorial sovereignty of the Republic of Ghana".[41] However, the Defence does not explain how or why there has been any violation of the territorial sovereignty of Ghana. The Defence appear to suggest that it was a violation of the sovereignty of Ghana for the Special Court to "attempt to effect service … extraterritorially" of the Indictment and arrest warrant.[42] However, in this case, the Indictment and arrest warrant were transmitted *to the*

---

40 Defence Rule 72(G) Submissions, p. 3.
41 Defence Reply, p. 5.
42 Defence Reply, p. 8.

Government of Ghana. As pointed out in the Prosecution Response,[43] the Defence does not explain how it could amount to a violation of the sovereignty of a State to transmit documents to the Government of a State, and cites no authority for this proposition. The Government of Ghana has never protested that its sovereignty has been violated. This is not a case in which authorities have physically arrested a person in the territory of another State and removed the person from that territory, without the consent of the territorial State. Even in such a situation, the Prosecution does not concede that an international court would be deprived of jurisdiction by virtue of such circumstances.[44] However, it is unnecessary to decide this, as this is simply not a case of that type, and the issue does not arise. The Prosecution submits that no violation of the sovereignty of Ghana has been established, and that the Defence has not explained why any violation of the sovereignty of Ghana, even if it could be established, would in the circumstances deprive the Special Court of jurisdiction.

C. THE ALLEGED VIOLATION OF THE CONSTITUTION OF SIERRA LEONE

30. The arguments relating to the alleged violation of the Constitution of Sierra Leone are raised for the first time in pages 4-7 and 9-10 of the Defence Rule 72(G) Submissions. The Prosecution argues that as the Defence argument under this rubric is outside the scope of the Defence Motion and is an entirely new argument which was not raised before in the Trial Chambers it ought not to be entertained by the Court.

31. The Defence Rule 72(G) Submissions argue that the Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**"), an Act of the Parliament of Sierra Leone, was "null and void at its inception", because it was not submitted to and approved by a referendum, as required by section 108(3) of the Constitution of

---

43 Prosecution Response, para. 19.

44 See, e.g., *Prosecutor v. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest*, Case No. IT-94-2-AR72, Appeals Chamber, 5 June 2003.

Sierra Leone.[45] The Prosecution notes that section 108(3) of the Constitution of Sierra Leone provides that a Bill for an Act of Parliament enacting a new Constitution or altering any of certain specified provisions of the Constitution shall not be submitted to the President for his assent and shall not become law unless the Bill has been submitted to and been approved at a referendum. The Defence is thereby impliedly arguing that the Implementing Legislation somehow amends the Constitution of Sierra Leone, but gives no explanation at all of how it considers the Constitution to have thereby been amended. The Prosecution understands that the Defence Rule 72(G) Submissions may hereby be seeking to raise an argument similar to that which has been raised in Defence preliminary motions in the *Kallon* case[46] and the *Norman* case.[47]

32. The Defence Rule 72(G) Submissions further argue that the Indictment in this case was signed by the approving Judge in violation of provisions of the Constitution of Sierra Leone which, according to the Defence, provide that the Attorney-General, Minister of Justice and Director of Public Prosecutions of Sierra Leone are the only proper persons vested with powers to prosecute persons for alleged offences committed within the jurisdiction of Sierra Leone and under Sierra Leonean law. According to the Defence Rule 72(G) Submissions, the Prosecutor of the Special Court is therefore not authorised by the Constitution to prosecute persons for alleged offences allegedly committed within the jurisdiction of Sierra Leone.[48]

33. The Defence Rule 72(G) Submissions request that the proceedings in this case be stayed by the Appeals Chamber, and that the Appeals Chamber should "remit" three

---

[45] Defence Motion, p. 4.

[46] Case No. SCSL–2003–07–PT, *Prosecutor v. Kallon*: see "Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates Constitution of Sierra Leone", filed by the Defence on 16 June 2003; "Prosecution Response to the Second Defence Preliminary Motion (Constitution of Sierra Leone)", filed by the Prosecution on 23 June 2003 (dated 24 June 2003); "Reply to the Prosecution Response to Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates Constitution of Sierra Leone", filed by the Defence on 30 June 2003.

[47] Case No. SCSL–2003–08–PT, *Prosecutor v. Norman*: see "Preliminary Motion Based on Lack of Jurisdiction: Lawfulness of the Court's Establishment", filed by the Defence on 26 June 2003; "Prosecution Response to the First Defence Preliminary Motion (Lawfulness of the Court's Establishment)", filed by the Prosecution on 7 July 2003; "Reply: Preliminary Motion Based on Lack of Jurisdiction: Lawfulness of the Court's Establishment", filed by the Defence on 14 July 2003.

[48] Defence Rule 72(G) Submissions, p. 5.

questions formulated by the Defence to the Supreme Court of Sierra Leone for its determination.[49]

34. The Prosecution submits that the raising of these arguments by the Defence constitutes the presentation of an entirely new motion. The Defence Motion raised only an issue of the alleged violation of the head of State immunity of the Accused, and an issue of the alleged violation of the sovereignty of Ghana. The Defence Motion in no way challenged the validity of the Implementing Legislation or the validity of the Indictment on the ground of any alleged violation of the constitutional law of Sierra Leone. Indeed, the Defence Reply indicated that the Defence Motion did not raise any such issue, and suggested that this would be a matter for determination by the Supreme Court of Sierra Leone and not the Special Court.[50] The Defence Motion never requested the Appeals Chamber to stay the proceedings and to "remit" certain question to the Supreme Court of Sierra Leone (even if it were possible for the Appeals Chamber to do this, which the Prosecution in no way concedes). The argument relating to the Constitution of Sierra Leone is entirely outside the scope of the Defence Motion, and the requested relief (i.e., the remitting of certain questions to the Supreme Court of Sierra Leone) is therefore entirely outside the matter that was referred to the Appeals Chamber by the Trial Chamber in its Referral Order of 19 September 2003.

35. The Prosecution submits that there is no procedure in the Rules by which a party may present a motion directly to the Appeals Chamber for its determination, or even a procedure by which a party may seek the leave of the Appeals Chamber to do so. Under Rule 72 and Rule 73, all preliminary motions and all other motions must be filed before the Trial Chamber. Furthermore, all such preliminary motions must be determined by the Trial Chamber, except in cases to which Rule 72(E) or (F) applies, in which case the Trial Chamber may refer the preliminary motion to the Appeals Chamber for determination. However, in a situation in which no preliminary motion

---

[49] Defence Rule 72(G) Submissions, p. 10.

[50] See Defence Reply, p. 7, stating that "Whether OR not the provisions of the Constitution of Sierra Leone do warrant the holding of a referendum for the establishment of such a Court under its entrenched provisions may well wait for a determination by the Supreme Court of Sierra Leone at some later date and at the proper time and this is only by way of distant early warning".

has been filed before a Trial Chamber, and there has been no referral of the preliminary motion by the Trial Chamber to the Appeals Chamber pursuant to Rule 72(E) or (F), the Appeals Chamber cannot be validly seised of this issue. For this reason, it is submitted that the Appeals Chamber must reject this argument.[51] In the event that the Defence were subsequently to raise this issue in a valid and timely motion filed before the Trial Chamber, the motion could be dealt with in accordance with the Rules.

36. In the event only that the Appeals Chamber rejects this submission and decides to rule on the substance of this argument, the Prosecution submits the further arguments below.

37. The Defence arguments relating to the alleged violation of the Constitution of Sierra Leone are premised on an argument that the Implementing Legislation is "a Sierra Leonean statute creating Sierra Leonean law",[52] and an underlying assumption that the Prosecutor of the Special Court is therefore prosecuting crimes under Sierra Leonean law. The Prosecution submits that this underlying assumption is erroneous.

38. The Constitution of Sierra Leone is only capable of regulating, and only purports to regulate, the judicial power *of the Republic of Sierra Leone* within the sphere of the municipal law of Sierra Leone. As is expressly stated in section 11(2) of the Implementing Legislation, the Special Court does "not form part of the Judiciary of Sierra Leone". Indeed, it does not exist or operate at all within the sphere of the municipal law of Sierra Leone.

39. The Special Court was established by the Special Court Agreement, an international treaty concluded by the United Nations and the Government of Sierra Leone,[53] which

---

[51] The Prosecution acknowledges that certain provisions of the Rules may be directory, rather than mandatory, in nature: see *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration), Separate Opinion of Judge Shahabuddeen,* Case No. ICTR-97-19-AR72, Appeals Chamber, 31 March 2000, para. 53. However, the Prosecution submits that it is fundamental to the structure of the Statute and the Rules that proceedings cannot be brought directly before the Appeals Chamber for a first instance determination. Even Rule 72(E) and (F) require that a preliminary motion be filed first before the Trial Chamber.

[52] Defence Rule 73(G) Submissions, p. 5.

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

is binding on both parties. As a creature of an international treaty, the Special Court exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone.

40. It has never been questioned that a treaty is a valid basis for the creation of an international criminal court. Indeed, the creation of the Special Court can be likened to the creation of the International Criminal Court, another treaty-based international criminal court, the Statute of which Sierra Leone signed on 17 October 1998 and ratified on 15 September 2000. Insofar as violations of international criminal law are concerned, the subject-matter jurisdiction of both of these treaty-based international courts is similar. In the selfsame way that the ICC is not perceived to violate the constitutional or other municipal law of Sierra Leone, nor does the Special Court. As an institution created by international law, and operating within the sphere of international law, the Special Court is not subject to the municipal law or constitution of any State, any more than the ICC would be.

41. The validity of Special Court Agreement as an international treaty is not affected by the Defence's arguments concerning the Constitution of Sierra Leone.[54] Article 46 of the 1969 Vienna Convention on the Law of Treaties provides:

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

Materially identical provision is made in Article 46(1) and (3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[55]

---

[54] See 1969 Vienna Convention on the Law of Treaties, Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46". Materially identical provision is made in Article 27(1) and (3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

42. In the present case, even if it assumed for the sake of argument that the conclusion of the Special Court Agreement by the Government of Sierra Leone was in breach of the Constitution of Sierra Leone (which is not conceded), any such breach would not be "manifest" within the meaning of Article 46 of the two Vienna Conventions. The Implementing Legislation states that the Special Court Agreement was, for the part of the Government of Sierra Leone, signed under the authority of the President pursuant to section 40(4) of the Constitution. The Implementing Legislation purports to ratification of the Special Court Agreement by the Parliament for the purposes of section 40(4) of the Constitution. Thus, *prima facie*, the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied.

43. If the argument of the Defence were correct, it would mean that the Government of Sierra Leone also violated the Constitution when Sierra Leone became a party to the ICC Statute,[56] which similarly involved conferring on the ICC, its Prosecutor and its Judges the power to prosecute and try criminal offences committed in Sierra Leone by Sierra Leonean citizens.[57] Moreover, the ICC is entitled to exercise its functions and powers on the territory of Sierra Leone.[58] A similar constitutional issue to the one that appears to be raised by the Defence was considered by an Australian Parliamentary committee in connection with the ratification of the ICC Statute by Australia, a common law Commonwealth State like Sierra Leone. Australia ratified the ICC Statute, and enacted legislation to implement the ICC Statute into municipal law,[59] after the Parliamentary Committee had found that:

> "The most complete argument presented [for the view that ratification of the ICC Statute would be unconstitutional] is that ratification of the ICC Statute would be inconsistent with Chapter III of the [Australian] Constitution, which provides that [the] ... judicial power [of the Commonwealth of Australia] shall be vested in the High Court of Australia and such other federal courts as the

---

[55] Although Sierra Leone is not a party to either of these two Vienna Conventions, it is submitted that the provisions of these treaties reflect customary international law: see Aust, *Modern Treaty Law and Practice* (2000), p. 10-11 Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 618.

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

[57] ICC Statute, Article 12.

[58] ICC Statute, Article 4(2) ("The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State party ...").

[59] Australia: International Criminal Court Act 2002 (Commonwealth).

> Parliament creates. However, the Committee accepts as reasonable the Attorney-General's submission ... that the ICC will not exercise the judicial power of the Commonwealth [of Australia], even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia."[60]

Similarly, South Africa enacted legislation implementing the ICC Statute,[61] even though section 165(1) of the Constitution of South Africa provides that the judicial authority of South Africa is vested in certain courts specifically identified in section 166 thereof, of which the ICC is not one.

44. For the purposes of disposing of this motion, it is unnecessary for the Trial Chamber to determine whether or not Australia or South Africa acted in accordance with their own constitutions when they ratified the ICC Statute and enacted national implementing legislation. In view of the fact that they did so, and in view of the opinion expressed by the Australian Parliamentary Committee, it cannot be said that there was any "*manifest*" violation of their constitutions. For the same reason, even if the Government and Parliament of Sierra Leone had acted unconstitutionally in entering into the Special Court Agreement and enacting the Implementing Legislation (as argued by the Defence), it cannot be said that any violation of constitutional norms was "*manifest*" within the meaning of Article 46 of the two Vienna Conventions, in view of the analogies with these other countries,[62] in view of the fact that *prima facie* the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied, and in view of the fact that both the

---

[60] Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002) (the "**Australian Parliament Report**"), para. 3.46. The issue is considered in paras. 2.35, 2.41 to 2.55, and 3.40 to 3.49. See *ibid.* para. 2.50, referring to Professor Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn, 1996), p. 269, in relation to the position in the United States of America.

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

[62] Even if it could be shown that there are some States who considered that ratification of the ICC Statute and the enactment of implementing legislation may have required a constitutional amendment, this would not make it *manifest* that such an amendment was in fact required in those States, and it certainly would not make it *manifest* that a constitutional amendment was required in Sierra Leone for this purpose.

Government and the Parliament of Sierra Leone apparently did not consider that they were acting unconstitutionally.

45. Because there has been no *manifest* violation of the Constitution of Sierra Leone, it is immaterial to the validity of the Special Court Agreement, and to Sierra Leone's obligations under that agreement, whether the conclusion of the Special Court Agreement by the Government of Sierra Leone was or was not in fact in conformity with the Constitution of Sierra Leone or whether implementing legislation has been validly enacted as a matter of Sierra Leonean national law.[63] It is therefore unnecessary for the Special Court to decide this question. Indeed, the Special Court has no *jurisdiction* to decide this question.

D. THE ALLEGED VIOLATION OF THE IMPLEMENING LEGISLATION

46. The argument relating to the alleged violation of the Implementing Legislation is dealt with in page 6 of the Defence Rule 72(G) Submissions.

47. The Defence argument appears to be that because no regulations have been made pursuant to section 47 of the Implementing Legislation, no effect can be given to the Implementing Legislation.

48. The Prosecution submits that this is also an argument that is entirely outside the scope of the Defence Motion, and is therefore entirely outside the subject-matter that was referred to the Appeals Chamber by the Trial Chamber in its Referral Order of 19 September 2003. For the reasons given in paragraphs 34-35 above, this argument must therefore also be rejected by the Appeals Chamber.

---

[63] See, e.g., Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997), pp. 65: "If a treaty requires changes in English law, it is necessary to pass an Act of Parliament in order to bring English law into conformity with the treaty. If the Act is not passed, the treaty is still binding on the United Kingdom from the international point of view, and the United Kingdom will be responsible for not complying with the treaty." This author notes (at p. 66) that "Most other common law countries, except the United States, ... follow the English tradition and strictly deny any direct internal effect of international treaties without legislative enactment".

49. In the event only that the Appeals Chamber rejects this submission and decides to rule on the substance of this argument, the Prosecution submits the following further arguments.

50. First, for the reasons given in paragraphs 37-45 above, the validity of the Special Court Agreement, and the validity of the creation and operation of the Special Court, do not depend on whether there is any Sierra Leonean national legislation that is valid and effective as a matter of Sierra Leonean national law. The Special Court exists and operates in the sphere of international law, regardless of the legal position under the municipal law of Sierra Leone.

51. Secondly, and in any event, the effect of section 47 of the Implementing Legislation, on its face, does not make the effective operation of the Implementing Legislation dependent upon the prior making of regulations under that section. Section 47 provides that "The Attorney-General may, after consultation with the Special Court, make regulations to give effect to this Act". While section 47 provides that regulations *may* be made, it does not state that they *must* be made. It is nowhere stated that the Implementing Legislation will not come into force unless and until such regulations are made. Section 106(4) of the Constitution of Sierra Leone provides that "When a bill which has been duly passed and is signed by the President in accordance with the provisions of this Constitution it shall become law and the President shall thereupon cause it to be published in the *Gazette* as law". Section 106(3) of that Constitution provides that "An Act signed by the President shall come into operation on the date of its publication in the *Gazette* or such other date as may be prescribed therein or in any other enactment". No date is prescribed in the Implementing Legislation for its coming into force. It thus appears that the Implementing Legislation came into operation as a matter of Sierra Leonean law on the date of its publication in the *Gazette*, regardless of whether or not regulations had been made under section 47 thereof. However, this is a matter of Sierra Leonean constitutional law that the Special Court is not required, or competent, to decide.

E. THE ARGUMENT CONCERNING UNIVERSAL JURISDICTION

52. The Defence Rule 72(G) Submissions refer, at page 8, to the fact that in the *Yerodia* case, the International Court of Justice did not make any pronouncements upon the issue of universal jurisdiction under international law. The Defence Rule 72(G) Submissions argue that the International Court of Justice thereby "missed a golden opportunity to cast light on a difficult and topical legal issue" and that "this matter is now squarely before the Appeals Chamber for its determination".[64]

53. The Prosecution submits that this issue of universal jurisdiction under international law does not arise in any way in this Defence Motion. Universal jurisdiction is a principle under which *a State* may exercise jurisdiction over certain crimes committed on the territory of another State, despite the absence of a territorial connection with the State exercising that jurisdiction. The Special Court is not a State with territory. Furthermore, the Accused has been indicted, in accordance with Article 1(1) of the Special Court's Statute, for crimes committed *in* the territory of Sierra Leone. Principles of universal jurisdiction simply do not arise.

III. CONCLUSION

54. The Court should therefore dismiss the Defence Motion in its entirety.

Freetown, 14 October 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Walter Marcus-Jones
Senior Appellate Counsel

pp Christopher Staker
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

[64] Defence Motion, p. 8.

INDEX OF AUTHORITIES

1. *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, 14 February 2002 (the "*Yerodia* case").

2. P. Gaeta, "*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The Hissène Habré Case" (2003) 1 *Journal of International Criminal Justice* 186.

3. *Prosecutor v. Delalic et al. (Celebici case), Judgment*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001.

4. Rome Statute of the International Criminal Court.

5. Statute of the Special Court for Sierra Leone.

6. *Prosecutor v. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest*, Case No. IT-94-2-AR72, Appeals Chamber, 5 June 2003.

7. *Barayagwiza v. Prosecutor, Decision* (Prosecutor's Request for Review or Reconsideration), Separate Opinion of Judge Shahabuddeen, Case No. ICTR-97-19-AR72, Appeals Chamber, 31 March 2000, para. 53.

8. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915.

9. 1969 Vienna Convention on the Law of Treaties.

10. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

11. Aust, *Modern Treaty Law and Practice* (2000).

12. Brownlie, *Principles of Public International Law.*

13. Details of Sierra Leone's ratification of the ICC Statute.

14. Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002).

15. Details of South Africa's ratification of the ICC Statute.

16. Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, 1997).

ANNEX 1

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice, 14 February 2002 (the "*Yerodia* case").

2 of 12 DOCUMENTS

International Legal Materials

Volume 41, Number 3

May, 2002

41 I.L.M. 536

SECTION: JUDICIAL AND SIMILAR PROCEEDINGS

INTERNATIONAL COURT OF JUSTICE (ICJ): CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO V. BELGIUM) *

* This document was reproduced and reformatted from the text appearing at the ICJ website (visited April 15, 2002) <http://www.icj-cij.org>. English translations were not available for the declaration and two opinions appended by Judges Ranjeva and Rezek, and Judge ad hoc Bula-Bula respectively, and they are being reproduced herewith from their French originals.

DATE: February 14, 2002

LENGTH: 86685 words

TEXT:

[*536] **INTERNATIONAL COURT OF JUSTICE**

YEAR 2002
2002
14 February
General List
No. 121

14 February 2002

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

TABLE OF CONTENTS

Judgement
Separate opinion of President Guillaume [ILM Page 537]
Dissenting opinion of Judge Oda [ILM Page 558]
Declaration of Judge Ranjeva (original French text only) [ILM Page 565]
Separate opinion of Judge Koroma [ILM Page 569]
Separate opinion of Judges Higgins, Kooijmans and Buergenthal [ILM Page 573]
Separate opinion of Judge Rezek (original French text only) [ILM Page 575]
Dissenting opinion of Judge Al-Khasawneh [ILM Page 592]
Separate opinion of Judge ad hoc Bula-Bula (original French text only) [ILM Page 595]
[ILM Page 597]

BLE OF CONTENTS
ssenting opinion of Judge ad hoc Van den Wyngaert

cts of the case--Issue by a Belgian investigating magistrate of "an
ternational arrest warrant in absentia" against the incumbent Minister for
oreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions
f 1949 and of the Additional Protocols thereto and crimes against
umanity--International circulation of arrest warrant through Interpol--Person
oncerned subsequently ceasing to hold office as Minister for Foreign Affairs.

* *

First objection of Belgium--Jurisdiction of the Court--Statute of the Court,
Article 36, paragraph 2--Existence of a "legal dispute" between the Parties at
the time of filing of the Application instituting proceedings--Events subsequent
to the filing of the Application do not deprive the Court of jurisdiction.
Second objection of Belgium--Mootness--Fact that the person concerned had ceased
to hold office as Minister for Foreign Affairs does not put an end to the
dispute between the Parties and does not deprive the Application of its object.
Third objection of Belgium--Admissibility--Facts underlying the Application
instituting proceedings not changed in a way that transformed the dispute
originally brought before the Court into another which is different in
character.
[*537] Fourth objection of Belgium--Admissibility--Congo not acting in the
context of protection of one of its nationals--Inapplicability of rules relating
to exhaustion of local remedies.
Subsidiary argument of Belgium--Non ultra petita rule--Claim in Application
instituting proceedings that Belgium's claim to exercise a universal
jurisdiction in issuing the arrest warrant is contrary to international
law--Claim not made in final submissions of the Congo--Court unable to rule on
that question in the operative part of its Judgment but not prevented from
dealing with certain aspects of the question in the reasoning of its Judgment.

* *

Immunity from criminal jurisdiction in other States and also inviolability of an
incumbent Minister for Foreign Affairs--Vienna Convention on Diplomatic
Relations of 18 April 1961, preamble, Article 32--Vienna Convention on Consular
Relations of 24 April 1963--New York Convention on Special Missions of 8
December 1969, Article 21, paragraph 2--Customary international law
rules--Nature of the functions exercised by a Minister for Foreign
Affairs--Functions such that, throughout the duration of his or her office, a
Minister for Foreign Affairs when abroad enjoys full immunity from criminal
jurisdiction and inviolability--No distinction in this context between acts
performed in an "official" capacity and those claimed to have been performed in
a "private capacity."
No exception to immunity from criminal jurisdiction and inviolability where an
incumbent Minister for Foreign Affairs suspected of having committed war crimes
or crimes against humanity--Distinction between jurisdiction of national courts
and jurisdictional immunities--Distinction between immunity from jurisdiction
and impunity.
Issuing of arrest warrant intended to enable the arrest on Belgian territory of
an incumbent Minister for Foreign Affairs--Mere issuing of warrant a failure to
respect the immunity and inviolability of Minister for Foreign Affairs--Purpose
of the international circulation of the arrest warrant to establish a legal
basis for the arrest of Minister for Foreign Affairs abroad and his subsequent

extradition to Belgium--International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

* *

Remedies sought by the Congo--Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo--Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert; Registrar Couvreur.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands, as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,

Maitre Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,

Mr. Francois Rigaux, Professor Emeritus at the Catholic University of Louvain,

[*538] Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, Charge de cours, Catholic University of Louvain,

Mr. Moka N'Golo, Batonnier,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs, as Agent;

Mr. Eric David, Professor of Public International Law, Universite libre de Bruxelles,

Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gilles de Pelichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,

Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,

Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,

Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,

Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,

Mr. Tom Vanderhaeghe, Assistant at the Universite libre de Bruxelles,

THE COURT,
composed as above,
after deliberation,
delivers the following Judgment:
1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi."
In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State," the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations," as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations."
[*539] In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium had accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signified acceptance of that jurisdiction by the Democratic Republic of the Congo."
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.
3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.
4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.
By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition."
5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.
6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by

Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,

H.E. Mr. Ngele Masudi, Maitre Kosisaka Kombe,

Mr. Francois Rigaux, Ms Monique Chemillier-Gendreau,

Mr. Pierre d'Argent.

For Belgium: Mr. Jan Devadder,

Mr. Daniel Bethlehem,

Mr. Eric David.

[*540] 9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

*

10. In its Application, the Congo formulated the decision requested in the following terms:

"The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels tribunal de premiere instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law,' that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

in the Memorial:

"In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."
On behalf of the Government of Belgium,
in the Counter-Memorial:
"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.
If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."
12. At the oral proceedings, the following submissions were presented by the Parties:
[*541] On behalf of the Government of the Congo,
"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."
On behalf of the Government of Belgium,
"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.
If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of

the case and to dismiss the Application."

*

* *

13. On 11 April 2000 an investigating judge of the Brussels tribunal de premiere instance issued "an international arrest warrant in absentia" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.
At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.
14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.
15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto," as amended by the Law of 19 February [*542] 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law"). *

* *38 ILM 921 (1999).*

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed." In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.
Article 5, paragraph 3, of the Belgian Law further provides that "immunity attaching to the official capacity of a person shall not prevent the application of the present Law."
16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution," and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely after an arrest warrant against Mr. Yerodia had been issued."
17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the

international arrest warrant issued on 11 April 2000." The Congo relied in its Application on two separate legal grounds. First, it claimed that "the universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a
"violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations."
Secondly, it claimed that "the non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations."
18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).
19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.
[*543] 20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.
21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

*

* *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

"That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect inter alia to the Northern Cameroons case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (I.C.J. Reports 1963, pp. 33-34), as well as to the Nuclear Tests cases (Australia v. France) and (New Zealand v. France), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (I.C.J. Reports 1974, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court," and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful ab initio, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties [*544] in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

*

26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122; Right of Passage over Indian Territory, Preliminary

Objections, Judgment, I.C.J. Reports 1957, p. 142; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 23-24, para. 38; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

"The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 22; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

[*545] "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the Northern Cameroons case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (I.C.J. Reports 1963, p. 38), and on the Nuclear Tests cases, in which the Court saw "no reason to allow the

continuance of proceedings which it knows are bound to be fruitless" (I.C.J. Reports 1974, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo--to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered--remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

*

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 26, para. 46; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

"That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until [*546] the very last moment, of the

substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

*

36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (Societe Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173; cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72; see also Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36). In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:
"That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

[*547] 39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

*

40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies. In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 26; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed (see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-44; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

* *

41. As a subsidiary argument, Belgium further contends that "in the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the non ultra petita rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s

final submissions." Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction in absentia. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities."

*

43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (Asylum, Judgment, I.C.J. Reports 1950, p. 402). While the Court is thus not entitled to decide [*548] upon questions not asked of it, the non ultra petita rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot, and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State

has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being "absolute or complete," that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts."

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence." The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of [*549] their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

*

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other

States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States." It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

"The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2(a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that charges d'affaires are accredited.

[*550] 54. The Court accordingly concludes that the functions of a Minister

for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity," or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

* *

56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the Pinochet and Qaddafi cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the Pinochet decision recognizes an exception to the immunity rule when Lord Millett stated that "international law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose," or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity rationae materiae to be accorded in respect of prosecution for an international crime." As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State," the Court explicitly recognized the existence

of such exceptions.
57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.
In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the Pinochet and Qaddafi cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the Pinochet case, the Congo cites Lord Browne-Wilkinson's statement that "this immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the [*551] person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . ."
According to the Congo, the French Court of Cassation adopted the same position in its Qaddafi judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State."
As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

*
58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.
The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27).
It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.
Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.
In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.
59. It should further be noted that the rules governing the jurisdiction of

national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

[*552] Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and

declare that:
"By issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."
63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.
The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.
64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government." The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition." The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly "no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere."
[*553] 65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]."
With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.
66. In respect of the legal effects of the arrest warrant outside Belgium,

Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium," the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State." Belgium further argues that "if a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity," but that "the Party directly responsible for that infringement would have been that State and not Belgium."

*

67. The Court will first recall that the "international arrest warrant in absentia," issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de premiere instance, is directed against Mr. Yerodia, stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa." The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

"--Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)

--Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

"These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement." The investigating judge does, however, observe in the [*554] warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

"Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against

its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the issuance, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement." The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international circulation of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium." The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringement [of] the sovereignty of the [Congo]." It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium," adding that "this, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'."

Accordingly, the Court concludes that the circulation of the warrant, whether or

not [*555] it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their cooperation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful ab initio, that "it is fundamentally flawed" and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself." The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs." Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

*

75. The Court has already concluded (see paragraphs 70 and 71) that the issue

and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The [*556] Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzow: "the essential principle contained in the actual notion of an illegal act--a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals--is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (P.C.I.J., Series A, No. 17, p. 47). In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(C) By fifteen votes to one, Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

[*557] IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(D) By fifteen votes to one, Finds that the Application of the Democratic Republic of the Congo is admissible;
IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;
AGAINST: Judge Oda;
(2) By thirteen votes to three,
Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;
IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;
AGAINST: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;
(3) By ten votes to six,
Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;
IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Bula-Bula;
AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert.
Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,

President.

(Signed) Philippe COUVREUR,

Registrar.
President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of [*558] the Court; Judge ad hoc BULA-BULA appends a separate opinion to the Judgment of the Court; Judge ad hoc VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

SEPARATE OPINION OF PRESIDENT GUILLAUME

riminal jurisdiction of national courts--Place of commission of the
ffence--Other criteria of connection--Universal jurisdiction--Absence of.
.. I fully subscribe to the Judgment rendered by the Court. I believe it useful
owever to set out my position on one question which the Judgment has not
addressed: whether the Belgian judge had jurisdiction to issue an international
arrest warrant against Mr. Yerodia Ndombasi on 11 April 2000.
This question was raised in the Democratic Republic of the Congo's Application
instituting proceedings. The Congo maintained that the arrest warrant violated
not only Mr. Yerodia's immunity as Minister for Foreign Affairs but also "the
principle that a State may not exercise its authority on the territory of
another State." It accordingly concluded that the universal jurisdiction which
the Belgian State had conferred upon itself pursuant to Article 7 of the Law of
16 June 1993, as amended on 10 February 1999, was in breach of international law
and that the same was therefore true of the disputed arrest warrant.
The Congo did not elaborate on this line of argument during the oral proceedings
and did not include it in its final submissions. Thus, the Court could not rule
on this point in the operative part of its Judgment. It could, however, have
addressed certain aspects of the question of universal jurisdiction in the
reasoning for its decision (see Judgment, para. 43).
That would have been a logical approach; a court's jurisdiction is a question
which it must decide before considering the immunity of those before it. In
other words, there can only be immunity from jurisdiction where there is
jurisdiction. Moreover, this is an important and controversial issue,
clarification of which would have been in the interest of all States, including
Belgium in particular. I believe it worthwhile to provide such clarification
here.
2. The Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999,
aims at punishing serious violations of international humanitarian law. It
covers certain violations of the Geneva Conventions of 12 August 1949 and of
Protocols I and II of 8 June 1977 additional to those Conventions. It also
extends to crimes against humanity, which it defines in the terms used in the
Rome Convention of 17 July 1998. Article 7 of the Law adds that "the Belgian
courts shall have jurisdiction in respect of the offences provided for in the
present Law, wheresoever they may have been committed."
3. The disputed arrest warrant accuses Mr. Yerodia of grave breaches of the
Geneva Conventions and of crimes against humanity. It states that under Article
7 of the Law of 16 June 1993, as amended, perpetrators of those offences "fall
under the jurisdiction of the Belgian courts, regardless of their nationality or
that of the victims." It adds that "the Belgian courts have jurisdiction even if
the accused (Belgian or foreign) is not found in Belgium." It states that "in
the matter of humanitarian law, the lawmaker's intention was thus to derogate
from the principle of the territorial character of criminal law, in keeping with
the provisions of the four Geneva Conventions and of Protocol I." It notes that
"the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment [is] to be viewed in the same way, recognizing
the legitimacy of extra-territorial jurisdiction in the area and enshrining the
principle of aut dedere aut judicare."
[*559] It concludes on these bases that the Belgian courts have jurisdiction.
4. In order to assess the validity of this reasoning, the fundamental principles
of international law governing States' exercise of their criminal jurisdiction
should first be reviewed.
The primary aim of the criminal law is to enable punishment in each country of
offences committed in the national territory. That territory is where evidence

of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental." n1

n1 "Lotus," Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 20.

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution, in accordance with the maxim aut dedere, aut judicare. n2

n2 Covarruvias, Practicarum quaestionum, Chap. II, No. 7; Grotius, De jure belli ac pacis, Book II, Chap. XXI, para. 4; see also Book I, Chap. V.

Beginning in the eighteenth century however, this school of thought favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire and Jean-Jacques Rousseau. n3 Their views found expression in terms of criminal law in the works of Beccaria, who stated in 1764 that "judges are not the avengers of humankind in general . . . A crime is punishable only in the country where it was committed." n4

n3 Montesquieu, L'esprit des lois, Book 26, Chaps. 16 and 21; Voltaire, Dictionnaire philosophique, heading "Crimes et delits de temps et de lieu;" Rousseau, Du contrat social, Book II, Chap. 12, and Book III, Chap. 18.

n4 Beccaria, Traite des delits et des peines, para. 21.

Enlightenment philosophy inspired the lawmakers of the Revolution and nineteenth century law. Some went so far as to push the underlying logic to its conclusion, and in 1831 Martens could assert that "the lawmaker's power [extends] over all persons and property present in the State" and that "the law does not extend over other States and their subjects." n5 A century later, Max Huber echoed that assertion when he stated in 1928, in the Award in the Island of Palmas case, that a State has "exclusive competence in regard to its own territory." n6

n5 G. F. de Martens, Precis du droit des gens modernes de l'Europe fonde sur les traites et l'usage, 1831, Vol. I, paras. 85 and 86 (see also para. 100).

n6 United Nations Reports of International Arbitral Awards (RIAA), Vol. II, Award of 4 April 1928, p. 838.

In practice, the principle of territorial sovereignty did not permit of any exception in respect of coercive action, but that was not the case in regard to legislative and judicial jurisdiction. In particular, classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad. But as the Permanent Court stated, once again in the "Lotus" case, the exercise of that jurisdiction is not without its limits. n7 Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.

n7 "Lotus," Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 19.

5. Traditionally, customary international law did, however, recognize one case

of universal jurisdiction, that of piracy. In more recent times, Article 19 of the Geneva Convention on the High Seas of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982 have provided:

"On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed."

Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves n8 or in narcotic drugs or psychotropic substances. n9

n8 See the Geneva Slavery Convention of 25 September 1926 and the United Nations Supplementary Convention of 7 September 1956 (French texts in de Martens, Nouveau recueil general des traites, 3rd. series, Vol. XIX, p. 303 and Colliard and Manin, Droit international et histoire diplomatique, Vol. 1, p. 220).

n9 Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed at Vienna on 20 December 1988, deals with illicit traffic on the seas. It reserves the jurisdiction of the flag State (French text in Revue generale de droit international public, 1989/3, p. 720).

[*560] 6. The drawbacks of this approach became clear at the beginning of the twentieth century in respect of currency counterfeiting, and the Convention of 20 April 1929, prepared within the League of Nations, marked a certain development in this regard. That Convention enabled States to extend their criminal legislation to counterfeiting crimes involving foreign currency. It added that "foreigners who have committed abroad" any offence referred to in the Convention "and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country." But it made that obligation subject to various conditions. n10

n10 League of Nations, Treaty Series (LNTS), Vol. 112, p. 371.

A similar approach was taken by the Single Convention on Narcotic Drugs of 30 March 1961 n11 and by the United Nations Convention on Psychotropic Substances of 21 February 1971, n12 both of which make certain provisions subject to "the constitutional limitations of a Party, its legal system and domestic law." There is no provision governing the jurisdiction of national courts in any of these conventions, or for that matter in the Geneva Conventions of 1949.

n11 United Nations, Treaty Series (UNTS), Vol. 520, p. 151.

n12 UNTS, Vol. 1019, p. 175.

7. A further step was taken in this direction beginning in 1970 in connection with the fight against international terrorism. To that end, States established a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction. This fundamental innovation was effected by The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970. n13 The Convention places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose. Thus, Article 4, paragraph 2, of the Convention provides:

"Each Contracting State shall . . . take such measures as may be necessary to

establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention]."
This provision marked a turning point, of which The Hague Conference was moreover conscious. n14 From then on, the obligation to prosecute was no longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.
n13 UNTS, Vol. 860, p. 105.
n14 The Diplomatic Conference at The Hague supplemented the ICAO Legal Committee draft on this point by providing for a new jurisdiction. That solution was adopted on Spain's proposal by a vote of 34 to 17, with 12 abstentions (see Annuaire francais de droit international, 1970, p. 49).
8. The system as thus adopted was repeated with some minor variations in a large number of conventions: the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973; the New York Convention Against the Taking of Hostages of 17 December 1979; the Vienna Convention on the Physical Protection of Nuclear Materials of 3 March 1980; the New York Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Montreal Protocol of 24 February 1988 concerning acts of violence at airports; the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988; the Protocol of the same date concerning the safety of platforms located on the continental shelf; the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the New York Convention for the Suppression of Terrorist Bombings of 15 December 1997; and finally the New York Convention for the Suppression of the Financing of Terrorism of 9 December 1999.
9. Thus, a system corresponding to the doctrines espoused long ago by Grotius was set up by treaty. Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. It must have first conferred jurisdiction on its courts to try him if he is not extradited. Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States.
By contrast, none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction in absentia is unknown to international conventional law.
[*561] 10. Thus, in the absence of conventional provisions, Belgium, both in its written Memorial and in oral argument, relies essentially on this point on international customary law.
11. In this connection, Belgium cites the development of international criminal courts. But this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts.
12. Hence, Belgium essentially seeks to justify its position by relying on the practice of States and their opinio juris. However, the national legislation and jurisprudence cited in the case file do not support the Belgian argument, and I will give some topical examples of this.
In France, Article 689-I of the Code of Criminal Procedure provides:
"Pursuant to the international conventions referred to in the following

articles, n15 any person, if present in France, may be prosecuted and tried by the French courts if that person has committed outside the territory of the Republic one of the offences specified in those articles."
Two Laws, of 2 January 1995 and 22 May 1996, concerning certain crimes committed in the former Yugoslavia and in Rwanda extended the jurisdiction of the French courts to such crimes where, again, the presumed author of the offence is found in French territory. n16 Moreover, the French Court of Cassation has interpreted Article 689-I restrictively, holding that, "in the absence of any direct effect of the four Geneva Conventions in regard to search and prosecution of the perpetrators of grave breaches, Article 689 of the Code of Criminal Procedure cannot be applied" in relation to the perpetrators of grave breaches of those Conventions found on French territory. n17
n15 Namely the international conventions mentioned in paragraphs 7 and 8 of the present opinion to which France is party.
n16 For the application of this latter Law, see Court of Cassation, Criminal Chamber, 6 January 1998, Munyeshyaka.
n17 Court of Cassation, Criminal Chamber, 26 March 1996, No. 132, Javor.
In Germany, the Criminal Code (Strafgesetzbuch) contains in Section 6, paragraphs 1 and 9, and in Section 7, paragraph 2, provisions permitting the prosecution in certain circumstances of crimes committed abroad. And indeed in a case of genocide (Tadic) the German Federal Supreme Court (Bundesgerichtshof) recalled that: "German criminal law is applicable pursuant to section 6, paragraph 1, to an act of genocide committed abroad independently of the law of the territorial State (principle of so-called universal jurisdiction)." The Court added, however, that "a condition precedent is that international law does not prohibit such action;" it is only, moreover, where there exists in the case in question a "link" legitimizing prosecution in Germany "that it is possible to apply German criminal law to the conduct of a foreigner abroad. In the absence of such a link with the forum State, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States." n18 In that case, the Federal Court held that there was such a link by reason of the fact that the accused had been voluntarily residing for some months in Germany, that he had established his centre of interests there and that he had been arrested on German territory.
n18 Bundesgerichtshof, 13 February 1994, 1 BGs 100.94, in Neue Zeitschrift fur Strafrecht 1994, pp. 232-233. The original German text reads as follows:
"4 a) Nach § 6 Nr. 1 StGB gilt deutsches Strafrecht fur ein im Ausland begangenes Verbrechen des Volkermordes (§ 220a StGB), und zwar unabhangig vom Recht des Tatorts (sog. Weltrechtsprinzip). Vorraussetzung ist allerdings--uber den Wortlaut der Vorschrift hinaus--, dab ein volkerrechtliches Verbot nicht entgegensteht und auberdem ein legitimierender Anknupfungspunkt im Einzelfall einen unmittelbaren Bezug der Strafverfolgung zum Inland herstellt; nur dann ist die Anwendung innerstaatlicher (deutscher) Strafgewalt auf die Auslandstat eines Auslanders gerechtfertigt. Fehlt ein derartiger Inlandsbezug, so verstobt die Strafverfolgung gegen das sog. Nichteinmischungsprinzip, das die Achtung der Souveranitat fremder Staaten gebietet (BGHSt 27, 30 und 34, 334; Oehler JR 1977, 424; Holzhausen NStZ 1992, 268)."
Similarly, Dusseldorf Oberlandesgericht, 26 September 1997, Bundesgerichtshof, 30 April 1999, Jorgic; Dusseldorf Oberlandesgericht, 29 November 1999, Bundesgerichtshof, 21 February 2001, Sokolvic.
The Netherlands Supreme Court (Hoge Raad) was faced with comparable problems in the Bouterse case. It noted that the Dutch legislation adopted to implement The Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch courts jurisdiction in respect of offences committed abroad if "the accused was found

in the Netherlands." It concluded from this that the same applied in the case of the 1984 Convention against Torture, even though no such specific provision had been included in the legislation implementing that Convention. It accordingly held that prosecution in the Netherlands for acts of torture committed abroad was possible only
"if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example if the accused or the victim was Dutch or fell to be regarded as such, or if the accused was on Dutch territory at the time of his arrest." n19
n19 Hoge Raad, 18 September 2001, Bouterse, para. 8.5. The original Dutch text reads as follows:
"indien daartoe een in dat Verdrag genoemd aankopingspunt voor de vestiging van rechtsmacht aanwezig is, bijvoorbeeld omdat de vermoedelijke dader dan wel het slachtoffer Nederlander is of daarmee gelijkgesteld moet worden, of omdat de vermoedelijke dader zich ten tijde van zijn aanhouding in Nederland bevindt."
Numbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way is the State of Israel, which in this field obviously constitutes a very special case.
[*562] To conclude, I cannot do better than quote what Lord Slynn of Hadley had to say on this point in the first Pinochet case:
"It does not seem . . . that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction . . . That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long established customary international law rule in the Courts of other states is another . . . The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it . . . There is no universality of jurisdiction for crimes against international law . . ." n20
In other words, international law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction in absentia as applied in the present case is unknown to international law.
n20 House of Lords, 25 November 1998, R. v. Bartle; ex parte Pinochet.
13. Having found that neither treaty law nor international customary law provide a State with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory, Belgium contends lastly that, even in the absence of any treaty or custom to this effect, it enjoyed total freedom of action. To this end it cites from the Judgment of the Permanent Court of International Justice in the "Lotus" case:
"Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . ." n21
Hence, so Belgium claimed, in the absence of any prohibitive rule it was entitled to confer upon itself a universal jurisdiction in absentia.
n21 "Lotus," Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 19.
14. This argument is hardly persuasive. Indeed the Permanent Court itself, having laid down the general principle cited by Belgium, then asked itself

whether the foregoing considerations really apply as regards criminal jurisdiction." n22 It held that either this might be the case, or alternatively, that: "the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, ipso facto, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers." n23 In the particular case before it, the Permanent Court took the view that it was unnecessary to decide the point. Given that the case involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence in question had made themselves felt on Turkish territory, and that consequently a criminal prosecution might "be justified from the point of view of this so-called territorial principle." n24

n22 Ibid., p. 20.

n23 Ibid., p. 20.

n24 Ibid., p. 23.

15. The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me--totally different. The adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle. International criminal law has itself undergone considerable development and constitutes today an impressive legal corpus. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an [*563] ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.

16. States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction in absentia.

17. Passing now to the specific case before us, I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, [certain] grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in

accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned . . ."
This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of The Hague Convention already cited. What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found a universal jurisdiction in absentia. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law.
The same applies as regards the proceedings for crimes against humanity. No international convention, apart from the Rome Convention of 17 July 1998, which is not in force, deals with the prosecution of such crimes. Thus the Belgian judge, no doubt aware of this problem, felt himself entitled in his warrant to cite the Convention against Torture of 10 December 1984. But it is not permissible in criminal proceedings to reason by analogy, as the Permanent Court of International Justice indeed pointed out in its Advisory Opinion of 4 December 1935 concerning the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City. n25 There too, proceedings were instituted by a judge not competent in the eyes of international law.
n25 Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65, pp. 41 et seq.
If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law.

(Signed) Gilbert GUILLAUME.

[*565] **DISSENTING OPINION OF JUDGE ODA**

Lack of jurisdiction of the Court--Absence of a legal dispute within the purview of Article 36, paragraph 2, of the Statute--Mere belief of the Congo that the Belgian Law violated international law not evidence or proof that a dispute existed between it and Belgium--Failure of the Application instituting proceedings to specify the legal grounds upon which the jurisdiction of the Court is said to be based or to indicate the subject of the dispute--Failure of the Congo to cite any damage or injury which the Congo or Mr. Yerodia has suffered or will suffer except for some moral injury--Changing of the subject-matter of the proceedings by the Congo--Principle that a State cannot exercise its jurisdiction outside its territory--National case law, treaty-made law and legal writing in respect of the issue of universal jurisdiction--Inability of a State to arrest an individual outside its territory--Arrest warrant not directly binding without more on foreign authorities--Issuance and international circulation of arrest warrant having no legal impact unless arrest request validated by the receiving State--Question of the immunity of a Minister for Foreign Affairs and of whether it can be claimed in connection with serious breaches of international humanitarian law--Concluding remarks.

INTRODUCTION

1. I voted against all provisions of the operative part of the Judgment. My objections are not directed individually at the various provisions since I am unable to support any aspect of the position the Court has taken in dealing with the presentation of this case by the Congo.

It is my firm belief that the Court should have declared ex officio that it lacked jurisdiction to entertain the Congo's Application of 17 October 2000 for the reason that there was, at that date, no legal dispute between the Congo and Belgium falling within the purview of Article 36, paragraph 2, of the Statute, a belief already expressed in my declaration appended to the Court's Order of 8 December 2000 concerning the request for the indication of provisional measures. I reiterate my view that the Court should have dismissed the Application submitted by the Congo on 17 October 2000 for lack of jurisdiction.

My opinion was that the case should have been removed from the General List at the provisional measures stage. In the Order of 8 December 2000, however, I voted in favour of the holding that the case should not be removed from the General List but did so reluctantly "only from a sense of judicial solidarity" (declaration of Judge Oda appended to the Court's Order of 8 December 2000 concerning the request for the indication of provisional measures, para. 6). I now regret that vote.

2. It strikes me as unfortunate that the Court, after finding that "it has jurisdiction to entertain the Application" and that "the Application . . . is admissible" (Judgment, para. 78(1)(B) and (D)), quickly comes to certain conclusions concerning "the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of [the Congo] enjoyed under international law" in connection with "the issue against [Mr. Yerodia] of the arrest warrant of 11 April 2000" and "its international circulation" (Judgment, para. 78(2)).

I. NO LEGAL DISPUTE IN TERMS OF ARTICLE 36, PARAGRAPH 2, OF THE STATUTE

3. To begin with, the Congo's Application provides no basis on which to infer that the Congo ever thought that a dispute existed between it and Belgium regarding the arrest warrant issued by a Belgian investigating judge on 11 April 2000 against Mr. Yerodia, the Minister for Foreign Affairs of the Congo. The word "dispute" appears in the Application only at its very end, under the heading "V. Admissibility of the Present Application," in which the Congo stated that:

"As to the existence of a dispute on that question [namely, the question that the Court is called upon to decide], this is established ab initio by the very fact that it is the non-conformity with international law [*566] of the Law of the Belgian State on which the investigating judge founds his warrant which is the subject of the legal grounds which [the Congo] has submitted to the Court." (Emphasis added.)

Without giving any further explanation as to the alleged dispute, the Congo simply asserted that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law contravened international law.

4. The Congo's mere belief that the Belgian law violated international law is not evidence, let alone proof, that a dispute existed between it and Belgium. It shows at most that the Congo held a different legal view, one opposed to the action taken by Belgium. It is clear that the Congo did not think that it was referring a dispute to the Court. The Congo, furthermore, never thought of this as a legal dispute, the existence of which is a requirement for unilateral applications to the Court under Article 36, paragraph 2, of the Court's Statute. The Congo's mere opposition to the Belgian Law and certain acts taken by Belgium

pursuant to it cannot be regarded as a dispute or a legal dispute between the Congo and Belgium. In fact, there existed no such legal dispute in this case. I find it strange that the Court does not take up this point in the Judgment; instead the Court simply states in the first paragraph of its decision that "the Congo filed in the Registry of the Court an Application instituting proceedings against Belgium in respect of a dispute concerning an 'international arrest warrant'" (Judgment, para. 1, emphasis added) and speaks of "a legal dispute between [the Congo and Belgium] concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the arrest warrant was unlawful" (Judgment, para. 27, emphasis added). To repeat, the Congo did refer in its Application to a dispute but only in reference to the admissibility of the case, not "in order to found the Court's jurisdiction," as the Court mistakenly asserts in paragraph 1 of the Judgment.

5. While Article 40 of the Court's Statute does not require from an applicant State a statement of "the legal grounds upon which the jurisdiction of the Court is said to be based," Article 38, paragraph 2, of the Rules of Court does and the Congo failed to specify those grounds in its Application. Furthermore, the Congo did not indicate "the subject of the dispute," which is required under Article 40 of the Statute.

In its Application the Congo refers only to "Legal Grounds" (Section I) and "Statement of the Grounds on which the Claim is Based" (Section IV). In those sections of the Application, the Congo, without referring to the basis of jurisdiction or the subject of dispute, simply mentions "violation of the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality" and "violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State."

6. The Congo's claim is, first, that the 1993 Belgian Law, as amended in 1999, is in breach of those two aforementioned principles and, secondly, that Belgium's prosecution of Mr. Yerodia, Foreign Minister of the Congo, violates the diplomatic immunity granted under international law to Ministers for Foreign Affairs. The Congo did not cite any damage or injury which the Congo or Mr. Yerodia himself has suffered or will suffer except for some moral injury; that is, at most, Mr. Yerodia might have thought it wise to forgo travel to foreign countries for fear of being arrested by those States pursuant to the arrest warrant issued by the Belgian investigating judge (that fear being ungrounded). Thus, as already noted, the Congo did not ask the Court to settle a legal dispute with Belgium but rather to render a legal opinion on the lawfulness of the 1993 Belgian Law as amended in 1999 and actions taken under it.

7. I fear that the Court's conclusions finding that this case involves a legal dispute between the Congo and Belgium within the meaning of Article 36, paragraph 2, of the Statute (such questions being the only ones which can be submitted to the Court) and upholding its jurisdiction in the present case will eventually lead to an excessive number of cases of this nature being referred to the Court even when no real injury has occurred, simply because one State believes that another State has acted contrary to international law. I am also afraid that many States will then withdraw their recognition of the Court's compulsory jurisdiction in order to avoid falling victim to this distortion of the rules governing the submission of cases. (See declaration of Judge Oda, Order of 8 December 2000.)

[*567] This "loose" interpretation of the compulsory jurisdiction of the Court will frustrate the expectations of a number of law-abiding nations. I would emphasize that the Court's jurisdiction is, in principle, based on the consent of the sovereign States seeking judicial settlement by the Court.

II. THE CONGO'S CHANGING OF THE SUBJECT-MATTER

8. In reaffirming my conviction that the Congo's Application unilaterally submitted to the Court was not a proper subject of contentious proceedings before the Court, I would like to take up a few other points which I find to be crucial to understanding the essence of this inappropriate, unjustified and, if I may say so, wrongly decided case. It is to be noted, firstly, that between filing its Application of 17 October 2000 and submitting its Memorial on 16 May 2001, the Congo restated the issues, changing the underlying subject-matter in the process. The Congo contended in the Application: (i) that the 1993 Belgian Law, as amended in 1999, violated the "principle that a State may not exercise [its authority] on the territory of another State" and the "principle of sovereign equality" and (ii) that Belgium's exercise of criminal jurisdiction over Mr. Yerodia, then Minister for Foreign Affairs of the Congo, violated the "diplomatic immunity of the Minister for Foreign Affairs of a sovereign State." The alleged violations of those first two principles concern the question of "universal jurisdiction," which remains a matter of controversy within the international legal community, while the last claim relates only to a question of the "diplomatic immunity" enjoyed by the incumbent Minister for Foreign Affairs.

9. The Congo changed its claim in its Memorial, submitted seven months later, stating that

"by issuing and internationally circulating the arrest warrant of 11 April 2000 against [Mr. Yerodia], Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (Memorial of the Democratic Republic of the Congo of 15 May 2001, p. 64 [translation by the Registry]).

Charging and arresting a suspect are clearly acts falling within the exercise of a State's criminal jurisdiction. The questions originally raised--namely, whether a State has extraterritorial jurisdiction over crimes constituting serious violations of humanitarian law wherever committed and by whomever (in other words, the question of universal jurisdiction) and whether a Foreign Minister is exempt from such jurisdiction (in other words, the question of diplomatic immunity)--were transmuted into questions of the "issue and international circulation" of an arrest warrant against a Foreign Minister and the immunities of incumbent Foreign Ministers.

This is clearly a change in subject-matter, one not encompassed in "the right to argue further the grounds of its Application," which the Congo reserved in its Application of 17 October 2000.

10. It remains a mystery to me why Belgium did not raise preliminary objections concerning the Court's jurisdiction at the outset of this case. Instead, it admitted in its Counter-Memorial that there had been a dispute between the two States, one susceptible to judicial settlement by the Court, at the time the proceedings were instituted and that the Court was then seised of the case, as the Court itself finds (Judgment, para. 27). Did Belgium view this as a case involving a unilateral application and the Respondent's subsequent recognition of the Court's jurisdiction, instances of which are to be found in the Court's past?

Belgium seems to have taken the position that once Mr. Yerodia had ceased to be Foreign Minister, a dispute existed concerning him in his capacity as a former Foreign Minister and contended that the Court lacked jurisdiction under those circumstances. Thus, Belgium also appears to have replaced the issues as they existed on the date of the Congo's Application with those arising at a later date. It would appear that Belgium did not challenge the Court's jurisdiction in

the original case but rather was concerned only with the admissibility of the Application or the mootness of the case once Mr. Yerodia had been relieved of his duties as Foreign Minister (see Belgium's four preliminary objections raised in its Counter-Memorial, referred to in the Judgment, paras. 23, 29, 33 and 37).

[*568] In this respect, I share the view of the Court (reserving, of course, my position that a dispute did not exist) that the alleged dispute was the one existing in October 2000 (Judgment, para. 38) and, although I voted against paragraph 78(1)(A) of the Judgment for the reasons set out in paragraph 1 of my opinion, I concur with the Court in rejecting Belgium's objections relating to "jurisdiction, mootness and admissibility" in regard to the alleged dispute which Belgium believed existed after Mr. Yerodia left office.

Certainly, the question whether a former Foreign Minister is entitled to the same privileges and immunities as an incumbent Foreign Minister may well be a legal issue but it is not a proper subject of the present case brought by the Congo in October 2000.

III. DOES THE PRESENT CASE INVOLVE ANY LEGAL ISSUES ON WHICH THE CONGO AND BELGIUM HELD CONFLICTING VIEWS?

11. Putting aside for now my view that that there was no legal dispute between the Congo and Belgium susceptible to judicial settlement by the Court under its Statute and that the Congo seems simply to have asked the Court to render an opinion, I shall note my incomprehension of the Congo's intention and purpose in bringing this request to the Court in October 2000 when Mr. Yerodia held the office of Foreign Minister.

In its Application of October 2000, the Congo raised the question whether the 1993 Belgian Law, as amended in 1999, providing for the punishment of serious violations of humanitarian law was itself contrary to the principle of sovereign equality under international law (see Application of the Democratic Republic of the Congo of 17 October 2000, Part III: Statement of the Facts, A.). Yet it appears that the Congo abandoned this point in its Memorial of May 2001, as the Court admits (Judgment, para. 45), and never took it up during the oral proceedings.

12. It is one of the fundamental principles of international law that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law. From the base established by the Permanent Court's decision in 1927 in the "Lotus" case, the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide. Belgium is known for taking the lead in this field and its 1993 Law (which would make Mr. Yerodia liable to punishment for any crimes against humanitarian law he committed outside of Belgium) may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

Legal scholars the world over have written prolifically on this issue. Some of the opinions appended to this Judgment also give guidance in this respect. I believe, however, that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.

13. It is clear that a State cannot arrest an individual outside its territory and forcibly bring him before its courts for trial. In this connection, it is necessary to examine the effect of an arrest warrant issued by a State authority against an individual who is subject to that State's jurisdiction to prescribe

law. The arrest warrant is an official document issued by the State's judiciary empowering the police authorities to take forcible action to place the individual under arrest. Without more, however, the warrant is not directly binding on foreign authorities, who are not part of the law enforcement mechanism of the issuing State. The individual may be arrested abroad (that is, outside the issuing State) only by the authorities of the State where he or she is present, since jurisdiction over that territory lies exclusively with that State. Those authorities will arrest the individual being sought by the issuing State only if the requested State is committed to do so pursuant to international arrangements with the issuing State. Interpol is merely an organization which transmits the arrest request from one State to another; it has no enforcement powers of its own.

It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal [*569] effect. The crucial point in this regard is not the issuance or international circulation of an arrest warrant but the response of the State receiving it.

14. Diplomatic immunity is the immunity which an individual holding diplomatic status enjoys from the exercise of jurisdiction by States other than his own. The issue whether Mr. Yerodia, as Foreign Minister of the Congo, should have been immune in 2000 from Belgium's exercise of criminal jurisdiction pursuant to the 1993 Law as amended in 1999 is twofold. The first question is whether in principle a Foreign Minister, the post which Mr. Yerodia held in 2000, is entitled to the same immunity as diplomatic agents. Neither the 1961 Vienna Convention on Diplomatic Relations nor any other convention spells out the privileges of Foreign Ministers and the answer may not be clear under customary international law. The Judgment addresses this question merely by giving a hornbook-like explanation in paragraphs 51 to 55. I have no further comment on this.

The more important aspect is the second one: can diplomatic immunity also be claimed in respect of serious breaches of humanitarian law--over which many advocate the existence of universal jurisdiction and which are the subject-matter of Belgium's 1993 Law as amended in 1999--and, furthermore, is a Foreign Minister entitled to greater immunity in this respect than ordinary diplomatic agents? These issues are too new to admit of any definite answer. The Court, after quoting several recent incidents in European countries, seems to conclude that Ministers for Foreign Affairs enjoy absolute immunity (Judgment, paras. 56-61). It may reasonably be asked whether it was necessary, or advisable, for the Court to commit itself on this issue, which remains a highly hypothetical question as Belgium has not exercised its criminal jurisdiction over Mr. Yerodia pursuant to the 1993 Belgian Law, as amended in 1999, and no third State has yet acted in pursuance of Belgium's assertion of universal jurisdiction.

IV. CONCLUDING REMARKS

15. I find little sense in the Court's finding in paragraph (3) of the operative part of the Judgment, which in the Court's logic appears to be the consequence of the finding set out in paragraph (2) (Judgment, para. 78). Given that the Court concludes that the violation of international law occurred in 2000 and the Court would appear to believe that there is nothing in 2002 to prevent Belgium

from issuing a new arrest warrant against Mr. Yerodia, this time as a former Foreign Minister and not the incumbent Foreign Minister, there is no practical significance in ordering Belgium to cancel the arrest warrant of April 2000. If the Court believes that this is an issue of the sovereign dignity of the Congo and that that dignity was violated in 2000, thereby causing injury at that time to the Congo, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. But I do not believe that Belgium caused any injury to the Congo because no action was ever taken against Mr. Yerodia pursuant to the warrant. Furthermore, Belgium was under no obligation to provide the Congo with any assurances that the incumbent Foreign Minister's immunity from criminal jurisdiction would be respected under the 1993 Law, as amended in 1999, but that is not the issue here.

16. In conclusion, I find the present case to be not only unripe for adjudication at this time but also fundamentally inappropriate for the Court's consideration. There is not even agreement between the Congo and Belgium concerning the issues in dispute in the present case. The potentially significant questions (the validity of universal jurisdiction, the general scope of diplomatic immunity) were transmuted into a simple question of the issuance and international circulation of an arrest warrant as they relate to diplomatic immunity. It is indeed unfortunate that the Court chose to treat this matter as a contentious case suitable for judicial resolution.

(Signed) Shigeru ODA.

DECLARATION DE M. RANJEVA

Effet du retrait de la premiere conclusion initiale du Congo--Exclusion de la competence universelle par defaut de l'objet des demandes--Competence universelle de la juridiction nationale: legislation belge--Evolution en droit [*570] international du regime de la competence universelle--La piraterie maritime et la competence universelle en droit coutumier--Obligation de reprimer et competence des juridictions nationales--Aut judicare aut dedere--Gravite des infractions non constitutive de titre de competence universelle--Interpretation de l'affaire du Lotus--Competence universelle par defaut en l'absence de lien de connexite non encore consacree en droit international.

1. Je souscris sans reserve a la conclusion de l'arret selon laquelle l'emission et la diffusion internationale du mandat d'arret du 11 avril 2000 constituaient des violations d'une obligation internationale de la Belgique a l'egard du Congo en ce qu'elles ont meconnu l'immunite de juridiction penale de ministre des affaires etrangeres du Congo. J'approuve egalement la position de la Cour qui, au vu des conclusions du Congo en leur dernier etat, s'est abstenue d'aborder et de traiter la question de savoir si la liceite dudit mandat devait etre remise en cause au titre de la competence universelle telle qu'elle a ete exercee par la Belgique.

2. Les considerations de logique auraient du amener la Cour a aborder la question de la competence universelle, une question d'actualite et sur laquelle une decision en la presente affaire aurait necessairement fait jurisprudence. Le retrait de la premiere conclusion initiale du Congo (voir paragraphe 10 du texte de l'arret), en soi n'etait pas suffisant pour justifier l'attitude de la Cour. On pouvait raisonnablement considerer cette premiere demande initiale comme une fausse conclusion et l'analyser comme un moyen qui a ete expose pour servir de fondement a la principale demande: la declaration de l'illiceite du mandat d'arret sur le terrain de la violation des immunites de juridiction penale. L'evolution des demandes du Congo montre que de moyen de demande, la question de la competence universelle s'est transformee en moyen de defense de la Belgique.

Sur le plan procedural, c'est cependant par rapport aux petita et aux moyens de demande que la Cour statue quel que soit, par ailleurs, l'interet en soi des questions soulevees au cours de la procedure. Compte tenu des conclusions sur le caractere illicite du mandat, il n'etait plus necessaire d'aborder le second aspect de l'illiceite, a mon grand regret. Une chose est certaine: on ne saurait inferer du texte de l'arret une interpretation selon laquelle la Cour se serait montree indifferente a l'egard de la competence universelle; la question reste ouverte au regard du droit.

3. Le silence de l'arret sur la question de la competence universelle me met dans une situation inconfortable. L'expression d'une opinion sur la question est singuliere: elle porterait sur des developpements hypothetiques alors que le probleme est reel tant dans la presente affaire que compte tenu de l'evolution du droit penal international lorsqu'il s'agit de la prevention et de la repression des crimes odieux et attentatoires aux droits et a la dignite de l'etre humain au regard du droit international. Aussi la presente declaration portera-t-elle sur l'interpretation que la Belgique donne de la competence universelle.

4. En application de la loi belge du 16 juin 1993 modifiee le 10 fevrier 1999, portant repression des violations graves du droit international humanitaire, le juge d'instruction pres le tribunal de grande instance de Bruxelles a emis un mandat d'arret international a l'encontre de M. Yerodia Ndombasi, alors ministre des affaires etrangeres du Congo; il etait reproche a ce dernier des violations graves de regles de droit humanitaire ainsi que des crimes contre l'humanite. Aux termes de l'article 7 de ladite loi, les auteurs de telles infractions <<relevent de la competence des juridictions belges quelle que soit leur nationalite et celle de la victime>>. L'interet de la presente decision reside dans le fait que l'affaire est une veritable avant-premiere.

5. La legislation belge qui institue la competence universelle in absentia pour les violations graves du droit international humanitaire a consacre l'interpretation la plus extensive de cette competence. Les juridictions ordinaires belges sont competentes pour juger les crimes de guerre, contre l'humanite et de genocide, commis par des non-Belges, en dehors du territoire belge tandis que le mandat emis a l'encontre de M. Yerodia Ndombasi est la premiere des applications de cette hypothese extreme. Il ne semble pas que des dispositions legislatives en droit positif autorisent l'exercice de la competence penale en l'absence d'un lien de connexite territoriale ou personnelle actif ou passif. L'innovation de la loi belge reside dans la possibilite de l'exercice de la competence universelle en l'absence de tout lien de la Belgique avec l'objet de l'infraction, la personne de l'auteur presume de l'infraction ou enfin le territoire pertinent. Mais apres les tragiques evenements survenus en Yougoslavie et au Rwanda, plusieurs Etats ont invoque la competence universelle pour engager des poursuites contre des auteurs presumes de crimes de droit [*571] humanitaire; cependant, a la difference du cas de M. Yerodia Ndombasi, les personnes impliquees avaient auparavant fait l'objet d'une procedure ou d'un acte d'arrestation, c'est-a-dire qu'un lien de connexion territoriale existait au prealable.

6. En droit international, la meme consideration liee au lien de connexite ratione loci est egalement exigee pour l'exercice de la competence universelle. La piraterie maritime est l'unique cas classique d'application de la competence universelle selon le droit coutumier. L'article 19 de la convention de Geneve du 29 decembre 1958 puis l'article 105 de la convention de Montego Bay n1 du 10 decembre 1982 disposent que:

<<Tout Etat peut, en haute mer ou en tout autre lieu ne relevant de la juridiction d'aucun Etat, saisir un navire ou un aeronef pirate, ou un navire ou

un aeronef capture a la suite d'un acte de piraterie et aux mains de pirates, et apprehender les personnes et saisir les biens se trouvant a bord. Les tribunaux de l'Etat qui a opere la saisie peuvent se prononcer sur les peines a infliger.>>
La competence universelle, en l'occurrence, s'explique en haute mer par l'absence de souverainete determinee et le regime de liberte; la juridiction de l'Etat du pavillon represente ainsi normalement le facteur de garantie du respect du droit. Mais la piraterie etant definie comme la repudiation et la soustraction du pirate de la juridiction de tout ordre etatique, l'exercice de la competence universelle permet d'assurer le retablissement de l'ordre juridique. C'est donc l'atteinte a l'amenagement international de l'ordre des juridictions des Etats qui explique, dans ce cas particulier la consecration de la competence universelle des tribunaux nationaux charges de juger les pirates et les actes de piraterie. En revanche, la gravite, en soi, des infractions, n'a pas ete consideree comme suffisante pour etablir la competence universelle. Il n'y a pas d'autre exemple d'infraction commise en haute mer pour laquelle la competence universelle a ete consacree (par exemple: conventions du 18 mai 1904 et du 4 mai 1910 (relatives a la repression de la traite des blanches); convention du 30 septembre 1921 (pour la repression de la traite des femmes et des enfants); convention du 28 juin 1930 (sur le travail force ou obligatoire) et du 5 juin 1957 (abolissant le travail force)).
n1 Convention des Nations Unies sur le droit de la mer.
7. L'evolution du droit penal conventionnel, dans les dernieres decennies, s'est orientee vers la consecration de l'obligation de reprimer et un nouvel amenagement de la competence des Etats en matiere de repression. Alors que les conventions de droit humanitaire de Geneve de 1949 sont sources d'obligations juridiques internationales, elles ne comportent aucune disposition sur la competence des juridictions nationales pour en assurer sur le plan judiciaire l'effectivite. Il en etait de meme de la convention de 1948 sur le genocide. Il a fallu attendre l'organisation sur le plan international de la lutte contre le terrorisme sur les aeronefs pour l'adoption de dispositions qui relevent de l'exercice de la competence universelle: la consecration du principe aut judicare aut dedere dans le paragraphe 2 de l'article 4 de la convention de la Haye du 16 decembre 1970, dans les termes suivants: <<Tout Etat contractant prend les mesures necessaires pour etablir sa competence aux fins de connaitre de l'infraction dans le cas ou l'auteur presume de celle-ci se trouve sur son territoire et ou ledit Etat ne l'extrade pas.>> n2 On relevera que la mise en oeuvre du principe aut judicare aut dedere est conditionnee par l'arrestation effective au prealable de l'auteur presume. Cette disposition de 1970 a servi de modele pour l'extension, dans diverses conventions ulterieures, de la competence penale des juridictions nationales dans l'exercice de la competence universelle. Ce developpement n'a pas eu pour effet la reconnaissance d'une competence in absentia ou par defaut.
n2 Convention pour la repression de la capture illicite d'aeronefs.
8. L'argumentation belge invoque a son profit non seulement une obligation juridique internationale de reprimer les infractions graves de droit humanitaire mais egalement la faculte qui est reconnue de legiferer de maniere discretionnaire en la matiere. Il n'est pas utile de revenir sur le manque de fondement du premier volet de cette argumentation qui confond a tort l'obligation de reprimer et son mode operatoire: la revendication de la competence in absentia des juridictions penales nationales en l'absence de clause attributive de competence. Ainsi l'affirmation de la Belgique selon laquelle <<on sait que la justice belge a le droit de connaitre de violations graves du droit international humanitaire meme si leur auteur presume n'est pas

trouve sur le territoire belge>> (contre-memoire de la Belgique, p. 89, par. 3.3.28) reste une petition de principe. Les exemples invoques a l'appui de cette proposition ne sont pas concluants: sur cent-vingt-cinq legislations nationales concernant la repression de crimes de guerre ou contre l'humanite, seuls cinq Etats ne requierent pas la presence sur le territoire pour l'ouverture de poursuites penales (contre-memoire de la Belgique, p. 98-99, par. 3.3.57).

[*572] 9. Quant a l'etendue de la competence legislative nationale, la Belgique l'a justifiee de la jurisprudence de l'affaire du Lotus:

<<Mais il ne s'ensuit pas que le droit international defend a un Etat d'exercer, dans son propre territoire, sa juridiction dans toute affaire ou il s'agit de faits qui se sont passes a l'etranger et ou il ne peut s'appuyer sur une regle permissive du droit . . . . Loin de defendre d'une maniere generale aux Etats d'etendre leurs lois et leur juridiction a des personnes, des biens et des actes hors du territoire, il leur laisse a cet egard, une large liberte, qui n'est limitee que dans quelques cas par des regles prohibitives; pour les autres cas chaque Etat reste libre d'adopter les principes qu'il juge les meilleurs et les plus convenables.>> (C.P.J.I. serie A n<o> 10, p. 19.)

et plus loin le meme arret de dire:

<<tout ce qu'on peut demander a un Etat, c'est de ne pas depasser les limites que le droit international trace a sa competence; . . . La territorialite du droit penal n'est donc pas un principe absolu du droit international et ne se confond aucunement avec la souverainete territoriale.>> (Ibid., p. 19-20.)

Sans aucun doute, on peut analyser l'evolution des idees et des conditions politiques dans le monde contemporain comme favorable a une attenuation de la conception territorialiste de la competence et a l'emergence d'une approche plus fonctionnaliste dans le sens d'un service au profit des fins superieures communes. Prendre acte de cette tendance ne saurait justifier l'immolation des principes cardinaux du droit sur l'autel d'une certaine modernite. Le caractere territorial de la basedu titre de competence reste encore une des valeurs sures, le noyau dur du droit international positif contemporain. L'acceptation doctrinale du principe enonce dans l'affaire du Lotus, lorsqu'il s'est agi de la lutte contre les crimes internationaux, ne s'est pas encore traduite par un developpement consecutif du droit positif en matiere de competence juridictionnelle penale.

10. Enfin l'argumentation de la Belgique invoque plus particulierement a l'appui de son interpretation de la competence universelle in absentia le passage suivant du meme arret Lotus:

<<S'il est vrai que le principe de la territorialite du droit penal est a la base de toutes les legislations, il n'en est pas moins vrai que toutes ou presque toutes ces legislations etendent leur action a des delits commis hors du territoire; et cela d'apres des systemes qui changent d'Etat a Etat.>> (Ibid. p. 20.)

Il est difficile d'induire de cette proposition la consecration de la competence universelle in absentia. Au contraire, la Cour permanente se montre tres prudente; elle restreint sa sphere d'investigation au cas d'espece qui est soumis a son examen et recherche des analogies etroites avec des situations analogues. En fait toute tentative d'y vouloir trouver les bases d'une competence universelle in absentia releve de la speculation: les faits de l'espece se limitaient au probleme de la competence des juridictions penales turques a la suite de l'arrestation du lieutenant Demons dans les eaux territoriales turques alors que cet officier commandait en second un navire battant pavillon francais.

11. En definitive, la question liee a la competence universelle in absentia reside dans la difficulte qui existe dans la possibilite d'une competence penale

extraterritoriale en l'absence de tout lien de rattachement de l'Etat qui revendique l'exercice de cette competence avec le territoire ou les faits incrimines ont eu lieu, avec l'effectivite de son autorite sur les auteurs presumes de ces forfaits. Ce probleme s'explique par la nature d'un acte en procedure penale: il n'a pas un caractere virtuel, il est executoire et requiert, a cette fin, une base materielle minimale au regard du droit international. Pour ces raisons, l'interdiction explicite de l'exercice d'une competence universelle, au sens ou la Belgique l'a interprete, ne constitue pas une base suffisante.

12. En conclusion, independamment de l'ardente obligation de rendre effective la necessite de prevenir et de reprimer les crimes de droit international humanitaire pour favoriser l'avenement de la paix et de la securite internationales, et sans qu'il soit, pour autant, indispensable de reprouver la loi belge du 16 juin 1993 modifiee le 10 [*573] fevrier 1999, il aurait ete difficile, au regard du droit positif contemporain, de ne pas donner droit a la premiere conclusion initiale de la Republique democratique du Congo.

(Signe) Raymond RANJEVA.

SEPARATE OPINION OF JUDGE KOROMA

Legal approach taken by Court justified in view of position of Parties, the origin and sources of the dispute and consistent with jurisprudence of the Court--Actual question before Court not a choice between universal jurisdiction or immunity--Though two concepts are linked, but not identical--Judgment not to be seen as rejection or endorsement of universal jurisdiction--Court not neutral on issues of grave breaches--But legal concepts should be consistent with legal tenets--Cancellation of warrant appropriate response for unlawful act.

1. The Court in paragraph 46 of the Judgment acknowledged that, as a matter of legal logic, the question of the alleged violation of the immunities of the Minister for Foreign Affairs of the Democratic Republic of the Congo should be addressed only once there has been a determination in respect of the legality of the purported exercise of universal jurisdiction by Belgium. However, in the context of the present case and given the main legal issues in contention, the Court chose another technique, another method, of exercising its discretion in arranging the order in which it will respond when more than one issue has been submitted for determination. This technique is not only consistent with the jurisprudence of the Court, but the Court is also entitled to such an approach, given the position taken by the Parties.

2. The Congo, in its final submissions, invoked only the grounds relating to the alleged violation of the immunity of its Foreign Minister, while it had earlier stated that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at its request but, rather, by virtue of the defence strategy adopted by Belgium. Belgium, for its part, had, at the outset, maintained that the exercise of universal jurisdiction is a valid counterweight to the observance of immunities, and that it is not that universal jurisdiction is an exception to immunity but rather that immunity is excluded when there is a grave breach of international criminal law. Belgium, nevertheless, asked the Court to limit its jurisdiction to those issues that are the subject of the Congo's final submissions, in particular not to pronounce on the scope and content of the law relating to universal jurisdiction.

3. Thus, since both Parties are in agreement that the subject-matter of the dispute is whether the arrest warrant issued against the Minister for Foreign Affairs of the Congo violates international law, and the Court is asked to pronounce on the question of universal jurisdiction only in so far as it relates

to the question of the immunity of a Foreign Minister in office, both Parties had therefore relinquished the issue of universal jurisdiction; this entitled the Court to apply its well-established principle that it has a "duty . . . not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (Asylum, Judgment, I.C.J. Reports 1950, p. 402). In other words, according to the jurisprudence of the Court, it rules on the petitum, or the subject-matter of the dispute as defined by the claims of the Parties in their submissions; the Court is not bound by the grounds and arguments advanced by the Parties in support of their claims, nor is it obliged to address all such claims, as long as it provides a complete answer to the submissions. And that position is also in accordance with the submissions of the Parties.

[*574] 4. This approach is all the more justified in the present case, which has generated much public interest and where two important legal principles would appear to be in competition, when in fact no such competition exists. The Court came to the conclusion, and rightly in my view, that the issue in contention is not one pitting the principle of universal jurisdiction against the immunity of a Foreign Minister. Rather, the dispute before it is whether the issue and international circulation of the arrest warrant by Belgium against the incumbent Minister for Foreign Affairs of the Congo violated the immunity of the Foreign Minister, and hence the obligation owed by Belgium to the Congo. The Court is asked to pronounce on the issue of universal jurisdiction only in so far as it relates to the question of the immunity of the Foreign Minister. This, in spite of appearances to the contrary, is the real issue which the Court is called upon to determine and not which of those legal principles is pre-eminent, or should be regarded as such.

5. Although immunity is predicated upon jurisdiction--whether national or international--it must be emphasized that the concepts are not the same. Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and the exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State. Accordingly, jurisdiction and immunity must be in conformity with international law. It is not, however, that immunity represents freedom from legal liability as such, but rather that it represents exemption from legal process. The Court was therefore justified that in this case, in its legal enquiry, it took as its point of departure one of the issues directly relevant to the case for determination, namely whether international law permits an exemption from immunity of an incumbent Foreign Minister and whether the arrest warrant issued against the Foreign Minister violates international law, and came to the conclusion that international law does not permit such exemption from immunity.

6. In making its determination, as it pointed out in the Judgment, the Court took into due consideration the pertinent conventions, judicial decisions of both national and international tribunals, resolutions of international organizations and academic institutes before reaching the conclusion that the issue and circulation of the warrant is contrary to international customary law and violated the immunity of the Minister for Foreign Affairs. The paramount legal justification for this, in my opinion, is that immunity of the Foreign Minister is not only of functional necessity but increasingly these days the Foreign Minister represents the State, even though his or her position is not assimilable to that of Head of State. While it would have been interesting if the Court had done so, the Court did not consider it necessary to undertake a disquisition of the law in order to reach its decision. In acknowledging that

the Court refrained from carrying out such an undertaking, in reaching its conclusion, perhaps not wanting to tie its hands when not compelled to do so, the Judgment cannot be said to be juridically constraining or not to have responded to the submissions. The Court's Judgment by its nature may not be as expressive or exhaustive of all the underlying legal principles pertaining to a case, so long as it provides a reasoned and complete answer to the submissions.
7. In the present case, the approach taken by the Court can also be viewed as justified and apposite on practical and other grounds. The Minister for Foreign Affairs of the Congo was sued in Belgium, on the basis of Belgian law. According to that law, immunity does not represent a bar to prosecution, even for a Minister for Foreign Affairs in office, when certain grave breaches of international humanitarian law are alleged to have been committed. The immunity claimed by the Foreign Minister is from Belgian national jurisdiction based on Belgian law. The Judgment implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone, an incumbent Minister for Foreign Affairs of a foreign State is immune from Belgian jurisdiction. International law imposes a limit on Belgium's jurisdiction where the Foreign Minister in office of a foreign State is concerned.
8. On the other hand, in my view, the issue and circulation of the arrest warrant show how seriously Belgium views its international obligation to combat international crimes. Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.
9. Against this background, the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and [*575] crimes against humanity, including the slave trade and genocide. The Court did not rule on universal jurisdiction, because it was not indispensable to do so to reach its conclusion, nor was such submission before it. This, to some extent, provides the explanation for the position taken by the Court.
10. With regard to the Court's findings on remedies, the Court's ruling that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom that warrant was circulated is a legal and an appropriate response in the context of the present case. For, in the first place, it was the issue and circulation of the arrest warrant that triggered and constituted the violation not only of the Foreign Minister's immunity but also of the obligation owed by the Kingdom to the Republic. The instruction to Belgium to cancel the warrant should cure both violations, while at the same time repairing the moral injury suffered by the Congo and restoring the situation to the status quo ante before the warrant was issued and circulated (Factory at Chorzow, P.C.I.J., Merits, Judgment No. 13, 1928, Series A, No. 17, p. 47).
11. In the light of the foregoing, any attempt to qualify the Judgment as formalistic, or to assert that the Court avoided the real issue of the commission of heinous crimes is without foundation. The Court cannot, and in the present case, has not taken a neutral position on the issue of heinous crimes. Rather, the Court's ruling should be seen as responding to the question asked of it. The ruling ensures that legal concepts are consistent with international law and legal tenets, and accord with legal truth.

(Signed) Abdul G. KOROMA

JOINT SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS & BUERGENTHAL

Necessity of a finding on jurisdiction--Reasoning on jurisdiction not precluded by ultra petita rule.

Status of universal jurisdiction to be tested by reference to the sources of international law--Few examples of universal jurisdiction within national legislation or case law of national courts--Examination of jurisdictional basis of multilateral treaties on grave offences do not evidence established practice of either obligatory or voluntary universal criminal jurisdiction--Aut dedere aut prosequi--Contemporary trends suggesting universal jurisdiction in absentia not precluded--The "Lotus" case--Evidence that national courts and international tribunals intended to have parallel roles in acting against impunity--Universal jurisdiction not predicated upon presence of accused in territory, nor limited to piracy--Necessary safeguards in exercising such a jurisdiction--Rejection of Belgium's argument that it had in fact exercised no extraterritorial criminal jurisdiction.

The immunities of an incumbent Minister for Foreign Affairs and their role in society--Rejection of assimilation with Head of State immunities--Trend to preclude immunity when charged with international crimes--Immunity not precluded in the particular circumstances of this case--Role of international law to balance values it seeks to protect--Narrow interpretation to be given to "official acts" when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court's order to withdraw warrant.

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

[*576] * * *

2. In its Judgment the Court says nothing on the question of whether--quite apart from the status of Mr. Yerodia at the relevant time--the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. "Immunity" is the common shorthand phrase for "immunity from jurisdiction." If there is no jurisdiction en principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that "immunity" is a free-standing topic of international law. It is not. "Immunity" and "jurisdiction" are inextricably linked. Whether there is "immunity" in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of "immunity" depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In bypassing the issue of jurisdiction the Court has

encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one--immunity--can arise only if the other--jurisdiction--exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it. But through choosing to look at half the story--immunity--it is not in a position to do so.

6. As Mr. Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction. Indeed, both it and the enabling legislation of 1993 and 1999 expressly say so. Moreover, Mr. Yerodia himself was outside of Belgium at the time the warrant was issued.

7. In its Application instituting proceedings (p. 7), the Democratic Republic of the Congo complained that Article 7 of the Belgian Law:

"establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of 'serious violations of international humanitarian law,' without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory. It is clearly this unlimited jurisdiction which the Belgian State confers upon itself which explains the issue of the arrest warrant against Mr. Yerodia Ndombasi, against whom it is patently evident that no basis of territorial or in personam jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked."

In its Memorial, the Congo denied that

"international law recognised such an enlarged criminal jurisdiction as that which Belgium purported to exercise, namely in respect of incidents of international humanitarian law when the accused was not within the prosecuting State's territory." (Memorial of Congo, para. 87.)

[*577] In its oral submissions the Congo once again stated that it was not opposed to the principle of universal jurisdiction per se. But the assertion of a universal jurisdiction over perpetrators of crimes was not an obligation under international law, only an option. The exercise of universal jurisdiction required, in the Congo's view, that the sovereignty of the other State be not infringed and an absence of any breach of an obligation founded in international law (CR 2001/6, p. 33). Further, according to the Congo, States who are not under any obligation to prosecute if the perpetrator is not present on their territory, nonetheless are free to do so in so far as this exercise of jurisdiction does not infringe the sovereignty of another State and is not in breach of international law (CR 2001/6, p. 33). The Congo stated that it had no intention of discussing the existence of the principle of universal jurisdiction, nor of placing obstacles in the way of any emerging custom regarding universal jurisdiction (ibid.). As the oral proceedings drew to a close, the Congo acknowledged that the Court might have to pronounce on certain aspects of universal jurisdiction, but it did not request the Court to do so, as the question did not interest it directly (CR 2001/10, p. 11). It was interested to have a ruling from the Court on Belgium's obligations to the Congo in the

light of Mr. Yerodia's immunity at the relevant time. The final submissions as contained in the Application were amended so as to remove any request for the Court to make a determination on the issue of universal jurisdiction.

8. Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option (Counter-Memorial of Belgium, para. 3.3.25). No territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community (Counter-Memorial of Belgium, paras. 3.3.44-3.3.52). In Belgium's view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity (Counter-Memorial of Belgium, paras. 3.3.28-3.3.74).

9. These submissions were reprised in oral argument, while noting that the Congo "no longer contested the exercise of universal jurisdiction by default" (CR 2001/9, pp. 8-13). Belgium, too, was eventually content that the Court should pronounce simply on the immunity issue.

10. That the Congo should have gradually come to the view that its interests were best served by reliance on its arguments on immunity, was understandable. So was Belgium's satisfaction that the Court was being asked to pronounce on immunity and not on whether the issue and circulations of an international arrest warrant required the presence of the accused on its territory. Whether the Court should accommodate this consensus is another matter.

11. Certainly it is not required to do so by virtue of the ultra petita rule. In the Counter-Memorial Belgium quotes the locus classicus for the non ultra petita rule, the Asylum (Interpretation) case:

"it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding issues not included in those submissions" (I.C.J. Reports 1950, p. 402; Counter-Memorial of Belgium, para. 2.75; emphasis added).

It also quotes Rosenne who said:

"It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision."

(Counter-Memorial of Belgium, para. 2.77.)

12. Close reading of these quotations shows that Belgium is wrong it if wishes to convey to the Court that the non ultra petita rule would bar it from addressing matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:

"unless certain distinctions are drawn, there is a danger that [the non ultra petita rule] might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by [*578] compelling it to neglect juridically relevant factors" (The Law and Procedure of the International Court of Justice, 1986, Vol. II, pp. 529-530).

13. Thus the ultra petita rule can operate to preclude a finding of the Court, in the dispositif, on a question not asked in the final submissions by a party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it does make in the dispositif. The Court has acknowledged this in paragraph 43 of the present Judgment. But having reserved the right to deal with aspects of

universal jurisdiction in its reasoning, "should it deem this necessary or desirable," the Court says nothing more on the matter.

14. This may be contrasted with the approach of the Court in the Advisory Opinion request put to it in the Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962, pp. 156-157. (The Court was constrained by the request put to it, rather than by the final submissions of the Applicant, but the point of principle remains the same.) The Court was asked by the General Assembly whether the expenditures incurred in connection with UNEF and ONUC constituted "expenses of the organization" for purposes of Article 17, paragraph 2, of the Charter.

15. France had in fact proposed an amendment to this request, whereby the Court would have been asked to consider whether the expenditures in question were made in conformity with the provisions of the Charter, before proceeding to the question asked. This proposal was rejected. The Court stated

"The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter,' if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to follow or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (Ibid., p. 157.)

The Court further stated that it

"has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent upon it unless it examined in some detail various problems raised by the question which the General Assembly has asked" (ibid., p. 158).

16. For all the reasons expounded above, the Court should have "found it appropriate" to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia's presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have "examined in some detail various problems raised" by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manoeuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium's view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium's view the case had become one "about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge" (CR 2001/8, p. 26, para. 43). The dispute was "a difference of opinion of an abstract nature" (CR 2001/8, p. 36, para. 71). The Court should not "entrer dans un debat qui risque fort de lui apparaitre comme essentiellement academique" (CR 2001/9, pp. 6-7, paras. 3-4).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. [*579] It is regrettable that the Court has not followed the logic of its own findings in the Certain Expenses case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could

legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: "Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?"

* * *

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1(c), of the Statute of the Court, together with obligations imposed upon all United Nations Members by Security Council resolutions, or by such General Assembly resolutions as meet the criteria enunciated by the Court in the case concerning Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (I.C.J. Reports 1996, p. 226, para. 70).

20. Our analysis may begin with national legislation, to see if it evidences a State practice. Save for the Belgian legislation of 10 February 1999, national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify the more qualified practice. The Australian War Crimes Act of 1945, as amended in 1988, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (ss. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

"This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany]."

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or "employed by Canada in a civilian or military capacity;" or the "victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict," or when "at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada" (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so far as reliance on universal jurisdiction is concerned. In the Pinochet case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (Nulyarimma, 1999: genocide). The High Court confirmed the authority of the legislature to confer jurisdiction on the courts to exercise a universal jurisdiction over war crimes (Polyukovich, [*580] 1991). In Austria (whose Penal Code emphasizes the double-criminality requirement), the Supreme Court found that it had jurisdiction over persons charged with genocide, given that there was not a functioning legal system in the State where the crimes had been committed nor a functioning international criminal tribunal at that point in time (Cvjetkovic, 1994). In France it has been held by a juge d'instruction that the Genocide Convention does not provide for universal jurisdiction (in re Javor, reversed in the Cour d'Appel on other grounds. The Cour de Cassation ruling equally does not suggest universal jurisdiction). The Munyeshyaka finding by the Cour d'Appel (1998) relies for a finding--at first sight inconsistent--upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the Qaddafi case the Cour d'Appel relied on passive personality and not on universal jurisdiction (in the Cour de Cassation it was immunity that assumed central importance).

23. In the Bouterse case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an "extraterritorial jurisdiction" could be exercised over a non-national. However, in the Hoge Raad, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke "universal jurisdiction," though considerations of passive personality have also been of key importance (Yunis, 1988; Bin Laden, 2000).

25. An even more ambiguous answer is to be derived from a study of the provisions of certain important treaties of the last 30 years, and the obligations imposed by the parties themselves.

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. (See the interesting recent article of Luis Benavenides "The Universal Jurisdiction Principle; Nature and Scope," Annuario Mexicano de Derecho Internacional, Vol. 1, p. 58 (2001). This is doubtful.

27. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, provides:

"Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

This is an obligation to assert territorial jurisdiction, though the travaux preparatoires do reveal an understanding that this obligation was not intended

to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C 6/SR, 134; p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal--even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case. (And see, more generally, Restatement (Third) of the Foreign Relations Law of the United States (1987), § 404.)

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

[*581] 29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the aut dedere aut prosequi to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true universality principle (see also Henzelin, Le principe de l'universalite en droit penal international: Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalite (2000), pp. 354-6). But a different interpretation is given in the authoritative Pictet Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1952), which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?

32. As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I.

33. The Single Convention on Narcotics and Drugs, 1961, provides in Article 36, paragraph 2, that:

"(a)(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given."

34. Diverse views were expressed as to whether the State where the offence was committed should have first right to prosecute the offender (E/CN.7/AC.3/9, 11 Sept. 1958, p. 17, fn. 43; cf. E/CN.7/AC.3/9 and Add.1, E/CONF.34/1/Add.1, 6 Jan. 1961, p. 32). Nevertheless, the principle of "primary universal repression" found its way into the text, notwithstanding the strong objections of States

such as the United States, New Zealand and India that their national laws only envisaged the prosecution of persons for offences occurring within their national borders. (The development of the concept of "impact jurisdiction" or "effects jurisdiction" has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm.) The compromise reached was to make the provisions of Article 36, paragraph 2 (iv) "subject to the constitutional limitations of a Party, its legal system and domestic law." But the possibility of a universal jurisdiction was not denounced as contrary to international law.

35. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, making preambular reference to the "urgent need" to make such acts "punishable as an offence and to provide for appropriate measures with respect to prosecution and extradition of offenders," provided in Article 4(1) for an obligation to take such measures as may be necessary to establish jurisdiction over these offences and other acts of violence against passengers or crew:

(a) when the offence is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State."

[*582] Article 4(2) provided for a comparable obligation to establish jurisdiction where the alleged offender was present in the territory and if he was not extradited pursuant to Article 8 by the territory. Thus here too was a treaty provision for aut dedere aut prosequi, of which the limb was in turn based on the principle of "primary universal repression." The jurisdictional bases provided for in Articles 4(1)(b) and 4(2), requiring no territorial connection beyond the landing of the aircraft or the presence of the accused, were adopted only after prolonged discussion. The travaux preparatoires show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula because of the gravity of the offence. Thus the representative of the United Kingdom stated that his country "would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory." Further,

"normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence ... he was prepared to support ... [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found]." (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall "without exception whatsoever and whether or not the offence was committed in its territory," submit the case for prosecution if it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16,

17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (ibid., A/AC.188/SR.24, para. 27) while others (Poland, para. 18; Mexico, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in its view to apply only to hostage taking that was a manifestation of international terrorism--another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

"(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate."

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted a contrario. (See J. H. Burgers and H. Danelius, The United Nations Convention against Torture, 1988, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of "primary universal repression" came now to be widely referred to by delegates as "universal jurisdiction"--moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an "offence against the law of nations." (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United [*583] Kingdom eventually dropped their objection that "universal jurisdiction" over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

40. This short historical survey may be summarized as follows:

41. The parties to these treaties agreed both to grounds of jurisdiction and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4(1) Hague Convention; Article 3(1) Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found, shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as "universal jurisdiction," though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

*

* *

42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, inter partes or, whether it is now, at least as

regards the offences articulated in the treaties, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed "universal jurisdiction principle" in these treaties is a principle of obligation, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an opinio juris on the illegality of such a jurisdiction. In short, national legislation and case law,--that is, State practice--is neutral as to exercise of universal jurisdiction.

[*584] 46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the aut dedere aut prosequi provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, e.g., Cherif Bassiouni, International Criminal Law, Volume III: Enforcement, 2nd Edition, (1999), p. 228; Theodore

Meron "Internationalization of Internal Atrocities" *89 AJIL (1995), at 576.)*

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. "Effects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

48. In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Torts Claim Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.

49. Belgium--and also many writers on this subject--find support for the exercise of a universal criminal jurisdiction in absentia in the "Lotus" case. Although the case was clearly decided on the basis of jurisdiction over damage to a vessel of the Turkish navy and to Turkish nationals, it is the famous dictum of the Permanent Court which has attracted particular attention. The Court stated that:

"The first and foremost restriction imposed by international law upon a State is that--failing the existence of a permissive rule to the contrary--it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." (P.C.I.J., Series A, No. 10, pp. 18-19.)

The Permanent Court acknowledged that consideration had to be given as to whether these principles would apply equally in the field of criminal jurisdiction, or whether closer connections might there be required. The Court noted the importance of the territorial character of criminal law but also the

fact that all or nearly all systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. After examining the issue the Court finally concluded that for an exercise of extraterritorial [*585] criminal jurisdiction (other than within the territory of another State) it was equally necessary to "prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation."

50. The application of this celebrated dictum would have clear attendant dangers in some fields of international law. (See, on this point, Judge Shahabudeen's dissenting opinion in the case concerning Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, I.C.J. Reports 1996, pp. 394-396.) Nevertheless, it represents a continuing potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies. The underlying idea of universal jurisdiction properly so-called (as in the case of piracy, and possibly in the Geneva Conventions of 1949), as well as the aut dedere aut prosequi variation, is a common endeavour in the face of atrocities. The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted. And those States and academic writers who claim the right to act unilaterally to assert a universal criminal jurisdiction over persons committing such acts, invoke the concept of acting as "agents for the international community." This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the "Lotus" case.

At the same time, the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis. (See Article 4(3) Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5(3) International Convention Against Taking of Hostages, 1979; Article 5(3) Convention Against Torture; Article 9, Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 19, Rome Statute of the International Criminal Court.)

52. We may thus agree with the authors of the Oppenheim, 9th Edition, at page 998, that:

"While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect."

*

* *

53. This brings us once more to the particular point that divides the Parties in

this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. The fact that in the past the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, outside of any territorial jurisdiction, is not determinative. The only prohibitive rule (repeated by the Permanent Court in the "Lotus" case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest [*586] warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

55. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to any extraterritoriality, including those that are well established and not just to universal jurisdiction.

56. Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.

57. On what basis is it claimed, alternatively, that an arrest warrant may not be issued for non-nationals in respect of offences occurring outside the jurisdiction? The textual provisions themselves of the 1949 Geneva Convention and the First Additional Protocol give no support to this view. The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of aut dedere aut prosequi. Definitionally, this envisages presence on the territory. There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of aut dedere aut prosequi jurisdiction, but cannot be interpreted a contrario so as to exclude a voluntary exercise of a universal jurisdiction.

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the aut dedere principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

* * *

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States. No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be

issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.
A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment. Further, such charges may only be laid by a prosecutor or juge d'instruction who acts in full independence, without links to or control by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or juge d'instruction. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

* * *

60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

[*587] 61. Piracy is the classical example. This jurisdiction was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas. War crimes (already since 1949 perhaps a treaty-based provision for universal jurisdiction) may be added to the list. The specification of their content is largely based upon the 1949 Conventions and those parts of the 1977 Additional Protocols that reflect general international law. Recent years have also seen the phenomenon of an alignment of national jurisdictional legislation on war crimes, specifying those crimes under the statutes of the ICTY, ICTR and the intended ICC.
62. The substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change. Article 6(c) of the Charter of the International Military Tribunal of 8 August, 1945, envisaged them as a category linked with those crimes over which the Tribunal had jurisdiction (war crimes, crimes against the peace). In 1950 the International Law Commission defined them as murder, extermination, enslavement, deportation or other inhuman acts perpetrated on the citizen population, or persecutions on political, racial or religious grounds if in exercise of, or connection with, any crime against peace or a war crime (YILC 1950, Principle VI(c), pp. 374-377). Later definitions of crimes against humanity both widened the subject-matter, to include such offences as torture and rape, and de-coupled the link to other earlier established crimes. Crimes against humanity are now regarded as a distinct category. Thus the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its 48th session, provides that crimes against humanity
"means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:

(a) Murder;
(b) Extermination;
(c) Torture;
(d) Enslavement;
(e) Persecution on political, racial, religious or ethnic grounds;
(f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(g) Arbitrary deportation or forcible transfer of population;
(h) Arbitrary imprisonment;
(i) Forced disappearance of persons;
(j) Rape, enforced prostitution and other forms of sexual abuse;
(k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm."

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as "grave breaches of international humanitarian law," and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed "crime against humanity" [*588] in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. "Racial hatred" would need to be assimilated to "persecution on racial grounds," or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome Statute for the ICC. However, Article 7(1) of the ICTY and Article 6(1) of the ICTR do stipulate that "any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime." In the Akayesu Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25(3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of "crimes against humanity" and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

* * *

66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for "representatives of foreign States who visit Belgium on the basis of any official invitation. In

such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium" (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

"has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition." (Counter-Memorial of Belgium, para. 3.1.12.)

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia's whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the purpose of the warrant was, if it was indeed so carefully formulated as to render it unenforceable.

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo's sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such--certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium." An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement [*589] of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium's choosing. Even if the action of a third State is required, the ground has been prepared.

* * *

70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court's Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value per se, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status (par in parem non habet imperium) has been replaced by that of restrictive immunity; within the latter a distinction was made between acta iure imperii and acta iure gestionis but immunity is granted only for the former. The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing interpretation which varies with time reflecting the changing priorities of society.

73. A comparable development can be observed in the field of international

criminal law. As we said in paragraph 49, a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development not only has led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts but also to the recognition of other, non-territorially based grounds of national jurisdiction (see paragraph 53 above).

74. The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.

75. These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.

[*590] 76. Such is the backdrop of the case submitted to the Court. Belgium claims that under international law it is permitted to initiate criminal proceedings against a State official who is under suspicion of having committed crimes which are generally condemned by the international community; and it contends that because of the nature of these crimes the individual in question is no longer shielded by personal immunity. The Congo does not deny that a Foreign Minister is responsible in international law for all of his acts. It asserts instead that he has absolute personal immunity from criminal jurisdiction as long as he is in office and that his status must be assimilated in this respect to that of a Head of State (Memorial of Congo, p. 30).

77. Each of the Parties, therefore, gives particular emphasis in its argument to one set of interests referred to above: Belgium to that of the prevention of impunity, the Congo to that of the prevention of unwarranted outside interference as the result of an excessive curtailment of immunities and an excessive extension of jurisdiction.

78. In the Judgment, the Court diminishes somewhat the significance of Belgium's arguments. After having emphasized--and we could not agree more--that the

immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed (para. 60), the Court goes on to say that these immunities do not represent a bar to criminal prosecution in certain circumstances (para. 61). We feel less than sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an uncooperative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolised. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers," Recueil des Cours 1994-III, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers of Foreign Affairs are entitled to the same immunities as Heads of State. In this respect, it should be pointed out that paragraph 3.2 of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property of 1991, which contained a saving clause for [*591] the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC, stated that mentioning the privileges and immunities of Ministers for Foreign Affairs

would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State.

82. The Institut de droit international took a similar position in 2001 with regard to Foreign Ministers. Its resolution on the Immunity of Heads of State, based on a thorough report on all relevant State practice, states expressly that these "shall enjoy, in criminal matters, immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity." But the Institut, which in this resolution did assimilate the position of Head of Government to that of Head of State, carefully avoided doing the same with regard to the Foreign Minister.

83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.

84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled. The arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for non-official reasons. The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo.

85. Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for "official" acts. It is now increasingly claimed in the literature (see, e.g., Andrea Bianchi "Denying State Immunity to Violations of Human Rights," 46 Austrian Journal of Public and International Law (1994), p. 229) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform: (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of 1<o> *Congreso del Partido (1978) QB 500* at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the Eichmann case; Supreme Court, 29 May 1962, 36 International Law Reports, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in R v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet ("Pinochet III"); and of Lords Steyn and Nicholls of Birkenhead in "Pinochet I," as well as the judgment of the Court of Appeal of Amsterdam in the Bouterse case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.)

* * *

86. We have voted against paragraph (3) of the dispositif for several reasons.
87. In paragraph (3) of the dispositif, the Court "finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom the warrant was circulated." In making this finding, the Court relies on the proposition enunciated in the Factory at Chorzow case pursuant to which "reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish [*592] the situation which would . . . have existed if the act had not been committed" (P.C.I.J., Series A, No. 17, p. 47). Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because "the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs."
88. We have been puzzled by the Court's reliance on the Factory at Chorzow case to support its finding in paragraph (3) of the dispositif. It would seem that the Court regards its order for the cancellation of the warrant as a form of restitutio in integrum. Even in the very different circumstances which faced the Permanent Court in the Factory at Chorzow case, restitutio in the event proved impossible. Nor do we believe that restoration of the status quo ante is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.
89. Moreover--and this is more important--the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court's finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that is not and cannot be of concern to this Court. Accordingly, we consider that the Court erred in its finding on this point.

(Signed) Rosalyn HIGGINS.

(Signed) Pieter KOOIJMANS.

(Signed) Thomas BUERGENTHAL.

OPINION INDIVIDUELLE DE M. REZEK

Preseance logique des questions de competence sur les questions d'immunites--Effet de l'exclusion des questions de competence des conclusions finales du Congo--Territorialite et defense de certains biens juridiques comme regles elementaires de competence--Nationalite active et passive comme regle de competence complementaire--Exercice de la competence penale sans aucune circonstance de rattachement au for non encore autorisee en droit international--Systeme international de cooperation pour la repression du crime.
1. Je suis persuade que j'ecris en ce moment une opinion dissidente, bien qu'elle doive etre classee parmi les opinions individuelles du fait que son

auteur a vote en faveur de l'ensemble du dispositif de l'arret. J'approuve, comme la majorite des membres de la Cour, tout ce qui est dit dans le dispositif, car le traitement de la question de l'immunite me parait conforme a l'etat du droit. Je regrette pourtant qu'une majorite ne se soit pas formee sur le point essentiel du probleme pose a la Cour.

2. Aucune immunite n'est absolue, dans aucun ordre juridique. Toute immunite s'inscrit forcement dans un cadre donne, et aucun sujet de droit ne saurait beneficier d'une immunite dans l'abstrait. Ainsi peut-on invoquer une immunite vis-a-vis d'une juridiction nationale donnee et non pas a l'egard d'une autre. De meme, une immunite peut deployer ses effets vis-a-vis de juridictions internes, mais pas a l'egard d'une juridiction internationale. Dans le cadre d'un ordre juridique donne, une immunite peut etre invoquee a l'encontre de la juridiction penale mais pas de la juridiction civile, ou bien a l'encontre de la juridiction ordinaire mais pas d'un for special.

[*593] 3. La question de la competence precede donc necessairement celle de l'immunite. Les deux questions ont en outre fait largement l'objet du debat, tant au niveau des pieces ecrites que lors de la procedure orale, entre les Parties. Le fait que, dans ses conclusions finales, le Congo se soit limite a inviter la Cour a rendre une decision fondee sur l'immunite de son ancien ministre vis-a-vis du for interne de la Belgique ne justifie pas l'abandon par la Cour de ce qui constitue une premisse inexorable a l'examen de la question de l'immunite. Il n'est ici aucunement question de retenir l'ordre des questions soumises a l'examen de la Cour mais d'observer l'ordre logique qui, en toute rigueur, s'impose. Autrement, on glisse vers un reglement par la Cour de la question de savoir si l'immunite existerait ou non au cas ou la justice belge serait competente . . .

4. En statuant au prealable sur la question de la competence, la Cour aurait eu l'occasion de rappeler que l'exercice de la juridiction penale interne, sur la seule base du principe de la justice universelle, presente necessairement un caractere subsidiaire et qu'il y a de substantielles raisons pour cela. D'abord, il est admis qu'aucun for n'est aussi qualifie pour conduire a son terme, comme il convient, un proces penal, que celui du lieu des faits, ne serait-ce que par la proximite des preuves, la connaissance plus approfondie des inculpes et des victimes, la perception plus nette de toutes les circonstances du cadre delictueux. Ce sont des raisons d'ordre plus politique que pratique qui conduisent plusieurs systemes internes a placer juste apres le principe de la territorialite un autre fondement de competence penale qui s'affirme sans egard au lieu des faits, celui de la defense de certains biens juridiques particulierement chers a l'Etat: la vie et l'integrite du souverain, le patrimoine public, l'administration publique.

5. En dehors de ces deux principes elementaires, la complementarite devient la regle: dans la plupart des pays, l'action penale est possible sur la base des principes de la nationalite active ou passive, lorsque l'on est en presence de crimes commis a l'etranger, ayant pour auteurs ou pour victimes des ressortissants de l'Etat du for, mais a la condition que, dans les cas susmentionnes, le proces n'ait pas eu lieu ailleurs, dans un Etat dont la competence penale s'imposerait tout naturellement, et que l'accuse se trouve sur le territoire de l'Etat du for, dont il est lui-meme un ressortissant, ou bien que tel soit le cas de ses victimes.

6. L'activisme qui pourrait mener un Etat a rechercher hors de son territoire, par la voie d'une demande d'extradition ou d'un mandat d'arret international, une personne qui aurait ete accusee de crimes definis en termes de droit des gens, mais sans aucune circonstance de rattachement au for, n'est aucunement autorise par le droit international en son etat actuel. C'est avec une forte

dose de presomption qu'est posee la question de savoir si la Belgique ne serait pas <<obligee>> d'engager l'action penale dans l'espece. Ce qui n'est pas autorise ne peut pas, a fortiori, etre obligatoire. Le defendeur n'a pas apporte la preuve qu'il existe un seul autre Etat qui, dans de pareilles circonstances, aurait deja donne libre cours a une action penale, meme si l'on fait abstraction du probleme de l'immunite de l'inculpe. Il n'y a pas de <<droit coutumier en formation>> qui decoule de l'action isolee d'un Etat; il n'y a pas, a l'etat embryonnaire, de regle coutumiere en gestation, meme si la Cour, en traitant la question de la competence, acceptait de donner suite a la demande du defendeur qui la prie de ne pas enrayer le processus de formation du droit.

7. L'article 146 de la convention de Geneve de 1949 (IV), sur la protection des personnes civiles en temps de guerre (article qui se trouve aussi dans les trois autres conventions de 1949), est, de toutes les normes du droit conventionnel existant, celle dont le texte serait le plus susceptible de conforter le point de vue du defendeur lorsqu'il fonde l'exercice de la juridiction penale sur la seule base du principe de la competence universelle. Cette disposition invite les Etats a rechercher, livrer ou juger les personnes inculpees des crimes prevus dans les conventions en cause. Neanmoins, a part le fait que le cas d'espece echappe au strict champ d'application des conventions de 1949, Mme Chemillier-Gendreau a rappele, pour comprendre le sens de la norme, l'enseignement d'un des plus notables specialistes du droit penal international (et du droit international penal), le doyen Claude Lombois:

<<La ou cette condition n'est pas formulee, on ne peut que la sous-entendre: comment un Etat pourrait-il rechercher un criminel sur un autre territoire que le sien? Le livrer, s'il n'est pas present sur son territoire? Recherche comme livraison supposent des actes de contrainte, lies a des prerogatives de puissance publique souveraine, qui ont le territoire pour limite spatiale.>> n1

n1 CR 2001/6, p. 31.

[*594] 8. En 1998, la justice espagnole a demande au Royaume-Uni l'extradition du general Augusto Pinochet, contre qui une action penale avait ete engagee pour des crimes prevus dans des conventions internationales. A ces conventions etaient parties un grand nombre d'Etats, y compris le Chili, dont l'inculpe etait, a l'epoque des faits, le president et de toute evidence le responsable direct d'une politique repressive qui a fait d'innombrables victimes parmi les Chiliens, mais aussi parmi des etrangers de nationalites diverses. La competence alors affirmee par le juge Baltasar Garzon avait pour base le principe de la nationalite passive, des lors que plusieurs victimes avaient ete des Espagnols, au nom desquels l'accusation avait saisi l'instance. Il n'y a pas d'equivalence possible entre l'affirmation de competence par la justice espagnole dans l'affaire Pinochet et l'affirmation de competence de la justice belge dans l'espece. Dans le premier cas, a part la circonstance--non decisive, mais non negligeable--que l'accusation portait sur des faits nettement plus graves que la prononciation televisee d'un discours dont le langage aurait incite le peuple a commettre des crimes, il faut considerer que l'ancien chef d'Etat chilien avait quitte temporairement son pays pour des raisons d'ordre prive et se trouvait sur le territoire d'un Etat qui fait partie, avec l'Espagne, d'un espace communautaire regional caracterise par un niveau appreciable d'integration juridique; et surtout que la competence de la justice espagnole avait pour fondement le principe de la nationalite passive, qui peut justifier--bien que ce ne soit pas le cas de la totalite, peut-etre meme pas d'une majorite d'Etats--l'engagement de l'action penale in absentia, donnant lieu de ce chef a l'emission d'un mandat d'arret international et a la demande d'extradition.

9. Il est imperatif que tout Etat se demande, avant d'essayer de faire avancer le droit des gens dans une direction qui va a l'oppose de certains principes qui

regissent encore de nos jours les relations internationales, quelles seraient les consequences de la conversion d'autres Etats, eventuellement d'un grand nombre d'autres Etats a une pareille pratique. Cela n'est pas sans raison que les Parties ont discute devant la Cour la question de savoir quelle serait la reaction de certains pays europeens si un juge du Congo avait inculpe leurs gouvernants pour des crimes supposes commis par eux ou sur leurs ordres en Afrique. n2

n2 CR 2001/6, p. 28 (Chemillier-Gendreau); CR 2001/9, p. 12-13 (Eric David).

10. Une hypothese encore plus adequate pourrait servir de contrepoint au cas d'espece. Il y a bien des juges dans l'hemisphere Sud, non moins qualifies que M. Vandermeersch et comme lui imbus de bonne foi et d'un amour profond des droits de l'homme et des droits des peuples, qui n'hesiteraient point a lancer des actions penales contre plusieurs gouvernants de l'hemisphere Nord au titre d'episodes militaires recents, survenus tous au nord de l'equateur. Leur connaissance des faits n'est pas moins complete ni moins impartiale que celle que le for de Bruxelles entend posseder sur les evenements de Kinshasa. Pourquoi ces juges font-ils preuve de retenue? Parce qu'ils ont conscience de ce que le droit international n'autorise pas l'affirmation d'une competence penale dans un tel cadre. Parce qu'ils savent que leurs gouvernements nationaux, a la lumiere de cette realite juridique, n'appuieraient jamais, sur le plan international, de telles initiatives. Si l'application du principe de la competence universelle ne presuppose pas la presence de la personne accusee sur le territoire de l'Etat du for, toute coordination devient impossible et c'est bien le systeme international de cooperation pour la repression du crime qui s'effondre. n3 Il importe que le reglement, sur le plan interne, de questions de cet ordre et par consequent la conduite des autorites de chaque Etat s'accordent avec l'idee d'une societe internationale decentralisee, fondee sur le principe de l'egalite de ses membres et appelant necessairement la coordination de leurs efforts. En dehors d'une telle discipline, toute politique adoptee au nom des droits de l'homme risque de desservir cette cause au lieu de la renforcer.

n3 Notez, pour ce qui est du stade actuel du principe de la competence universelle, que les Etats negociateurs du traite de Rome ont evite d'attacher a ce principe la competence du futur Tribunal penal international.

11. L'examen prealable de la question de la competence aurait du, a mon avis, dispenser la Cour de toute deliberation sur la question de l'immunite. Je m'associe en tout cas aux conclusions de la majorite de mes collegues sur ce point. J'estime que le for interne de la Belgique n'est pas competent, dans les circonstances de l'espece, pour l'action penale, faute d'une base de competence autre que le seul principe de la competence universelle et faute, a l'appui de celui-ci, de la presence de la personne accusee sur le territoire belge, qu'il ne serait pas legitime de forcer a comparaitre. Mais je pense que, si la competence de la justice belge pouvait etre admise, l'immunite du ministre congolais des affaires etrangeres aurait interdit l'engagement de l'action penale ainsi que l'expedition par le juge, avec le soutien par le Gouvernement belge, du mandat d'arret international.

(Singe) Francisco REZEK

[*595] **DISSENTING OPINION OF JUDGE AL-KHASAWNEH**

Immunity of a Foreign Minister functional--Its extent is not clear--Different from diplomatic representatives--Also different from Heads of State--Ministers entitled to immunity from enforcement when on official missions--But not on private visits--Belgian warrant did not violate Mr. Yerodia's immunity--Express language on non-enforce ability when on official mission--Circulation of warrant

not accompanied by Red Notice--More fundamental question is whether there are exceptions in the case of grave crimes--Immunity and impunity--Distinction between procedural and substantive aspects of immunity artificial--Cases postulated by the Court do not address questions of impunity adequately--Effective combating of grave international crimes has assumed a jus cogens character--Should prevail over rules on immunity--Development in the field of jurisdictional immunities relevant--Two faulty premises--Absolute immunity--No exception--Dissent.

1. As a general proposition it may be said without too much fear of contradiction that the effective conduct of diplomacy--the importance of which for the maintenance of peaceful relations among States needs hardly to be demonstrated--requires that those engaged in such conduct be given appropriate immunities from--inter alia--criminal proceedings before the courts of other States. The nature and extent of such immunities has been clarified in the case of diplomatic representatives in the 1961 Vienna Convention, as well as in extensive jurisprudence since the adoption of that Convention. By contrast, and this is not without irony, the nature and extent of immunities enjoyed by Foreign Ministers is far from clear, so much so that the ILC Special Rapporteur on Jurisdictional Immunities of States and Their Property expressed the opinion that the immunities of Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law. To be sure the Convention on Special Missions--the status of which as a reflection of customary law is however not without controversy--covers the immunities of Foreign Ministers who are on official mission, but reserves the extent of those immunities under the unhelpful formula:

"The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law" (Article 21, para. 2).

Nor is the situation made any clearer by the total absence of precedents with regard to the immunities of Foreign Ministers from criminal process. What is sure however is that the position of Foreign Ministers cannot be assimilated to diplomatic representatives for in the case of the latter the host State has a discretion regarding their accreditation and can also declare a representative persona non grata, which in itself constitutes some sanction for wrongful conduct and more importantly opens the way--assuming good faith of course--for subsequent prosecution in his/her home State. A Minister for Foreign Affairs accused of criminal conduct--and for that matter criminal conduct that infringes the interests of the community of States as a whole in terms of the gravity of the crimes he is alleged to have committed, and the importance of the interests that the community seeks to protect and who is furthermore not prosecuted in his home State--is hardly under the same conditions as a diplomatic representative granted immunity from criminal process.

[*596] 2. If the immunities of a Minister for Foreign Affairs cannot be assimilated to a diplomatic representative, can those immunities be established by assimilating him to a Head of a State? Whilst a Foreign Minister is undoubtedly an important personage of the State and represents it in the conduct of its foreign relations, he does not, in any sense, personify the State. As Sir Arthur Watts correctly puts it:

"heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching

to them personally" (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," Racal des Court, 1994, III, pp. 102-103).

3. Moreover, it should not be forgotten that immunity is by definition an exception from the general rule that man is responsible legally and morally for his actions. As an exception, it has to be narrowly defined.

4. A Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission for the unhindered conduct of diplomacy would suffer if the case was otherwise, but the opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy. A faint-hearted or ultra-sensitive Ministerial restrict his private travels or feel discomfort but this is a subjective element that must be discarded. The warrant issued against Mr. Yerodia goes further than a mere opening of investigation and may arguably be seen as an enforcement measure but it contained express language to the effect that it was not to be enforced if Mr. Yerodia was on Belgian territory on unofficial mission. In fact press reports--not cited in the Memorials or the oral pleadings--suggest that he had paid a visit to Belgium after the issuance of the warrant and no steps were taken to enforce it. Significantly also the circulation of the international arrest warrant was not accompanied by a Red Notice requiring third States to take steps to enforce it (which only took place after Mr. Yerodia had left office) and had those States acted they would be doing so at their own risk. A breach of an obligation presupposes the existence of an obligation and in the absence of any evidence to suggest a Foreign Minister is entitled to absolute immunity, I cannot see why the kingdom of Belgium, when we have regard to the terms of the warrant and the lack of an Interpol red Notice was in breach of its obligations owed to the Democratic Republic of Congo.

5. A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed exceptionally grave crimes recognized as such by the international community. In other words, should immunity become de facto impunity for criminal conduct as long as it was in pursuance of State policy? The Judgment sought to circumvent this morally embarrassing issue by recourse to an existing but artificially drawn distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other. The artificiality of this distinction can be gleaned from the ILC commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, which states: "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings"--and it should not be forgotten that the draft was intended to apply to national or international courts--"is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."

6. Having drawn this distinction, the Judgment then went on to postulate four cases where, in an attempt at proving that immunity and impunity are not synonymous, a Minister, and by analogy a high-ranking official, would be held personally accountable for:

(a) Prosecution in his/her home State;

(b) Prosecution in other States if his/her immunity had been waived;

(c) After he/she leaves office except for official acts committed while in office;

(d) Prosecution before an international court.

[*597] This paragraph (Judgment, para. 61) is more notable for the things it

does not say than for the things it does: As far as prosecution at home and waiver are concerned, clearly the problem arises when they do not take place. With regard to former high-ranking officials the question of impunity remains with regard to official acts, the fact that most grave crimes are definitionally State acts makes this more than a theoretical lacuna. Lastly with regard to existing international courts their jurisdiction ratione materiae is limited to the two cases of the former Yugoslavia and Rwanda and the future international court's jurisdiction is limited ratione temporis by non-retroactivity as well as by the fact that primary responsibility for prosecution remains with States. The Judgment cannot dispose of the problem of impunity by referral to a prospective international criminal court or existing ones.

7. The effective combating of grave crimes has arguably assumed a jus cogens character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail. Even if we are to speak in terms of reconciliation of the two sets of rules, this would suggest to me a much more restrictive interpretation of the immunities of high-ranking officials than the Judgment portrays. Incidentally, such a restrictive approach would be much more in consonance with the now firmly-established move towards a restrictive concept of State immunity, a move that has removed the bar regarding the submission of States to jurisdiction of other States often expressed in the maxim par in parem non habet imperium. It is difficult to see why States would accept that their conduct with regard to important areas of their development be open to foreign judicial proceedings but not the criminal conduct of their officials.

8. In conclusion, this Judgment is predicated on two faulty premises.

(a) That a Foreign Minister enjoys absolute immunity from both jurisdiction and enforcement of foreign States as opposed to only functional immunity from enforcement when on official mission, a preposition which is neither supported by precedent, opinio juris, legal logic or the writings of publicists.

(b) That as international law stands today, there are no exceptions to the immunity of high-ranking State officials even when they are accused of grave crimes. While, admittedly, the readiness of States and municipal courts to admit of exceptions is still at a very nebulous stage of development, the situation is much more fluid than the Judgment suggests. I believe that the move towards greater personal accountability represents a higher norm than the rules on immunity and should prevail over the latter. In consequence, I am unable to join the majority view.

(Signed) Awn AL-KHASAWNEH.

OPINION INDIVIDUELLE DE M. BULA-BULA

Retablissement des faits, mediats et immediats--Decolonisation--Droit des peuples a disposer d'eux-memes--Egalite souveraine des Etats--Intervention dans les affaires interieures--Agression armee--Droit international humanitaire--Immunites du ministre des affaires etrangeres--Immunite et impunite--Objet et persistance du differend--Recevabilite d'une requete--Allegation de competence universelle--Regle non ultra petita--Droit international coutumier--Exception--Opinio juris et pratique internationale--Fait internationalement illicite--Conception africaine--Dignite d'un peuple--Responsabilite internationale--Dommage moral--Reparation--Bonne foi--Developpement du droit international--Communaute internationale--Enseignement du droit international.

* * *

1. Puisque l'arret de principe du 14 fevrier 2002 dit le droit et tranche le differend qui opposait la Republique democratique du Congo (ci-apres denommee le <<Congo>>) au Royaume de Belgique (ci-apres denomme la <<Belgique>>), puisque cette decision judiciaire sans precedent en la matiere codifie et developpe le droit international [*598] contemporain, puisque la Cour vient ainsi d'imposer la force du droit contre le droit de la force au sein de la <<communaute internationale>> qu'elle s'attache a construire au fil des ans; j'appuie pleinement sans reserve tout le dispositif de l'arret.

2. Neanmoins, je voudrais ici souligner d'autres motifs de fait et de droit qui me paraissent completer et conforter cette oeuvre collective. Mon opinion se justifie aussi par le devoir particulier que me dicte ma qualite de juge ad hoc. Il n'est pas certain qu'une <<opinion>> obeisse a des regles rigides. Sans doute ne doit-elle pas traiter des questions sans rapport avec l'une ou l'autre partie de l'arret. Sous cette reserve, la liberte semble caracteriser la pratique judiciaire. Non seulement il arrive que le volume du propos excede la longueur de l'arret lui-meme; n1 mais encore il peut se fixer divers objectifs. n2 Sans verser dans de tels travers, il m'est ainsi loisible de developper de maniere raisonnable mon argumentation juridique. D'une part, il me parait que le raccourci des faits presentes par les Parties en litige ne laisse apparaitre que la face visible de l'iceberg. Il expose a une lecture en surface d'une affaire relevant d'un vaste contentieux. D'autre part, les circonstances immediates ainsi presentees ont, en partie, conduit la Cour a ne pas examiner en profondeur la question fondamentale de l'independance du Congo, ancienne et unique colonie de la Belgique, vis-a-vis de cette derniere. La mention relative a l'egalite souveraine, martelee successivement a l'occasion de la phase conservatoire et lors de la phase du fond par deux conseils du Congo, membres du gouvernement, invite a regarder les choses en profondeur. Elle est reiteree dans les conclusions finales. N'est-elle pas a la base de la designation des juges ad hoc, d'abord par le defendeur, ensuite par le demandeur!

n1 Comp. l'arret du 5 fevrier 1970 en l'affaire de la Barcelona Traction, Light and Power Company, Limited (51 pages) avec l'opinion de MM. Ammoun (46 pages), Tanaka (46 pages), Fitzmaurice (49 pages) et Jessup (59 pages); l'avis du 21 juin 1971 en l'affaire du Sud-Ouest africain (58 pages) avec l'opinion de Fitzmaurice (102 pages); l'arret du 27 juin 1986 en l'affaire des Activites militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amerique) (150 pages), avec l'opinion de S. M. Schwebel (208 pages); l'arret du 16 juin 1992 sur Certaines terres a phosphate a Nauru (29 pages) avec l'opinion de M. Shahabuddeen (30 pages); l'arret du 3 juin 1993 en l'affaire de la Delimitation maritime dans la region situee entre le Groenland et Jan Mayen (Danemark c. Norvege) (82 pages) avec l'opinion de M. Shahabuddeen (80 pages); l'arret du 24 fevrier 1982 en l'affaire du Plateau continental (Tunisie/Jamahiriya arabe libyenne) (94 pages) avec l'opinion S. Oda (120 pages); l'arret du 12 decembre 1996 en l'affaire des Plates-formes petrolieres (Republique islamique d'Iran c. Etats-Unis d'Amerique) (18 pages) avec l'opinion de M. Shahabuddeen (29 pages).

n2 Voir sur ce point, Charles Rousseau, <<Les rapports conflictuels,>> Droit international public, t. I, Paris, Sirey, 1983, p. 463.

3. La doctrine impose particulierement aux juges ad hoc le fardeau de contribuer au retablissement objectif et impartial des faits ainsi que de presenter la conception juridique de chaque partie au differend. n3 De l'avis de E. Lauterpacht, il incombe au juge ad hoc de <<veiller a ce que, dans toute la mesure possible, chacun des arguments pertinents de la partie qui l'a designe ait ete pleinement pris en consideration au cours de l'examen collegial et soit,

en fin de compte, reflete--a defaut d'etre accepte--dans sa propre opinion individuelle ou dissidente.>> n4

n3 Nguyen Quoc Dinh, Patrick Daillier et Alain Pellet, Droit international public, Paris, Librairie generale de droit et de jurisprudence, p. 855, par. 541, 1999; E. Mc Whinney, Les Nations Unies et la formation du droit, Pedone, Unesco, Paris, 1986, p. 150.

n4 E. Lauterpacht, opinion individuelle jointe a l'ordonnance du 17 decembre 1997 en l'affaire relative a l'Application de la convention pour la prevention et la repression du crime de genocide (Croatie c. Yougoslavie), C.I.J. Recueil 1997, p. 278.

4. Se plier a une telle obligation ne rapproche guere le juge ad hoc d'un representant d'un Etat. n5 Au demeurant, il ne s'agit point d'une representation nationale mais d'une <<presence nationale>> n6 par ailleurs permanente pour les membres permanents du Conseil de securite. Regardant le role du juge ad hoc, J. G. Mesrills estime que l'institution <<provides an important link betweem the parties and the Court.>> Dans ces conditions <<the institution of the ad hoc juge is too useful to be dispensed with.>> n7

n5 Voir la communication de E. Lauterpacht, The role of ad hoc judges, Increasing the Effectiveness of the International Court of Justice, Kluwer Law International, The Hague, 1997, p. 370.

n6 Voir le commentaire de Krzystof Skubisevski, ibid., p. 378.

n7 S. G. Mesrills, International Dispute Settlement, 2nd edition, 1996. p. 125.

5. Naturellement, je suis d'accord, en ma qualite de juge ad hoc avec <<at least the basic stance of the appointing State juridiction, admissibility, fundamentals of the merits.>> n8 Autrement, comment aurais-je accepte la proposition de cette charge? Le consentement donne a cette derniere signifie bien sur que <<there is a certain understanding . . . for the case that has been put in front.>> n9 D'autre part, il m'a paru interessant, comme juge ad hoc d'exprimer mon opinion dans les deux phases qu'a connues cette affaire. n10 Il en resulte a mon sens une meilleure intelligence de l'analyse.

n8 Voir le commentaire de Krzystof Skubisevski, Increasing the Effectiveness of the International Court of Justice, loc. cit., p. 378.

n9 Voir l'intervention de Hugh W. B. Thirlway, ibid., p. 393.

n10 Selon le commentaire d'A. Pellet, ibid., <<judges ad hoc are very appreciated if they express their opinions during the various phases of the case,>> p. 395.

6. A grandes enjambees et par respect pour la Cour et sa methodologie de travail, je me bornerai a rappeler tres succinctement a partir des sources belges, congolaises, transnationales et internationales, quelques donnees factuelles mediates et immediates qui constituent la toile de fond de l'affaire du Mandat d'arret du 11 avril 2000. A travers ces mentions breves, je souhaite conjurer le passe d'une part et promouvoir entre l'Etat demandeur et l'Etat defendeur, intimement lies par l'histoire, la mise en oeuvre effective du principe de l'egalite souveraine entre les Etats.

7. S'adressant aux Congolais a Kinshasa, le 30 juin 1991, quarante et unieme anniversaire de l'independance du pays, le premier ministre belge declara: <<Vous etes une part importante de notre passe. Des liens particuliers tres forts unissent nos deux pays. Des liens fondes sur des rapports tantot douloureux, tantot prometteurs; tantot circonspects . . . Ce qui nous unit, vous le savez, nous le savons, releve de ce miroir exterieur qui est notre bonne ou notre mauvaise conscience, cette frontiere entre le bien et le mal, entre la bonne intention et la maladresse . . . [*599] Je veux dire au peuple congolais, ou qu'il se trouve sur ce grand territoire, que nous savons sa douleur et les epreuves endurees.>>

Rarement de tels propos ont ete publiquement tenus par le chef du gouvernement d'une ancienne puissance coloniale quatre decennies apres la decolonisation. A tort ou a raison, il faut peut-etre chercher dans les conditions d'une decolonisation singuliere aux sequelles toujours presentes, y compris dans la presente affaire, la justification de ce propos.

8. La relecture de l'histoire du Congo decolonise n11 a laquelle s'est livree l'une de la quarantaine des conferences politiques de reconciliation n12 nous apprend:

<<Victorieux des elections legislatives, Patrice Emery Lumumba, apres consultation des principaux partis et personnalites politiques de l'epoque, forma le gouvernement.

En date du 23 juin 1960, il obtient la confiance du Parlement, et ce bien avant l'election par celui-ci du chef de l'Etat Kasavubu grace a la majorite lumumbiste.

En moins d'une semaine apres le 30 juin 1960, soit le 4 juillet, eclate la mutinerie de la force publique. Suite a l'equation provocatrice du general Janssens aux militaires, savoir, <<apres l'independance egale avant l'independance,>> les troubles s'attisent. Le Katanga proclame sa secession le 11 juillet 1960 et le Sud-Kasai son autonomie le 8 aout 1960. Il y a effondrement de l'administration territoriale et militaire ainsi que manque des ressources financieres. La souverainete populaire est hypothequee.

En depit des accords de cooperation signes entre le royaume de Belgique et la jeune Republique, le 29 juin 1960, la crise est aggravee par l'intervention intempestive des troupes belges. Face a cette situation, le 15 juillet, le chef de l'Etat Kasavubu, garant de l'integrite territoriale et le premier ministre et ministre de la defense nationale Lumumba signent conjointement le telegramme faisant appel aux troupes des Nations Unies a New York . . . . les manoeuvres diplomatiques belges feront que les Nations Unies hesitent d'intervenir . . .>> n13

n11 Les evenements tragiques qui ont marque la decolonisation du Congo ont amene l'Organisation des Nations Unies a mettre a contribution la Cour. Voir S. Rosenne, <<La Cour internationale de Justice en 1961,>> Revue generale de droit international public, 3 e serie, t. XXX III, octobre-decembre 1962, n<o> 4, p. 703.

n12 Denommee <<conference nationale souveraine,>> le forum s'est tenu de novembre 1991 a decembre 1992. Il fut organise par le gouvernement alors en place, sous pression de ses principaux partenaires et finance par ceux-ci, y compris la Belgique.

n13 Conference nationale souveraine, rapport de la commission des assassinats et des violations des droits de l'homme, p. 18-19.

9. A juste titre ou non, le rapport met aussi en cause la responsabilite de la Belgique dans l'eviction du premier ministre Lumumba:

<<Apres l'accession de notre pays a l'independance . . . le president Kasavubu et le premier ministre Lumumba travaillaient en harmonie. Ils avaient meme effectue une tournee ensemble a Elisabethville. Je pense que les Belges etaient contre cette harmonie. C'est pourquoi ils avaient cree cette tension de division . . . Moi, j'ai telephone a Lumumba pour lui en faire part. A son tour, il a contacte le president Kasavubu. J'ai cru qu'ils avaient pris des precautions contre ces manoeuvres. J'etais surpris d'entendre a la radio vers le 5 septembre 1960, la revocation de Lumumba et le meme jour aussi celle de Kasavubu par Lumumba.>> n14

n14 Ibid., temoignage de M. Cleophas Kamitatu, alors president provincial de Leopoldville (Kinshasa).

10. A en croire le rapport: <<L'ambassadeur belge a Leo suscite la creation de

l'Etat autonome du Sud-Kasai. Le 8 aout 1960, c'etait chose faite.>> n15 Sur l'assassinat du premier ministre Lumumba et de ses compagnons, il est notamment dit: <<Le 16 janvier 1961, se tient une reunion a l'aeroport de Ndjili. Y prennent part MM. Nendaka, Damien Kandolo, Ferdinand Kazadi, Lahaye et les representants de la Sabena.>> Un temoin, M. Gabriel Kitenge, dira que:
<<a l'arrivee de l'avion, il n'a reconnu, des trois colis, que M. Lumumba qui, tres tumefie, tentait de s'agripper a une muraille. Tous les trois ont debarque vivants a Elisabethville. Conduits peu apres a la villa Brouwez a quelques kilometres de l'aeroport, ils s'entretiendront avec MM. Godefroid Munongo et Jean-Baptiste Kibwe en compagnie de quelques militaires blancs . . .
Ils seront executes en brousse a un kilometre de la villa. Sous le commandement d'un officier blanc, les soldats noirs tireront d'abord sur Okito pour enfin terminer avec Lumumba
[*600] Sont presents: MM. Munongo, Kitenge, Sapwe, Muke, quatre belges . . .
Sur l'ordre d'un commissaire de police belge, les trois detenus seront fusilles chacun a son tour et jetes dans une fosse commune prealablement creusee.>> n16
n15 Ibid., p. 26.
n16 Ibid., p. 40.
11. En definitive, le rapport de la conference a propose <<l'ouverture du proces.>> Elle a propose que:
<<Les assassinats de Lumumba, Mpolo et Okito, bien que n'entrant pas dans les categories definies actuellement par les Nations Unies, devraient etre assimiles aux Crimes contre l'humanite, car, il s'agit des persecutions et assassinats pour des raisons politiques.>>
La proposition peut ainsi stimuler la reflexion des auteurs qui decelent des incertitudes sur le concept de crime contre l'humanite. n17 La conference a etabli la responsabilite de plusieurs personnes tant physiques que morales, nationales et etrangeres. Au nombre desquelles il suffit de retenir dans le cadre de la presente affaire:
<<Le Gouvernement du Royaume de Belgique en tant que puissance de tutelle de n'avoir pas su contenir la securite bilaterale d'une independance baclee par elle-meme intentionnellement. L'ambiguite de la loi fondamentale fait foi. En depit des accords du 29 juin 1960, il n'a pas offert aux autorites legitimes qu'il avait installees au Congo une assistance technique et militaire qui aurait permis d'eviter le pire.

. . .
Le soutien du Gouvernement belge a la secession du Katanga par sa reconnaissance officielle comme Etat independant avec ouverture d'un consulat general constitue autant d'acte infractionnel contre le peuple du Congo. Sur intervention du ministre belge des affaires africaines, M. Harold Aspremont, le president Tshombe, acceptera en date du 16 janvier 1961, le transfert des colis.>> n18
Repondant en quelque sorte anticipativement a l'Etat defendeur, la conference a decide de:
<<alerter l'opinion internationale que ceux-la meme qui nous enseignent le respect des droits de l'homme et du citoyen contenues dans la Declaration des Nations Unies, ne puissent in futurum reediter les memes erreurs qui ne cadrent pas avec l'opinion dans le monde.>> n19
n17 Voir G. Abi-Saab, <<International Criminal Tribunals,>> Melanges Bedjaoui, Kluwer, La Haye, 1999, p. 651. Voir aussi E. Roucounas, <<Time limitations for claims and actions under international law,>> ibid., p. 223-240.
n18 Ibid., p. 55-56.
n19 Ibid., p. 55-56.
12. Six ans plus tot, le groupement transnational dit <<tribunal permanent des

peuples>> appele a statuer sur le cas du Zaire (Congo) a dit:
<<Lorsque le droit du peuple de poursuivre librement son developpement
economique, social et culturel est meprise par un Etat se personnalisant en des
oligarchies complices, otages ou agents de l'etranger, mises en place ou
maintenues par sa volonte, cet Etat ne saurait constituer un ecran derriere
lequel s'annule le droit du peuple a l'autodetermination.>> n20
n20 Voir la Sentence du Tribunal permanent des peuples, Rotterdam, le 20
septembre 1982. p. 29.
Car cette <<juridiction>> a estime que
<<dans ce cas-la, on se trouve devant un phenomene semblable dans son essence, a
la situation coloniale opposant un peuple asservi a une puissance etrangere, les
autorites gouvernementales jouant un role de courroie de transmission et
n'apparaissant guere differentes, dans leurs fonctions, des anciens agents
coloniaux (vice-rois, gouverneurs, prefets, etc.) ou des potentats locaux au
service de la metropole.>> n21
n21 Voir ibid.
Le jury a aussi soutenu que:
<<La violation des droits du peuple zairois perpetree par un Etat aliene souleve
le probleme de la responsabilite d'autres gouvernements et notamment de ceux qui
defendent les interets au profit desquels la souverainete du peuple zairois est
alienee.>> n22
n22 Voir, ibid., p. 30.
[*601] C'est ainsi qu'il a ete etabli, entre autres, <<la responsabilite . . .
de la Belgique.>> n23 Le dispositif conclut que nombre des faits juges
<<constituent des crimes contre le peuple zairois.>> n24 Examinant entre autres,
la valeur juridique des decisions de ce tribunal d'opinion, des auteurs
concluent que <<such a condemnation is a first of reparation.>> n25
n23 Voir, ibid.., p. 32
n24 Voir ibid., p. 34.
n25 B. H. Weston, R. A. Falk, A. d'Amato, International Law and World Order, 2nd
edition, West Publishing Co., St Paul Minn., p. 1286
13. Plus recemment, la commission de l'Organisation des Nations Unies chargee
d'enqueter sur l'exploitation illegale des ressources naturelles du Congo a mis
en cause, entre autres, des societes belges en territoires occupes. La
<<neutralite>> revendiquee par les autorites belges en place face a l'agression
armee n26 subie par le Congo depuis le 2 aout 1998 ne pourrait-elle pas etre
mise a mal par la participation des groupements prives ou des organismes
parastataux belges au pillage des ressources naturelles du Congo d'apres une
enquete de l'ONU? n27 D'autant plus que la commission etablit un lien entre
cette exploitation illegale et la poursuite n28 de la guerre.
n26 Au sens de l'article 51 de la Charte de l'Organisation des Nations Unies,
precisee par l'article 3 de la resolution 3314 du 14 decembre 1974, confirme en
tant que norme coutumiere par l'arret de la Cour du 27 juin 1986 en l'affaire
des Activites militaires et paramilitaires au Nicaragua et contre celui-ci
(Nicaragua c. Etats-Unis d'Amerique), par. 195.
n27 Voir Report of the Panel of Experts on the illegal Exploitation of Natural
Ressources and other Forms of Wealth of the Democratic Republic of Congo. Sont
aussi cites, les societes belges suivantes: Cogem, Muka-Entreprise pour la
cassiterite, Soges, Chimie-Pharmacie, Sogem, Cogecom, Cogea, Tradement, Fining
Ltd., Cicle International, Special Metal, Mbw et Transitra, pour le coltan, la
cassiterite. Source: http://www.un.org/News/dh/latest/drcongo.htm
n28 Voir, ibid., par. 109 et suiv. Links between, the exploitation of natural
ressources and the continuation of conflict.
14. Les circonstances immediates qui ont occasionne l'emission du mandat ont ete

amplement presentees de maniere contradictoire par les Parties. Il serait futile d'y revenir. Neanmoins, il est des questions pertinentes que souleve cette affaire. Pourquoi la quasi-totalite des personnalites prevenues devant la justice belge, y compris M. Abdulaye Yerodia Ndombasi, appartiennent essentiellement a une tendance politique evincee en 1960 et reapparue au pouvoir en 1997 a la faveur de circonstances diverses? Pourquoi l'Etat defendeur n'exerce-t-il pas sa competence territoriale en poursuivant les societes belges etablies sur son sol suspectees d'activites illicites en zones d'occupation etrangere au Congo?

15. Tels sont quelques elements de fait arpentes sur plus de quatre decades qui permettent de juger du comportement respectif des Parties au litige tranche. Ils doivent etre mis en regard avec la plaidoirie finale de la Belgique. Lorsque l'Etat defendeur conclut brillamment sa plaidoirie par l'invocation de la democratie et des droits de l'homme qui guideraient son comportement, n29 il rouvre tout de meme l'une des pages les plus honteuses de la decolonisation. Dans les annees soixante, de la main gauche, il a semble octroyer l'independance au Congo et, de la main droite, il a en meme temps virtuellement precarise cette souverainete et la democratie congolaise naissante. L'ecrivain Joseph Ki-Zerbo a pu ecrire qu'au Congo <<l'independance fut jetee comme un os aux indigenes pour mieux exploiter leurs divisions,>> soit le <<modele des independances empoisonnees.>> n30

n29 Voir plaidoiries de la Belgique, CR 2001/11, p. 17-18, par. 8, 9 et 11.

n30 Joseph Ki-Zerbo, <<preface a l'ouvrage de Ahamadou A. Dicko, Journal d'une defaite. Autour du referendum du 28 septembre 1958 en Afrique noire, Paris, l'Harmattan, Dag Hammarskjold Foundation, 1992, p. XIV.

16. Parmi les points aprement debattus de maniere contradictoire par les Parties figure la perte, a l'heure actuelle, de toute fonction gouvernementale par M. A. Yerodia Ndombasi. La situation est mise en avant par le defendeur afin d'obtenir un non-lieu de la part de la Cour. Elle serait sans effet pour l'instance de l'avis du demandeur.

17. A mon sens, l'argument tire de la perte (et non de l'absence) de fonction gouvernementale actuellement exercee par M. Ndombasi est moralement indecent. Mais la Cour ne tranche pas les litiges sur la base d'une morale internationale chere a Nicolas Politis. n31 Juridiquement cependant ce moyen invoque devrait se retourner contre le defendeur. Puisque ce dernier leve ainsi un coin du voile sur la cause de cette situation dont le defendeur exploite a fond les effets, rien que les effets. Il est juridiquement incorrect de chercher a asseoir solidement son argumentation principale sur une grave violation du droit international (la censure de la composition du Gouvernement congolais equivaut a l'ingerence dans les affaires interieures d'autrui) qui s'ajoute a l'atteinte portee primitivement aux immunites et a l'inviolabilite penales de la personne du ministre des affaires etrangeres. Les ecritures et les plaidoiries du demandeur (lors de la phase <<conservatoire>> et lors de la phase du fond) ont denonce ce fait sans etre veritablement contredites par le defendeur. La Cour a ete temoin de cette decheance d'un organe de l'Etat congolais survenu non seulement apres la saisine (17 octobre 2000); mais encore le limogeage a eu lieu le jour de l'ouverture des audiences de la phase conservatoire (le 20 novembre 2000) et le depart du gouvernement peu apres (14 avril 2001). Depuis toute nomination nouvelle de l'interesse, pourtant sans cesse annoncee par la presse, est repoussee apparemment a cause des pressions illicites du defendeur.

n31 Nicolas Politis, La morale internationale, editions de la Baconniere, Neuchatel, 1943 (179 pages).

18. Il est du devoir de la Cour, garant de l'integrite du droit international, n32 de sanctionner ce double comportement illicite du defendeur stigmatise par

le demandeur dans ses conclusions finales.
n32 Affaire du Detroit de Corfou, C.I.J. Recueil 1949, p. 35.
19. Il est possible de reconnaitre deux acceptions a l'expression organe d'integrite du droit international. Pour certains, il s'agirait du <<duty to preserve the intensity of law as a discipline--distinct from considerations of politics, [*602] morality, expediency and son on.>> n33 A mon avis, la formule devrait aussi signifier que la Cour a l'obligation d'assurer le respect de la totalite du droit international. Quant a la specificite de la mission d'un organe judiciaire par rapport au mandat d'un organe politique, tel que le Conseil de securite, la jurisprudence y relative est deja abondante.
n33 Voir l'opinion de M. H. Mendelson, <<Formation of International Law and the Observational Standjoint,>> au sujet de <<The Formation of Rules of Customary (General) International Law,>> International Law Association, Report of the Sixty-Third Conference, p. 944, Warsaw, August 21st to August 27th, 1988.
20. Je partage ainsi l'opinion de Manfred Lachs selon laquelle <<la Cour est la gardienne de la legalite pour la communaute internationale dans son ensemble.>>
n34
n34 Voir M. Lachs, opinion individuelle jointe a l'ordonnance du 14 avril 1992 en l'affaire relative a des Questions d'interpretation et d'application de la convention de Montreal de 1971 resultant de l'incident aerien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), C.I.J. Recueil 1992, p. 26.
21. On imagine mal que la Cour puisse projeter un regard soutenu sur la perte actuelle des fonctions gouvernementales de M. Ndombasi et fermer les yeux sur les raisons evidentes de cette situation a la lumiere des evenements qui lui ont ete suffisamment exposes des la phase de demande de mesures conservatoires jusqu'a la cloture de la phase de fond. D'autant plus que la transgression des immunites en cause n'est qu'un fait revelateur de la meconnaissance du principe de l'egalite souveraine d'un Etat decolonise par la Belgique. La-dessus, la Cour ne s'est guere trompee. Elle a plus d'une fois dans les motifs sanctionne de maniere elegante la pratique illicite du defendeur.
22. Outre l'attention de la Cour qu'attire l'argument de perte de fonction officielle que brandit l'auteur du comportement fondamentalement illicite, il y a cet effet juridique inexistant recherche par l'Etat defendeur dans la nouvelle situation de M. A. Yerodia Ndombasi. Des l'instant ou l'atteinte aux immunites du ministre des affaires etrangeres a ete portee, la violation du droit international a ete realisee. Et le Congo a commence et a continue a exiger, jusqu'a la cloture des debats, que le constat de l'infraction soit fait par la Cour et que celle-ci lui octroie reparation consecutive. Elle n'a jamais cru et n'a jamais dit qu'un de ses citoyens avait ete victime d'un fait illicite belge. Le demandeur a toujours ete convaincu et a toujours declare que ce dernier le visait en tant qu'entite souveraine desireuse de s'organiser librement, y compris de conduire ses relations exterieures par le ministre de son choix. Mais elle a subi et continue de subir des entraves de fait resultant de l'emission, du maintien, de la diffusion du mandat et des tentatives de lui donner plus d'effets par la Belgique.
23. La pertinence de la perte des fonctions gouvernementales de M. A Yerodia Ndombasi reside dans la lumiere toute crue qu'elle projette sur la flagrante immixtion dans les affaires interieures du Congo par la Belgique. En temoigne encore l'identite de certains plaignants congolais, membres d'un parti politique congolais d'opposition, n35 que le defendeur tait obstinement pour des raisons dites de securite devant la Cour. Par quelque bout qu'on la prenne, cette affaire montre bien l'ingerence du defendeur dans les affaires interieures du demandeur. Et, en definitive, la grave meconnaissance de l'egalite souveraine des Etats, derriere l'atteinte aux immunites du ministre des affaires

etrangeres. La pertinence de la perte de responsabilite gouvernementale est nulle relativement a l'odyssee personnelle de M. A. Yerodia Ndombasi qui essuya, a l'exclusion curieuse des autres personnalites congolaises inculpees et d'autres autorites etrangeres, le mandat insolite en tant que ministre des affaires etrangeres, appele a entretenir le contact permanent avec le principal partenaire etranger du Congo.

n35 Selon le demandeur, il s'agirait de representants d'un parti d'opposition fonctionnant a Bruxelles! (Voir compte rendu d'audience publique du 22 novembre 2000, CR 2000/34, p. 20). En revanche, le defendeur excipe des <<raisons de securite>> devant la Cour (alors que le huis clos est permis) pour ne pas reveler l'identite des plaignants de nationalite congolaise (voir compte rendu de l'audience publique du 21 novembre 2000, CR 2000/33, p. 23).

24. Tant qu'existera l'authentique Etat independant du Congo, issu de la decolonisation--a ne pas confondre avec l'entite etatique fictive dite <<Etat independant du Congo>> portee aux fonds baptismaux par les puissances berlinoises n36 --cette dette subsistera. Il ne s'agit pas de la creance d'un gouvernement en place donne, au demeurant appele a passer un jour comme tout gouvernement. Mais il est question d'un du au peuple congolais librement organise en Etat souverain qui reclame le respect de sa dignite.

n36 Les quatorze puissances coloniales reunies a Berlin (14 novembre 1884-26 fevrier 1885) avaliserent le projet colonial du roi Leopold II denomme <<Etat independant du Congo.>>

25. Or, la dignite n'a pas de prix. Elle releve precisement du domaine extrapatrimonial, impossible a evaluer en argent. Lorsqu'une personne juridique, physique ou morale, a renonce a sa dignite, elle a perdu l'essentiel de son etre physique ou moral. La dignite du peuple congolais, victime du desordre neocolonial impose au lendemain de la decolonisation, dont les tragiques evenements en cours constituent largement l'expression continue, est de celle-la.

26. La perte de fonction d'une de ses autorites ne pouvait pas mettre un terme a l'illiceite du mandat belge, pas plus qu'elle ne pouvait le transformer en acte licite. Afin de comprendre qu'il n'y a guere extinction de l'illiceite en raison de la perte des fonctions gouvernementales par M. A. Yerodia Ndombasi, j'emets deux hypotheses. Lorsqu'un representant d'un Etat etranger est tue par des agents de l'ordre d'un pays donne, n37 ce diplomate cesse par le fait meme de son deces d'exercer ses fonctions. Peut-on soutenir que l'illiceite de l'acte s'est effacee avec la mort du representant [*603] de l'Etat etranger? Il me semble que l'illiceite demeure. Prenons un autre cas. A supposer que ce diplomate n'ait ete que grievement blesse. Evacue vers son pays d'envoi, il est declare inapte pour le service diplomatique. Peut-on affirmer que le fait illicite a disparu etant donne que la victime des coups et blessures n'est plus representant de son pays a l'etranger? Je ne le pense pas.

n37 Le cas est arrive a Lome (Togo) en octobre-novembre 1995 ou un diplomate allemand a ete tue par des agents de l'ordre a un barrage routier en debut de soiree. L'incident avait gravement deteriore les relations germano-togolaises.

27. La question du defaut d'objet de la demande congolaise aurait pu se poser si la Belgique avait adopte un comportement radicalement oppose consistant a respecter l'independance du Congo. Elle aurait du reconnaitre la violation du droit international commise par elle, avant de mettre a neant son mandat et de s'empresser de demander aux pays etrangers auxquels elle avait adresse son acte de lui reserver une fin de non-recevoir. Toute cette panoplie de mesures aurait ete communiquee au Congo et vaudrait expression de regrets et presentation d'excuses. Rien de semblable ne s'est produit. La demande du Congo a ainsi conserve pleinement son objet.

28. Le Congo admet que <<ces demandes different quelque peu de . . . celles qui furent formulees dans sa requete introductive>> eu egard a la nouvelle situation de M. A. Yerodia Ndombasi. Mais elle ajoute que <<des l'instant ou ils prennent appui sur les memes faits que ceux mentionnes dans cette requete, aucune difficulte ne saurait surgir a cet egard.>> n38 A bon droit la Cour a confirme sa pratique constante de laisser aux parties la faculte de preciser exactement leur demande depuis le depot de la requete introductive d'instance jusqu'a la soumission des conclusions finales a la fin de la procedure orale. Il n'y a la rien de reprochable des lors que ces modifications ulterieures s'appuient sur les faits identiques deja mentionnes dans la demande initiale.

n38 Memoire de la Republique democratique du Congo, p. 6, par. 8.

29. D'autre part, la recevabilite de la requete du Congo, selon la jurisprudence constante de la Cour, s'apprecie a <<la seule date pertinente>> qu'est son depot au Greffe de la Cour. n39 Que le defendeur se soit par la suite comporte de maniere a ce que la requete soit videe de sa substance est inoperant. La demande etait deja deposee telle quelle le 17 octobre 2000. Au demeurant, sa substance reposant sur la violation de la souverainete du Congo face a l'emission du mandat qui appelle reparation demeure intacte.

n39 Voir affaire relative a des Questions d'interpretation et d'application de la convention de Montreal de 1971 resultant de l'incident aerien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amerique), C.I.J. Recueil 1998, p. 130, par. 43.

30. La tentative du defendeur de faire operer une mutation de l'action judiciaire interetatique propre du Congo, initiee et poursuivie en tant que telle par le demandeur a la suite de l'atteinte aux immunites et a l'inviolabilite penales d'un de ses plus hauts representants, en exercice de protection diplomatique d'un de ses ressortissants quelconque, merite une fin de non-recevoir polie qui interdit tout commentaire de ma part.

31. Les conclusions finales du Congo ont-elles empeche la Cour de se prononcer sur la question de la competence dite universelle?

32. Il est vrai que les <<conclusions finales>> du Congo passent completement sous silence cette question. Elles visent a obtenir de la Cour le respect de la <<regle de droit international coutumier relative a l'inviolabilite et l'immunite penale absolues du ministre des affaires etrangeres en exercice; que ce faisant [le defendeur] a porte atteinte au principe de l'egalite souveraine entre les Etats.>> n40

n40 CR 2001/10, p. 26; les italiques sont de moi.

33. C'est une question relative a la procedure judiciaire qui se pose. Le revirement spectaculaire opere par le demandeur sur ce point obligeait-il la Cour a ne pas trancher dans son dispositif la competence dite universelle? Certainement. Il lui serait reproche de statuer ultra petita. C'est dire autre chose que de ne pas prendre position collectivement la-dessus. De toute maniere, si les motifs de l'arret l'omettaient, les opinions y reviendraient.

34. Au demeurant quatorze pages sur soixante-quatre du memoire du Congo n'ont-elles pas ete reservees a cette question. n41 Au cours des plaidoiries, le Congo a declare par la voie de son conseil, M. Rigaux, que <<cela ne [l']interesse pas>> quoiqu'elle l'ait evoque dans sa requete initiale. n42 Mais de guerre lasse ou par strategie judiciaire, elle a concede a la Cour l'examen des
<<problemes suscites en droit international par la competence universelle, mais elle ne le fera pas a la requete de la Partie demanderesse, elle y est entrainee en quelque sorte par le systeme de defense de la Partie defenderesse, parce que la Partie defenderesse semble affirmer non seulement qu'il est licite [*604] d'exercer cette competence, mais en plus qu'il serait obligatoire de le faire et

que, par consequent, l'exercice de cette competence pourrait valablement contrebalancer le respect des immunites.>>
Et de conclure:
<<je crois donc que la Cour devra se prononcer sur certains aspects, en tout cas, de la competence universelle mais j'insiste, ce n'est pas a la requete de la Partie demanderesse que cette question n'interesse pas directement.>> n43
Et de renvoyer aux conclusions a lire du Congo. Pour sa part, un autre conseil du Congo, Mme Chemillier-Gendreau precisera:
<<que l'extension de cette competence a l'hypothese ou l'interesse n'est pas sur le territoire est actuellement sans fondement juridique confirme, ce qui est tres different de dire, comme veut nous le faire dire le professeur David, que nous ne contesterions plus la competence universelle par defaut.>>
Le conseil du Congo poursuit:
<<La Belgique souhaiterait a la lumiere de cette affaire que la Cour, en se prononcant en faveur d'une competence universelle ainsi etendue, intervienne dans le processus de creation du droit et lui donne une reconnaissance du bien-fonde de sa politique.>>
Et de conclure:
<<Nous soutenons pour notre part que le point sur lequel il est necessaire que la Cour se prononce, relativement a la competence universelle, comme vient de le dire le professeur Rigaux, est limite a son usage lorsqu'elle passe outre a une immunite de juridiction d'un ministre des affaires etrangeres en exercice. Et nous lui demandons alors de dire que cet usage, tel qu'il resulte de l'action de la Belgique, est contraire au droit international.>> n44
n41 Memoire de la Republique democratique du Congo, p. 47-61.
n42 Voir CR 2001/10, p. 11.
n43 Voir CR 2001/10, p. 11; les italiques sont de moi.
n44 Voir CR 2001/10, p. 16-17; les italiques sont de moi.
35. Pour sa part, la Belgique a fondamentalement construit son systeme de defense sur la competence dite universelle sur laquelle se baseraient et sa loi controversee et son mandat conteste. Mais etant donne que le Congo a ignore dans ses conclusions finales ladite competence alleguee, la Belgique en a tire comme consequence que la Cour, conformement a la regle non ultra petita, voyait ainsi sa competence limitee aux seuls points litigieux figurant dans les conclusions finales. Le defendeur s'est appuye sur la jurisprudence de la Cour. n45 Celle-ci <<a le devoir de repondre aux demandes des parties telles qu'elles s'expriment dans leurs conclusions finales, mais aussi celui de s'abstenir de statuer sur des points non compris dans lesdites demandes ainsi exprimees.>> n46
n45 Affaire du Detroit de Corfou, fixation du montant des reparations, arret du 15 decembre 1949, C.I.J. Recueil 1949, p. 249; affaire relative a la Demande d'interpretation de l'arret du 20 novembre 1950 en l'affaire du droit d'asile, (Colombie c. Perou), arret du 27 novembre 1950, C.I.J. Recueil 1950, p. 402.
n46 Affaire de la Barcelona Traction, Light and Power Company, Limited, deuxieme phase, arret, C.I.J. Recueil 1970, p. 37, par. 49; contre-memoire de la Belgique, par. 0.25, 2.74, 2.79, 2.81, 10.2.
36. Lors de ses plaidoiries, la Partie defenderesse s'est aussi declaree <<reticente, non parce qu'elle a des doutes sur la legalite de sa position ou la solidite de ses arguments mais plutot parce qu'elle aurait prefere que les accusations contre M. Yerodia Ndombasi aient ete traitees par les autorites competentes en Republique Democratique du Congo.>> n47
Elle a egalement affirme que <<les principes de competence universelle et l'absence d'immunite en cas d'allegations de violations graves du droit international humanitaire sont bien fondes en droit . . .>> n48
n47 CR 2001/8, p. 8.

n48 CR 2001/8, p.31, par. 54.
37. A mon sens, il y a la un point de desaccord majeur entre les Parties que la Cour pouvait trancher si la regle non ultra petita ne lui avait pas ete opposee. A peine de verser dans l'exces de pouvoir, la Cour ne pouvait statuer ultra petita. On a pu dire justement que <<si l'arbitre est juge de sa competence, il n'en est pas le maitre.>> n49 L'examen de points qui ne figureraient pas dans les demandes congolaises aurait expose la Cour a des reproches semblables. Dans ses conclusions finales muettes, le Congo ne s'est cependant pas montre hostile a une prise de position par la Cour a ce sujet dans sa motivation.
n49 Charles Rousseau, <<Les rapports conflictuels,>> Droit international public, t. V, Paris, Sirey, 1983, p. 326.
[*605] 38. D'autre part, la Belgique n'a pas voulu que la Cour se prononce au fond relativement aux allegations ci-dessus qu'elle estimait pourtant etablies en droit:
<<Si l'on considere le droit comme un processus evolutif et s'il faut s'en remettre finalement a la decision de la Cour en la matiere, la question est de savoir s'il serait souhaitable que la Cour se prononce au fond. La Belgique, malgre tout le respect du au role que joue la Cour dans le developpement du droit international, pense pour sa part que la reponse est negative. Elle considere en effet que, sauf motif imperieux--par exemple parce qu'il subsiste un litige concret entre deux Etats necessitant un reglement--le fait pour la Cour de statuer au fond risque de figer le droit au moment precis ou les Etats, auxquels la responsabilite du developpement du droit revient en premier lieu, cherchent en tatonnant une solution qui leur soit propre. De l'avis de la Belgique, il n'est pas opportun a ce stade de figer le droit dans un sens extensif ou restrictif.>> n50
n50 CR 2001/8, p. 31, par. 54.
39. Il va sans dire qu'il n'appartient pas a un plaideur d'apprendre au juge son metier. Les apprehensions de ce dernier sur les effets cristallisants eventuels d'une decision judiciaire internationale manquent de fondement. Particulierement dans l'ordre coutumier international, il est prouve que la jurisprudence internationale n'a pas pour effet de figer absolument le droit. Il en est de meme dans une certaine mesure du droit conventionnel lui-meme elabore par les Etats. Enfin, dire que ces derniers ont la responsabilite premiere de batir le droit revient a reconnaitre implicitement la responsabilite d'autres organes ou entites dont la Cour de s'acquitter d'autres taches. La doctrine le constate quasi-unanimement.

*

40. En definitive, quel sort aurait du etre reserve a la competence dite universelle eu egard a la discretion des conclusions finales du Congo a ce sujet et au peu d'empressement manifeste par la Belgique a voir la Cour se prononcer la-dessus? La prudence extreme du Congo n'etait pas justifiee puisque cet Etat sollicitait que le litige soit totalement vide. La resistance de la Belgique egalement n'etait pas fondee. La Partie defenderesse, qui alleguait agir en vertu du droit international, avait l'opportunite de faire sanctionner positivement sa pratique jugee par elle licite. A mon sens, la Cour avait la responsabilite principale de trancher si oui ou non comme le pretendait le demandeur les regles coutumieres relatives aux immunites et a l'inviolabilite personnelle penales du ministre des affaires etrangeres du Congo, M. Yerodia Ndombasi, ont ete violees par le defendeur. Et puisque c'est au nom d'une competence dite universelle, mal concue et mal appliquee, a mon avis, que cette transgression est intervenue, le dispositif de l'arret sanctionne implicitement malgre tout cette pretention. Mais la Cour n'aurait-elle pas du dans l'expose

des motifs, en tant qu'organe garant de l'integrite du droit international, se prononcer aussi nettement sur la validite ratione loci et ratione personae des pretentions belges aussi manifestement illicites? La motivation de l'arret n'aurait-elle pas du comporter une mention pertinente sur l'une des questions les plus controversees actuellement en droit international. Aurait-on reproche a la Cour d'avoir dit le droit sur ce point? Cependant, il demeure que la Cour a bien choisi, en accord avec les Parties <<des motifs essentiels>> n51 pour trancher le litige. Elle a, a cette occasion, codifie et developpe le droit des immunites. La nebuleuse question de competence dite universelle, telle que presentee dans cette affaire, a aussi ete reglee.

n51 Voir Tanaka, opinion individuelle jointe a l'arret du 24 juillet 1964 en l'affaire de Barcelona Traction, Light and Power Company, Limited, C.I.J. Recueil 1964, p. 65.

41. Que les ministres des affaires etrangeres jouissent des immunites et de l'inviolabilite penale de leur personne physique en droit international coutumier devant les juridictions nationales ne fait l'ombre d'aucun doute. Celles-la correspondent a des restrictions imposees par le droit international a l'expression du droit interne. En termes precis, tout droit national cesse de se manifester contre la presence de l'organe superieur de l'Etat etranger. Aucune entite souveraine ne saurait en droit soumettre a son autorite tout autre Etat egalement souverain ainsi represente. Tel est l'etat actuel du droit international positif qu'une enquete, a l'echelle mondiale, devrait confirmer.

42. Le defendeur s'est evertue a entretenir la confusion dans l'esprit de l'homme du commun. Il ne pouvait le faire a l'egard d'un homme de droit. La Belgique a deploye toutes ses energies pour faire croire qu'immunite equivaut a impunite. Nul juriste ne s'y egarerait pour qu'il faille montrer que la responsabilite penale personnelle de l'auteur d'une infraction eventuelle est intacte nonobstant les immunites dont il est couvert. Encore ne faut-il pas perdre son latin [*606] de penaliste au point d'oublier le principe de presomption d'innocence de l'inculpe! A la limite, examiner les immunites du ministre serait une banalite n'eut ete l'invocation de <<certains developpements recents.>> n52 A tort. Les defenseurs des Etats legislateurs, face a la Cour, tentent d'eriger une certaine doctrine en legislateur, apres avoir refuse a la haute juridiction cette qualite.

n52 Contre-memoire de la Belgique, p. 109, par. 3.4.1.

43. Il ne fait pas de doute que les immunites et leur corollaire l'inviolabilite de la personne physique du ministre en examen, revetent un caractere fonctionnel. Elles se fondent sur l interet de la fonction que doit assumer librement, sans entrave, l'organe eminent representant l'autre Etat egal a soi-meme. C'est pourquoi les prerogatives en matiere de maintien de l'ordre, de la defense et de la justice, entre autres, de l'Etat hote, doivent etre exercees de maniere a faciliter davantage l'activite du ministre des affaires etrangeres d'autrui. Comme le commentent des auteurs: <<the immunity representatives of Foreign states enjoy is a function of the nature of their office.>> n53

n53 Louis Henkin, Richard Crawford, Oscar Schachter, Hans Smit, International Law, West Publishing Co., 1990, p. 1188.

44. La doctrine americaine rappelle:

<<According to the Restatement, immunity extended to:

(a) the State itself;

(b) its head of State;

(c) its government or any governmental agency;

(d) its head of government;

(e) its foreign minister;

(f) any other public minister, official, or agent of the State with respect to

acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the State.>> n54

n54 Ibid., p. 1191.

45. Quoique ni dans ses ecritures, ni dans ses plaidoiries, le Congo n'ait pu montrer suffisamment l'entrave faite a l'exercice libre de ses fonctions de ministre des affaires etrangeres du Congo par la Belgique, je peux signaler quelques exemples. Le ministre congolais des affaires etrangeres n'a pas pu participer, au lendemain de l'emission du mandat aux reunions ministerielles des Etats ACP avec l'Union europeenne a Bruxelles, ses immunites et son inviolabilite penales n'etant pas garanties. Il n'a pas pu prendre part aussi a la reunion de Paris sur l'evaluation du sommet de la francophonie. M. A. Yerodia Ndombasi n'a pas pu effectuer une visite officielle a Tokyo (Japon), en octobre 2000, au motif que les autorites japonaises ont declare n'etre pas en mesure de l'assurer que ses immunites et son inviolabilite penales lui seraient garanties.

46. Outre des missions officielles manquees, le ministre a du se separer de son chef de l'Etat, selon les itineraires, et arriver en retard a la meme destination. Il en est resulte des couts de voyage plus eleves, des pertes de bagages, des arrivees tardives aux reunions internationales, tel qu'au sommet de Maputo au depart de la Chine. Il va sans dire qu'a la suite des missions officielles manquees ou realisees avec tant de desagrements, le ministre des affaires etrangeres n'a pu assumer normalement ses fonctions aux cotes du chef de l'Etat ou en dehors de celui-ci. En definitive, la conjugaison de divers facteurs, particulierement son caractere indesirable aux yeux de certaines autorites belges, conduira a son limogeage le 20 novembre 2000, date d'ouverture des audiences de la phase conservatoire de cette affaire.

47. L'Etat defendeur allegue l'existence d'une exception aux immunites de la personne du ministre des affaires etrangeres et a la regle de l'inviolabilite penale en cas de commission de <<crimes de droit international.>> Il ne l'a guere prouvee. Cela participe tout simplement de sa strategie de defense. Tantot n'a-t-il pas cherche a contourner la qualite officielle alors revetue par M. A. Yerodia Ndombasi en arguant qu'il n'a vise que la personne privee de ce dernier, tantot n'a-t-il pas tente d'inventer une exception inexistante en droit international coutumier?

[*607] 48. L'existence d'une regle fermement etablie suivie obligatoirement par la majorite d'environ cent quatre-vingt-dix Etats appartenant a l'Afrique, l'Asie, l'Amerique, l'Europe et l'Oceanie, en vertu de laquelle le ministre des affaires etrangeres en fonction beneficie d'une immunite et d'une inviolabilite penales absolues n'est pas contestable. Le constat en est fait par la doctrine. n55

n55 Voir notamment Jean Salmon, Manuel de droit diplomatique, Bruxelles, Bruylant, 1994, p. 539: le ministre des affaires etrangeres jouit <<des privileges et immunites analogues a ceux du chef de gouvernement;>> Joe Verhoeven, Droit international public, Bruxelles, Larcier, 2000, p. 123: <<Il existe une tendance, au moins doctrinale, a accorder au chef du gouvernement, voire au ministre des affaires etrangeres, la protection reconnue au chef de l'Etat.>>

49. Neanmoins, quelques voix dissonantes, a priori animees de certaines preoccupations morales, s'expriment afin que ces representants qualifies des Etats soient depouilles de ces protections juridiques absolues en cas de commission de certaines infractions internationales. Plus que dans nombre de regions du monde, ces dispositions ne peuvent qu'etre les bienvenues dans des pays victimes traditionnelles de crimes contre l'humanite. Des sa naissance, la Cour permanente de Justice internationale, notre devanciere, s'est reconnue la responsabilite

<<dans l'accomplissement de sa tache de connaitre elle-meme le droit international, elle [la Cour] ne s'est pas bornee a cet examen, mais a etendu ses recherches a tous les precedents et faits qui lui etaient accessibles et qui auraient, le cas echeant, pu reveler l'existence d'un des principes du droit international vise par le compromis.>> n56

n56 Affaire du Lotus, arret n<o> 9, 1927, C.P.J.I. Recueil serie A n<o> 10, p. 31.

50. C'est sur le terrain du droit coutumier que les assertions belges et leur pendant, les denegations congolaises se situent. Le Gouvernement belge a peut-etre escompte, a la maniere de la proclamation Truman sur le plateau continental de 1945, que sa revendication nouvelle formulee au moment ou des idees humanitaires connaissent un regain d'interet, serait suivie (massivement) par d'autres Etats. Il donne l'impression d'avoir surestime son poids sur l'echiquier mondial. Peu importe. Le grief principal qui doit etre articule a l'encontre du defendeur est d'user de l'argument humanitaire a des fins de domination politique. Comme au XIXe siecle! n57 Au point d'inventer une entorse au droit international des immunites parfaitement inexistantes en droit international.

n57 Le preambule de l'Acte general de Berlin du 26 fevrier 1885 rassure sur l'objet et le but du traite: <<le bien-etre moral et materiel des populations indigenes.>>

51. Sommairement, la revendication belge ne peut, a l'origine, que violer le droit existant. Nonobstant la publicite dont a beneficie le mandat du 11 avril 2000, elle n'a ete suivie par aucun autre Etat. Nul membre de la societe internationale ne lui a prete main forte en vue de son execution. Bien au contraire, plusieurs Etats, specialement des Etats africains, l'ont ignore. Le facheux precedent belge est donc demeure isole. Si la Belgique a le titre juridique de contribuer a la formation du droit international general; elle ne saurait, a elle seule, creer ce dernier. La pratique internationale lui fait donc defaut. En revanche, l'Etat victime de ce fait, le Congo, s'est fermement oppose a l'application de la mesure belge. Au motif qu'elle est illicite.

52. D'autre part, le Gouvernement belge montre, par son comportement, qu'il n'est pas sur de la liceite de son acte conteste. La correspondance adressee au demandeur en cours d'instance judiciaire le prouve. n58 Le defendeur pretend envisager la revision de sa loi querellee afin de respecter les immunites des hauts representants des Etats etrangers. Au milieu de tant de contradictions, d'attitudes incertaines qui marquent fondamentalement cette pratique unilaterale et solitaire--sauf l'initiative yougoslave du 21 septembre 2000 passee curieusement sous silence par la Belgique--nulle norme coutumiere ne saurait emerger. Comme l'opinio juris dans le chef du defendeur lui-meme n'est apparemment guere etablie.

n58 Voir, la communication belge du 14 fevrier 2001 a laquelle le Congo a repondu le 22 juin 2001.

53. A dire vrai, l'Etat defendeur s'est evertue a s'appuyer sur quelques opinions de publicistes pour alleguer l'apparition d'une norme coutumiere derogatoire. Il n'a pas rapporte la preuve de son existence. On sait que la doctrine constitue un moyen de determination de la regle de droit. Elle doit se fonder sur une pratique generale correspondant a l'opinion juris sive necessitas. Rien de pareil a ce jour. A mon sens, il n'a pas ete malaise pour la Cour de relever le caractere non fonde des allegations du defendeur. La mise en oeuvre du droit international humanitaire serait-elle affectee d'un coefficient de normativite relative, pour paraphraser P. Weil? Sinon, comment justifier juridiquement la suspension des poursuites contre l'organe d'un Etat du Proche-Orient et le maintien obstine des poursuites contre l'ancien ministre

congolais des affaires etrangeres?
54. Evoquant les rapports entre crimes et immunites, ou dans quelle mesure la nature des premiers empeche l'exercice des secondes, Pierre-Marie Dupuy estime a la suite de la decision de la Chambre des lords en l'affaire Pinochet: <<Pour autant il convient d'etre prudent dans l'affirmation d'une nouvelle coutume, dont la decision des [*608] Lords, au demeurant fondee sur des considerations souvent heterogenes, ne saurait, a elle seule, entrainer la consolidation.>> n59
Et de rappeler que
<<la coutume procede de l'opinion juridique des Etats telle qu'elle ressort de leur pratique. Or celle-ci est encore loin d'etre unifiee et manifeste en tout cas la persistance des reticences etatiques a la reduction des immunites des agents superieurs de l'Etat.>> Il n'y a pas de comportement <<generalement>> adopte <<par la pratique des Etats.>> n60
Ainsi que l'a dit notre Cour,
<<la presence [des normes coutumieres] dans l'opinio juris des Etats se prouve par la voie d'induction en partant de l'analyse d'une pratique suffisamment etoffee et convaincante et non pas par voie de deduction en partant d'idees preconstituees a priori.>> n61
Point de nombreuses decisions des cours et tribunaux de l'ensemble des Etats du globe, a tout le moins d'un nombre significatif, dans l'optique belge. Bien au contraire. Tres recemment, la Cour a emis un avis dans l'affaire relative au Differend relatif a l'immunite de juridiction d'un rapporteur special de la Commission des droits de l'homme, en ces termes: <<les tribunaux malaisiens avaient l'obligation de traiter la question de l'immunite de juridiction comme une question preliminaire a trancher dans les meilleurs delais.>> n62
n59 Pierre-Marie Dupuy, <<Crimes et immunites,>> Revue generale de droit international public, t. 105, 1999, n<o> 2, p. 289-296; les italiques sont de moi.
n60 Ibid., p. 293
n61 Affaire de la Delimitation de la frontiere maritime dans la region du golfe du Maine, nomination d'expert, arret du 12 octobre 1984, C.I.J. Recueil 1984, p. 299; les italiques sont de moi.
n62 Differend relatif a l'immunite de juridiction d'un rapporteur special de la Commission des droits de l'homme, paragraphe 67, 2b) du dispositif de l'avis consultatif du 29 avril 1999; les italiques sont de moi.
55. Auparavant, elle avait constate que
<<la High Court de Kuala Lumpur n'a pas statue in limine litis sur l'immunite . . . mais a rendu un jugement par lequel elle s'est declaree competente pour connaitre au fond de l'affaire dont elle etait saisie; y compris pour determiner si M. Cumaraswamy pouvait se prevaloir d'une quelconque immunite.>> n63
Semblable obligation pese aussi et surtout sur les Etats dans leurs rapports mutuels. Aussi, par analogie, conjuguee avec l'argument a fortiori entre sujets primaires du droit international et les organes particulierement qualifies que sont les ministres des affaires etrangeres, cette regle rappelee par la Cour devrait s'appliquer a la presente espece.
n63 Ibid., par. 17.
56. Les changements de statut qu'a connus successivement M. A. Yerodia Ndombasi n'ont pas de consequence facheuse sur l'affaire sinon de souligner davantage l'atteinte a la souverainete du Congo par la Belgique en raison de ses ingerences continues (voir ci-dessus).
57. D'autre part, centree qu'elle l'est sur la violation des immunites du ministre des affaires etrangeres au moment de l'emission et de la notification du mandat, le statut anterieur et les statuts posterieurs revetus par M. A. Yerodia Ndombasi n'affectent en rien la plainte congolaise. Des lors que les

poursuites illicites sont exercees au moment ou il a cette qualite d'organe specialise dans les relations exterieures d'un Etat et, en consequence, couvert d'immunites et d'inviolabilite personnelle penales absolues, la violation du droit international au prejudice du Congo subsiste; la Belgique ayant contracte une dette a l'egard non pas d'un individu en transgressant la norme du droit international coutumier regissant les relations interetatiques, mais vis-a-vis d'un Etat, le Congo, dont l'organe en charge des relations internationales s'est vu inflige une mesure temeraire, vexatoire et illicite, qui appelle reparation. Or, face a ces allegations bien fondees du demandeur, le defendeur pretend ne pas porter atteinte aux droits de souverainete de sa victime. Bien au contraire, la Belgique affirme exercer un droit a elle confere ou accomplit une obligation a elle imposee par le droit international. D'ou le refus d'aneantir le mandat et en consequence de reparer le prejudice subi. L'odyssee personnelle de M. A. Yerodia Ndombasi ne vide en rien le differend interetatique.

58. Il est significatif que le defendeur reconnaisse implicitement le manque de solidite de ses moyens en ces termes:

<<Meme dans l'eventualite ou la Cour devrait, contrairement aux conclusions de la Belgique, confirmer l'immunite de M. A. Yerodia Ndombasi, en sa qualite de ministre des affaires etrangeres du Congo dans les circonstances considerees, il n'en decoulerait pas qu'il demeurerait au benefice de l'immunite, meme en occupant le poste de ministre pour ses activites de caractere prive . . .>> n64

n64 Contre-memoire, p. 116, par. 3.4.15.

[*609] 59. A moins de soutenir que l'infraction commise par la Belgique a ete prescrite au bout de deux ans. A priori, rien de pareil comme regle en droit international, encore moins dans la conception africaine du droit. En Afrique, un differend ne se dissout pas. Il se transmet, comme une dette, de succession en succession. Il en est ainsi de l'objet du litige qui est ineffacable tant que la reconnaissance de la faute commise par l'auteur et la reparation du prejudice subi par sa victime n'ont pas eu lieu. Les denegations non fondees du defendeur me poussent a formuler une proposition theorique.

60. Prenons l'hypothese d'une personnalite assumant les fonctions de conseiller aux affaires africaines a la presidence ou a la primature d'une puissance donnee. Elle ordonne a ce titre la repression d'une insurrection populaire ou d'une manifestation estudiantine dans un <<pays ami>> n65 qui entraine mort d'hommes. Par la suite, ce conseiller accede aux fonctions de ministre des affaires etrangeres ou de secretaire d'Etat de la puissance en question.

n65 Jean-Pierre Cot, A l'epreuve du pouvoir. Le tiers-mondisme. Pour quoi faire? Editions du Seuil, Paris, 1984, p. 85. L'auteur signale que, alors qu'il etait ministre de la cooperation, il a donne des ordres afin que les cooperants militaires francais ne soient pas meles a la repression de la manifestation estudiantine de juin 1981 a Kinshasa.

61. Un Etat tiers delivre alors un mandat contre le ministre ou secretaire d'Etat au motif qu'il avait donne des ordres, en tant que conseiller, qui, dans leur mise en oeuvre, ont cause des violations massives et systematiques des droits humains. La question est de savoir si pareil mandat affecte ou n'affecte pas les immunites et l'inviolabilite personnelle penales du ministre ou du secretaire d'Etat. A mon avis, la reponse est affirmative. C'est l'organe de l'Etat, charge de le representer internationalement, qui est victime de la mesure a ce moment-la.

62. A la suite d'un changement d'administration ou de gouvernement, le ministre des affaires etrangeres ou le secretaire d'Etat perd son poste (ce qui est different du cas Yerodia en raison des pressions exterieures). L'Etat auteur du mandat maintient son acte. Cette mesure continue-t-elle d'affecter le conseiller aux affaires africaines, le ministre des affaires etrangeres ou le secretaire

d'Etat ou touche la personne desormais liberee de toute charge gouvernementale? Je pense que c'est la date de l'emission du mandat qui definit le moment precis de la violation du droit international et la qualite en ce temps-la du destinataire de l'acte qui indique la personnalite violee dans son integrite morale. C'est le ministre des affaires etrangeres ou le secretaire d'Etat au jour et a l'heure de l'emission du mandat qui fut atteint. Il ne s'agit ni d'un acte d'instruction emis contre une personne privee que l'ancien secretaire d'Etat ou ministre des affaires etrangeres est devenu, ni d'une mesure frappant a l'epoque le conseiller aux affaires africaines. L'intangibilite des faits se dresse, impassible comme un sphinx.

63. Le principe d'une competence dite universelle par une partie de la doctrine ne saurait etre serieusement conteste aux termes des dispositions genevoises pertinentes. Quelques reserves que je puisse avoir d'abord sur une terminologie peu heureuse au plan du droit international. Car, la summa divisio correcte, a mon sens, devrait retenir 1) la competence territoriale, 2) la competence personnelle, et 3) la competence a raison de services publics.

64. Je ne qualifierais pas de <<competence universelle>> l'autorite exercee par un Etat, soit a l'egard de ses nationaux a l'etranger, qui releve de sa competence personnelle, soit a l'egard de ressortissants etrangers en haute mer auteurs d'actes de piraterie maritime, qui rentre dans le cadre de la competence a raison de services publics, soit a l'egard de toute personne se trouvant sur son territoire ayant porte atteinte a son ordre public, qui tombe ainsi dans le champ de sa competence territoriale. Il en est de meme de la competence en matiere de repression de certaines violations de dispositions conventionnelles que se reconnaissent les Etats. On concoit aisement qu'une entite universelle, encore inexistante, l'Organisation des Nations Unies elle-meme et son principal organe judiciaire, etant plutot quasi universelle, puisse se prevaloir d'un pouvoir juridique universel. On sait qu'en vertu des traites specifiques auxquels ils sont parties, les membres de la communaute quasi universelle se reconnaissent le pouvoir de reprimer certaines infractions commises au-dela de leur territoire dans des conditions bien definies. Materiellement ensuite, semblable pouvoir juridique n'est pas universel. Peut-etre sous l'influence peu heureuse des conceptions penalistes, n66 une partie de la doctrine internationaliste s'y refere comme l'exercice d'une competence universelle. Cette expression parait impropre dans l'ordre international actuel. n67 Au moment ou une fraction importante des Etats tend a promouvoir un mecanisme institutionnel repressif a vocation universelle, la promotion de la competence dite universelle ne constituerait-elle pas une regression juridique?

n66 L'absence de mention de <<competence universelle>> n'est pas aussi rare dans les travaux des penalistes eux-memes. Voir par exemple Andre Huet et Rene Koering-Joulin, Droit penal international, Paris, PUF, 1994.

n67 C'est du droit international penal, branche embryonnaire aux regles eparses et fragmentaires, que ressortit la competence improprement dite universelle. Cette derniere ne saurait s'affranchir des marques qui caracterisent sa matrice. D'ou le caractere quelque peu nebuleux d'un pouvoir juridique ancien, limite a quelques curiosites historiques telle que la repression de la traite des esclaves, etendu timidement au milieu des XX e siecle a la repression des infractions au droit international humanitaire. C'est de ce dernier que la doctrine et la jurisprudence specialisees (Tribunal penal international pour l'ex-Yougoslavie) s'efforcent de lui conferer une autonomie. Puisque la <<competence universelle>> telle que revendiquee par la Belgique interesse la mise en oeuvre coercitive des regles humanitaires genevoises. Que le droit international positif autorise les Etats a sanctionner des infractions commises en dehors de leur territoire lorsque certaines conditions de rattachement a leur

souverainete territoriale sont reunies n'est pas contestable. Que cette competence repressive doive etre interpretee de maniere stricte comme l'exige le droit penal n'est pas non plus douteux.

[*610] 65. Le principe d'une <<competence universelle>> ainsi entendue est affirme notamment a l'article 49 de la premiere convention de Geneve du 8 aout 1945. n68 Mais sa conception et surtout son application par le defendeur dans le cas d'espece s'eloignent de l'etat du droit en vigueur.

n68 L'article 49 dispose:

<<Chaque partie contractante aura l'obligation de rechercher les personnes prevenues d'avoir commis, ou d'avoir ordonne de commettre l'une ou l'autre de ces infractions, et elle devra les deferer a ses propres tribunaux, quelle que soit leur nationalite.>>

66. Selon l'interpretation autorisee de la stipulation conventionnelle ci-dessus, le systeme se fonde sur trois obligations essentielles qui sont mises a la charge de chaque partie contractante, a savoir: <<promulguer une legislation speciale; rechercher toute personne prevenue d'une violation de la convention; juger une telle personne ou, si la partie contractante le prefere, la remettre pour jugement a un autre Etat interesse.>> n69

n69 Jean Pictet, (dir. pub.), Commentaire de la convention de Geneve pour l'amelioration du sort des blesses et des malades dans les forces armees en campagne, Geneve, CICR, 1952, p. 407.

67. Il faut savoir gre a la Partie defenderesse d'avoir, en principe, satisfait a la premiere obligation, sans prejudice pour l'heure de la portee de sa legislation speciale. Il convient aussi d'apprecier le souci qui semble l'animer, a priori, de rechercher toute personne presumee avoir viole les dispositions conventionnelles pertinentes.

68. Le satisfecit qu'on peut adresser au defendeur sur le plan des principes laisse place a des reproches legitimes en raison de la portee de sa legislation et de ses mesures d'application. Le mandat semble correspondre a ces dernieres.

1. Legislation speciale

69. Aucun des deux Etats (Suisse et Yougoslavie) cites dans le commentaire ci-dessus n'avait adopte une legislation aussi geographiquement universelle que le texte belge. Les developpements du commentaire ne refletent que le souci de la repression des infractions. Le commentaire previent meme qu'<<aucune allusion n'est faite a la responsabilite que pourraient encourir des personnes qui ne sont pas intervenues pour empecher une infraction ou la faire cesser.>> Face au <<silence de la convention on doit admettre que c'est a la legislation nationale qu'il appartient de regler cette matiere.>> n70

n70 Ibid., p. 409.

2. Recherche et poursuite des auteurs

70. Non seulement le commentaire met l'accent sur une repression des inculpes sans egard a leur nationalite, mais encore il retient le rattachement territorial. Rien de plus normal dans l'etat du droit international classique ainsi codifie a Geneve:

<<A partir du moment ou l'une des Parties contractantes <<a connaissance du fait qu'une personne se trouvant sur son territoire aurait commis une telle infraction, son devoir est de veiller a ce qu'elle soit arretee et poursuivie rapidement.>> Ce n'est donc pas seulement sur la demande d'un Etat que l'on devra entreprendre les recherches policieres necessaires, mais aussi spontanement.>> n71

Au-dela du territoire national qui limite en principe l'exercice de l'autorite de l'Etat qu'elle soit legislative, executive ou judiciaire, a mon avis, le commentaire designe tout naturellement le mecanisme de cooperation judiciaire qu'est l'extradition dans la mesure ou <<des charges suffisantes>> sont retenues

contre l'inculpe. n72 Non seulement il n'y a pas de traite d'extradition entre les Parties en presence relativement a la matiere, mais encore le Congo dit appartenir a la conception juridique qui refuse d'extrader ses nationaux. Argument decisif, il ajoute ne pouvoir poursuivre M. A. Yerodia Ndombasi faute de charge a son egard, puisqu'il ne lui reproche rien.

n71 Ibid., p. 411.

n72 Ibid.

71. L'exercice de la competence dite universelle suppose donc l'existence de <<charges suffisantes,>> selon les termes des conventions humanitaires. n73 Y en a-t-il dans le cas d'espece? L'Etat demandeur les a rejetees. n74 Des batonniers congolais ont soutenu devant les medias locaux, au lendemain de la notification du mandat le 12 juillet 2000, que <<le dossier etait vide.>> L'Etat defendeur n'a pas rapporte dans son mandat des charges suffisantes hormis l'affirmation qui reste a demontrer que son inculpe a <<activement et directement>> participe a la commission des infractions graves de droit international humanitaire.

n73 Voir par exemple l'article 129, al. 2 de la troisieme convention de Geneve du 10 aout 1949.

n74 Memoire de la Republique democratique du Congo, p. 38, par. 57 <<abusivement interpretees . . .>> par [les autorites publiques belges] . . . [sans] aucune mise en contexte, ni historique, ni culturelle . . . alors que le lien de causalite entre ces paroles et certains actes inqualifiables de violence . . . est loin d'etre clairement etabli.>> Quant au contre-memoire du Royaume de Belgique, il reprend (page 11, paragraphe 1.10) les faits tels que repris dans le mandat du 11 avril 2000 apres avoir annonce: <<il n'est pas necessaire d'approfondir ces faits qui seront traites brievement dans la partie III.>>

72. D'autre part, quel est le critere objectif qui autoriserait l'exercice de la competence universelle par defaut par un Etat devant plusieurs situations de non-exercice? Est-ce le core crimes? Il y en aurait plusieurs. D'ou la legitimite du critere territorial qui departage les competences entre Etats en presence. Sinon, le critere politique d'opportunite triompherait. On comprend alors que les consequences des evenements tragiques au Congo en aout 1998 aient offert [*611] l'alibi au mandat du 11 avril 2000. Mais que l'extermination de plus de deux millions et demi de Congolais depuis la meme date par les agresseurs rwandais, ougandais et burundais, demeure, jusque la impunie.

73. La partie defenderesse s'est acharnee, dans la droite ligne de son esprit singulier, a criminaliser le comportement du demandeur. Elle s'est evertuee jusqu'au bout, a chercher a troubler la conscience des juges. Non seulement elle s'est trompee de pretoire--la Cour n'etant en rien une juridiction de fond relativement a une responsabilite penale individuelle eventuelle--mais encore elle n'a pas rapporte la preuve de cette derniere. Il convient de rappeler que actori incumbit probatio mais aussi allegans probat.

74. L'ancienne colonie modele du Congo belge doit-elle, sans preuve, poursuivre l'un des dirigeants congolais, qui s'est dresse, comme partout ailleurs, contre des envahisseurs etrangers et leurs auxiliaires congolais? L'idee selon laquelle un Etat aurait le pouvoir juridique de connaitre des infractions eventuelles commises a l'etranger, par des etrangers, contre des etrangers, alors meme que le suspect eventuel se trouve en territoire etranger, est contraire a la conception du droit international.

75. L'article 129, alinea 2 de la troisieme convention genevoise enoncant le principe aut dedere aut judicare en matiere de sanctions penales pose l'exigence de <<charges suffisantes.>> Il n'a aucunement envisage une competence dite universelle par defaut (in absentia). Puisque le commentaire y relatif vise expressement l'hypothese ou l'inculpe <<se trouve sur son territoire>> (de l'Etat partie).

76. C'est en vain qu'on explorerait dans la pratique recente, soit un texte legislatif, soit une jurisprudence interne aussi osee. Par son <<War crimes Act 1945 amended in 1988,>> l'Australie dit que <<only an Australian citizen or resident can be charged under the 1988 Act>> (section 11 de la loi ci-dessus). La Hight Court de l'Australie avait reconnu, a l'occasion de l'affaire Polyakhovich v. The Commonwealth, que la juridiction australienne avait le pouvoir d'exercer <<a juridiction recognized by international law as universal jurisdiction>> a l'egard des crimes de guerre. n75

n75 Polyakhovich v. Commonwealth of Australia (1991) 172 CLR 581.

77. Le rattachement territorial est aussi vise par l'article 65.7.20 du Code penal de l'Australie pour la poursuite des crimes internationaux tel que le genocide (voir application dans l'affaire Busko Cvjekovic du 13 juillet 1994). Le rattachement personnel ou territorial est aussi requis par l'article 7 du Code penal du Canada, tel que revise en 1985. Il a ete applique dans l'affaire R v. Finta. La France prevoit aussi ce rattachement <<si [la personne] se trouve en France.>> n76 Il serait fastidieux de multiplier les exemples.

n76 Article 629 du Code de procedure penale.

78. S'il est permis de recourir au raisonnement par analogie, on relevera que dans l'affaire des Activites militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amerique), fond, la Cour avait precisement declare au sujet des droits humains:

<<Quand les droits de l'homme sont proteges par des conventions internationales, cette protection se traduit par des dispositions prevues dans le texte des conventions elles-memes et qui sont destinees a verifier ou a assurer le respect de ces droits.>> n77

Les instruments genevois ont bien circonscrit a l'epoque les droits et les obligations des Etats sur ce point. Il est certain que les auteurs de ces textes n'ont nullement envisage l'interpretation excessive belge. D'autre part, la pratique ulterieure ne montre guere une evolution de la norme conventionnelle au plan coutumier dans cette perspective. Elle aurait pu etre codifiee dans la convention de Rome du 28 juillet 1998. Tel n'est pas le cas. Aussi la Belgique a, une annee apres l'adoption de celle-ci, innove radicalement et solitairement. Sentiments humanitaires obligent!

n77 C.I.J. Recueil 1986, p. 134, par. 267.

79. En decidant a l'article 7 de la loi du 16 juin 1993, telle qu'amendee le 10 fevrier 1999, que <<les juridictions belges sont competentes pour connaitre des infractions prevues a la presente loi, independamment du lieuou celles-ci auront ete commises,>> la Belgique a adopte une legislation totalement insolite. Elle s'est autoproclamee sinon procureur de l'humanite, au sens transtemporel et transpatial que R. J. Dupuy attribuait a ce mot, mais au moins justicier sans frontieres d'apres la doctrine du <<sans frontierisme.>> A la limite, cette revendication depasse le droit international lui-meme puisque ce dernier regle essentiellement les relations entre des structures aux frontieres definies: les Etats. Mais selon une appreciation minimale, l'Etat defendeur viole le droit international. Il ne saurait, [*612] en l'etat actuel, superbement le transcender. Ainsi des chefs d'Etat en fonction, Laurent Gbagbo (Cote d'Ivoire), le 26 juin 2001, Saddam Hussein, le 29 juin 2001, Fidel Castro (Cuba), le 4 octobre 2001, Denis Sassou Nguesso (Congo-Brazzaville), le 4 octobre 2001, Yasser Arafat, le 27 novembre 2001, un premier ministre, Ariel **Sharon** (Israel), le 1 er juillet 2001, un ministre des affaires etrangeres en fonction, Abdulaye Yerodia Ndombasi, le 11 avril 2000, font l'objet de plaintes ou de poursuites judiciaires devant les juridictions belges pour divers <<crimes internationaux.>> La liste est loin d'etre exhaustive, si on y ajoute en decembre 2001 le president Paul Biya (Cameroun). Joe Verhoeven n78 a eu raison

de craindre l'instauration d'un chaos, par definition le contraire de l'ordre deja difficile, dans le milieu international. La Cour ne pouvait qu'etre interpellee.

n78 Joe Verhoeven, <<M. Pinochet, la coutume internationale et la competence universelle,>> Journal des Tribunaux, 1999, p. 315 et du meme auteur <<Vers un ordre repressif universel? Quelques observations,>> Annuaire francais de droit international, 1999, p. 55. D'autre part, <<Que se passerait-il si un plaignant poursuivait devant les tribunaux belges M. Chirac qui a servi durant la guerre d'Algerie ou des massacres ont ete commis par l'armee francaise?>> aurait interroge un haut fonctionnaire israelien a la suite de la plainte deposee par M. **Sharon,** premier ministre d'Israel (The Washington Post, 30 avril 2001, Washington Post Foreign Service, Karl Vick, p. 101: <<Death toll in Congo War may approche 3 million>>).

80. On mentionnera de maniere appuyee que seul apparemment M. A. Yerodia Ndombasi s'est vu inflige un <<mandat d'arret international.>> Tres curieux. Il convient de souligner aussi que les poursuites contre M. Ariel **Sharon,** suivies attentivement de par le monde, auraient ete suspendues, au bas mot, que la Belgique cherche en faveur de ce dernier une porte de sortie honorable a coup d'arguties juridiques, que depuis les plus hautes autorites politiques du pays se sont repandues en conferences dans les universites (ULB) pour denoncer soudainement les absurdites de cette loi, que l'un des conseils de la Belgique a revise sa doctrine d'enseignement a l'issue des plaidoiries de novembre 2001 dans le sens d'un rattachement territorial sine qua non. Telle est la loi belge a l'epreuve des rapports de force internationaux. On peut parier que les poursuites initiees a la suite d'une plainte de <<justiciables impenitents>> contre M. A. **Sharon** sont mort-nees.

81. Ni au titre d'obligation examinee plus haut, ni au titre d'une prerogative a elle attribuee par le droit international, la Belgique ne saurait se poser en procureur de l'humanite, a savoir pretendre assumer le malheur des hommes au-dela des frontieres etatiques et au-dela des generations. La pratique des Etats signalee ci-dessus vaut egalement pour les presents developpements. Pour autant il ne s'agit nullement de couvrir une impunite quelle qu'elle soit dans le temps et dans l'espace, y compris lors des guerres de conquete coloniale et de reconquete neocoloniale en Afrique, en Amerique, en Asie, en Europe et en Oceanie.

82. Victime de la violence n79 des agresseurs et du cortege d'infractions graves au droit international humanitaire, telle que la prise en otage du barrage d'Inga entrainant la coupure d'electricite et d'eau, notamment a Kinshasa, ville de plus de cinq millions d'habitants d'ou il en resulta plusieurs morts, le peuple congolais n'a de cesse d'exiger le retrait des forces armees regulieres d'occupation de l'Ouganda, du Rwanda et du Burundi. Il sollicite en outre l'etablissement d'un tribunal penal international sur le Congo. Ce dernier jugerait toutes les personnes, auteurs, coauteurs ou complices, Africains et non-Africains, ayant commis des crimes de guerre, des crimes contre l'humanite, comme l'extermination de plus de deux millions cinq cent mille Congolais n80 dans les regions sous occupation etrangere depuis le 2 aout 1998. A priori, ces victimes la n'interessent pas (encore) la Belgique. Elle, dont le passe colonial n81 et neocolonial n82 est, a tort ou a raison, juge tristement celebre dans le domaine des droits humains au Congo. La perdure une situation de violations graves, systematiques et massives des droits humains qui doivent interpeller l'opinion internationale. Pour emprunter les mots justes de l'ambassadeur de France a Kinshasa:

<<devant pareil enjeu, les choses doivent etre dites clairement. On ne peut jouer indefiniment dans la semantique lorsqu'un peuple entier est en train

d'agoniser.>> Car, <<c'est le temps de guerre et . . . les armees d'occupation se trouvent sur le sol congolais en depit des injonctions de la communaute internationale.>> n83

n79 Voir. S. Oda, declarations jointes a l'ordonnance du 9 avril 1998 en l'affaire relative a la Convention de Vienne sur les relations consulaires, p. 260, par. 2 et a l'ordonnance du 3 mars 1999, p. 18, par. 2, en l'affaire LaGrand (Allemagne c. Etats-Unis d'Amerique), sur la necessite de tenir compte des droits des victimes d'actes de violence (aspect qui a souvent ete neglige).

n80 Source: International Rescue Committee (USA), www.the IRC.org/mortality.htm

n81 Adam Horschild, Le fantome du Roi Leopold. Un holocauste oublie, Belfond, Paris, 1998, p. 264-274; Daniel Vangroenweghe, Du sang sur les lianes. Leopold II et son Congo, Didier Hatier, Paris, 1986, p. 18-123; Barbara Emerson, Leopold II. Le Royaume et l'Empire, editions Soufflot, Paris/editions Duculot, Gembloux, 1980, p. 248-251.

n82 Voir CR 2000/34, p. 16, sur la plaidoirie aceree du Congo et Noam Chomsky, <<Autopsie des terrorismes,>> Paris, Le Serpent a Plumes, 2001, p. 12-13. <<Les puissances europeennes menaient la conquete d'une grande partie du monde, avec une brutalite extreme. A de tres rares exceptions, ces puissances n'ont pas ete en retour attaquees par leurs victimes . . ., ni la Belgique par le Congo . . .>>

n83 Voir discours de M. Gildas Le Lidec, ambassadeur de France a Kinshasa, le 14 juillet 2001 a l'occasion de la fete nationale de la Republique francaise, Le Palmares, n<o> 2181, du 16 juillet 2001, p. 8.

83. Il suffit maintenant de signaler quelques vues doctrinales qui montrent peut-etre l'ampleur de la controverse sur la question. A en croire P. M. Dupuy, <<encore rarement reconnue en droit coutumier, la competence universelle ne l'est alors que de facon facultative.>> n84 L'auteur s'appuie sur le fait que la Cour de cassation francaise <<a confirme le refus de la Cour d'appel de voir dans les conventions de Geneve de 1949 une base de droit pour l'invocation d'une telle competence.>> n85 Enfin, il releve que <<la convention de Rome n'institue . . . pas vraiment une competence universelle, puisqu'elle s'etablit en fonction de celle de l'Etat de nationalite du criminel et/ou celle de l'Etat ou l'infraction a ete commise.>> n86 Quant a Francois Rigaux, il prefere ne pas se prononcer <<sur un theme actuel et controverse.>> n87 A l'oppose, Mario Bettati est d'avis que <<la competence universelle . . . fonde n'importe quel Etat a poursuivre des crimes [*613] d'autant plus graves qu'ils melent parfois ceux commis contre les lois de la guerre et ceux accomplis contre l'humanite.>> n88 L'affirmation n'est guere suivie de demonstration. A l'oppose, Nguyen Quoc Dinh, Patrick Dailler et Alain Pellet la signale comme <<un principe controverse.>> n89 Olivier T. Covey l'admet que si l'auteur de l'infraction <<est par la suite retrouve sur le territoire national.>> n90 Les partisans de la competence universelle reconnaissent cette derniere a condition que l'inculpe, <<se trouve sur son territoire.>> n91 Pour leur part, Jean Combacau et Serge Sur soulignent que <<les Etats restent fideles aux criteres territorial et personnel et s'abstiennent de tout recours a une competence universelle ou reelle.>> n92 Quant a Philippe Weckel, observant la mention dans le preambule du traite de Rome du 28 juillet 1998 de la competence universelle, il note neanmoins l'omnipresence de la <<souverainete judiciaire des Etats>>; car comme le demontre deja la pratique de la Belgique, <<une competence universelle . . . s'exercerait en definitive de maniere unilaterale.>> n93

n84 Pierre-Marie Dupuy, loc. cit., p. 293.

n85 Ibid., p. 294.

n86 Ibid., p. 29.

n87 Francois Rigaux, <<Le concept de territorialite: un fantasme en quete de

realite,>> in Melanges Bedjaoui, La Haye, Kluwer Law International, 1999, p. 210.
n88 Mario Bettati, Le droit d'ingerence. Mutation de l'ordre international, Paris, Odile Jacob, 1996, p. 269.
n89 Nguyen Quoc Dinh, Patrick Dailler et Alain Pellet, Droit international public, Paris, Librairie generale de droit et de jurisprudence, 1999, p. 689.
n90 Olivier T. Covey, <<La competence des Etats,>> Droit international. Bilan et perspectives, Paris, Pedone, Unesco, 1991, p. 336.
n91 Brigitte Stern, <<A propos de la competence universelle,>> Melanges Bedjaoui, p. 748.
n92 Jean Combacau et Serge Sur, Droit international public, Paris, Montchrestien, 1993, p. 351
n93 Ph. Weckel, <<La Cour penale internationale,>> Revue generale de droit international public, t. 102, n<o> 4, 1998, p. 886, 989. D'apres les vues d'un penaliste du Congo, Nyabirungu Mwene Songa, Droit penal general, Kinshasa, editions Droit et societe, 1995, p. 77 et 79, le <<systeme dit de competence universelle de la loi penale donne au juge du lieu d'arrestation le pouvoir de juger.>>

84. Le mandat du 11 avril 2000 a produit des effets juridiques tant sur le plan interne belge que sur le plan international.

85. Au plan interne d'abord. Juridiquement, il parait evident que l'emission du mandat a l'encontre du ministre des affaires etrangeres constitue un fait illicite puisqu'elle viole les immunites et l'inviolabilite penales attachees a ce dernier. Au plan formel, il s'agit d'un acte coercitif par nature. Sous l'angle materiel, la teneur de cet instrument ne fait guere mystere du sort reserve a l'organe etranger. Il est exige des agents de l'autorite publique belge d'apprehender physiquement un ministre des affaires etrangeres d'un autre Etat souverain! Du point de vue teleologique, il vise a aneantir la liberte d'aller et de venir ainsi que la dignite inherente a un organe d'un pays independant. Sous l'angle organique, le juge d'instruction, qui a agi a l'encontre du ministre en question, ne se confond pas avec un agent du protocole d'Etat. A bon droit, la Cour dit au sujet du mandat:

<<[sa] seule emission . . . portait atteinte a l'immunite . . . La Cour en conclut que l'emission dudit mandat a constitue une violation d'une obligation de la Belgique a l'egard du Congo, en ce qu'elle a meconnu l'immunite [dont beneficiait] ce ministre . . . en vertu du droit international.>> (Par. # 70.)

86. Tels sont les elements objectifs qui attestent de la production des effets juridiques par le mandat insolite. Qu'il n'ait pas ete execute materiellement est une autre question. Il etait susceptible de l'etre. Que l'Etat defendeur puisse mepriser vis-a-vis d'un pair les regles de courtoisie elementaires entre Etats dits civilises passe encore en droit. Le mandat a bel et bien jete le discredit sur les organes de l'Etat congolais traites de maniere aussi discourtoise et illicite. Il y a davantage.

87. Au plan international, qui nous preoccupe le plus, s'agissant d'une atteinte flagrante au droit international coutumier des immunites, il convient de rappeler l'analyse esquissee des la phase de l'examen de la demande de mesures conservatoires. Au demeurant, la motivation de l'arret semble bien faire ressortir le prejudice juridique ainsi subi. n94

n94 Voir par. 70 et 71.

88. Ainsi que je l'ai indique en la phase de demande de mesures conservatoires, le mandat querelle a cause un prejudice a la diplomatie congolaise. Si son chef a neanmoins pu se deplacer sans entrave dans l'hemisphere sud en vue de participer a des rencontres diplomatiques tendant a mettre un terme au conflit arme au Congo, il n'a pu par contre effectuer de tels deplacements dans d'autres

regions qui comptent beaucoup pour le reglement du conflit. Quand bien meme si l'Etat congolais y a pu etre represente, il l'a ete a un echelon inferieur. La substance des pourparlers de paix au niveau des ministres des affaires etrangeres en a ete affectee en raison de la regle de preseance diplomatique. En fin de compte, les prerogatives de souverainete internationale du Congo ont subi des dommages. n95

n95 Voir aussi: S. Bula-Bula, opinion dissidente jointe a l'ordonnance du 8 decembre 2000, par. 16.

89. En particulier le fonctionnement regulier et continu du service public des affaires etrangeres a pu etre perturbe par cette ingerence politico-judiciaire des lors que son chef a subi une <<quarantaine arbitraire.>> D'autre part, l'emission du mandat a porte atteinte a l'independance politique du Congo. Comme montre plus haut, elle a contraint un Etat faible, davantage affaibli par une agression armee, a modifier malgre lui, selon l'un des conseils du Congo, membre du gouvernement de ce pays, n96 la composition de l'equipe gouvernementale pour plaire a l'Etat defendeur. La Belgique n'a guere conteste cette declaration.

n96 Voir plaidoirie du 22 novembre 2000, CR 2000/34, p. 10.

[*614] 90. Il ne fait pas l'ombre d'un doute que le comportement de la Belgique a discredite le Congo. Il a eu pour effet d'accabler, a priori par un jugement sommaire, un Etat agresse au moment ou les Etats d'Afrique centrale reunis a Libreville (Gabon) le 24 septembre 1998 ont <<condamne l'agression contre la Republique democratique du Congo et les ingerences caracterisees dans les affaires interieures de ce pays.>> n97 Les poursuites penales ainsi intentees contre un organe de cet Etat agresse constituent des accusations infamantes au sein de la <<communaute internationale.>> Elles ont affecte les droits extrapatrimoniaux a l'honneur, a la dignite du peuple congolais represente par son Etat. n98

n97 Voir Le Phare, n<o> 818 du 28 septembre 1988, p. 3.

n98 Voir aussi: S. Bula-Bula, opinion dissidente jointe a l'ordonnance du 8 decembre 2000, par. 17.

91. Que l'Etat defendeur ait, par l'emission, la diffusion et le maintien du mandat d'arret du 11 avril 2000 commis un fait internationalement illicite a ete montre plus haut. Il a opere une rupture de ses engagements internationaux en droit international general.

92. Pour l'heure, me parait tout instructive l'opinion suivante de Paul Guggenheim:

<<Contrairement a une opinion repandue, ce n'est pas seulement au moment ou il est veritablement applique que le droit interne peut violer le droit international. Il y a delit international du fait meme de la promulgation--ou de la non-promulgation--d'une norme generale susceptible d'etre appliquee directement et causant par la meme un dommage. La promulgation d'une norme contraire au droit international donne lieu a des sanctions . . .>> n99

C'est en consequence un argument a fortiori qu'il faudrait appliquer s'agissant du mandat, mesure d'application d'un simple fait, mieux d'une voie de fait, de l'avis d'un conseil du Congo.

n99 Paul Guggenheim, Traite de droit international public, t. I, p. 7-8, cite par Krystyna Marek, <<Les rapports entre le droit international et le droit interne a la lumiere de la jurisprudence de la Cour permanente de Justice internationale,>> Revue generale de droit international public, t. XXXIII, 1962, p. 276.

93. A serrer de plus pres, le mandat belge ne constitue pas en droit international un acte juridique. Comme l'a releve l'un des conseils du Congo, il s'agit d'un fait internationalement illicite. L'opinion selon laquelle: <<Au regard du droit international et de la Cour qui en est l'organe, les lois

nationales sont de simples faits, manifestations de la volonte et de l'activite des Etats, au meme titre que les decisions judiciaires ou les mesures administratives.>> n100 trouve bien sa place ici.

n100 Affaire relative a Certains interets allemands en Haute-Silesie polonaise, fond, arret n<o> 7, 1926, C.P.J.I. serie A n<o> 7, p. 19.

94. D'ou le raisonnement qui tendrait a distinguer d'un cote l'instrumentum et de l'autre cote, le negotium ne vaut pas. L'illiceite ne s'estompe pas parce que l'organe de l'Etat a change. Puisque a travers ledit organe, c'est bien sur l'Etat qui a ete vise. Cela est encore plus manifeste dans le cas d'espece ou plusieurs membres du gouvernement etaient sur la liste dressee par le juge belge, y compris le chef de l'Etat! D'autre part, un mandat illicite n'est pas ipso facto illegal. Tel est precisement le cas ici. De maniere generale, il existe en droit international (droits de l'homme, droit de la mer, etc.) des mesures nationales parfaitement legales, mais qui demeurent illicites. Elles engagent la responsabilite de leurs auteurs. Mais le constat de l'illiceite par un organe international n'emporte pas en lui-meme l'aneantissement de la mesure nationale. C'est a l'Etat transgresseur du droit international qu'incombe l'obligation d'extinction de son acte illicite.

95. Le defendeur a commis une infraction au droit international des immunites des le 11 avril 2000 par l'emission du mandat. Il a, par la suite, confirme son comportement illicite en diffusant ce dernier au plan international. Le fait illicite a ete communique au demandeur le 12 juillet 2000. L'infraction consommee, des le 11 avril 2000, le defendeur s'est evertue, d'apres lui, a tenter de transmettre par voie diplomatique le 15 septembre 2000, le pretendu dossier judiciaire au demandeur. Non seulement il n'a apporte aucune preuve de ce repentir actif mais tardif, par ailleurs conteste par l'un des conseils du Congo; mais encore la tentative de blanchiment du fait illicite repudiee par l'Etat requerant, a bon droit, est denuee de tout effet.

96. Pire, il y a un element majeur qui montre le comportement resolument illicite de la Belgique au cours du proces. Comment qualifier autrement la demande de notice rouge formulee le 12 septembre 2001 par le defendeur? Actionne devant la justice internationale, ce dernier n'arrete pas de poursuivre la mise en oeuvre de son acte unilateral illicite au moyen de la notice rouge. Non seulement la Belgique a ainsi fait preuve de maniere eloquente de manque de bonne foi dans la poursuite de la procedure judiciaire internationale; mais encore, n'a-t-elle pas commis <<un empietement sur les fonctions de la Cour?>> n101

n101 Je m'inspire ainsi de l'avis de M. Tarazi, opinion dissidente jointe a l'arret du 24 mai 1980, affaire du Personnel diplomatique et consulaire des Etats-Unis a Teheran, C.I.J. Recueil 1980, p. 64.

[*615] *

97. Alors que les Etats puissants--notion relative dans le temps et l'espace--ont parfois tendance a invoquer le droit international pour justifier a posteriori leur comportement, les Etats faibles--concept egalement relatif selon les memes facteurs--inclinent souvent a conformer leur conduite au droit international. Puisque ce dernier est leur unique force.

98. Sans egards aux immunites et a l'inviolabilite penales du ministre des affaires etrangeres du Congo, le Royaume de Belgique a emis un mandat d'arret contre cet organe eminent d'un Etat souverain au nom d'allegations de commission de <<crimes internationaux>> lors de l'agression armee du 2 aout 1998 contre le Congo.

99. Non seulement le Congo a demontre a la face de la <<communaute internationale,>> sa qualite de sujet de droit international capable d'ester en

justice; mais encore cet Etat agresse s'est comporte en tant qu'Etat de droit, a savoir une entite respectueuse du droit international.
100. Le peuple congolais, a travers son Etat, a pu ainsi exprimer sa personnalite internationale. Il s'est aussi affirme libre. Sous ce rapport, l'Etat defendeur s'est-il trompe de generation et d'epoque? Lorsqu'en 1989, le gouvernement en place a Kinshasa a envisage de saisir la Cour du contentieux belgo-congolais, son initiative s'est arretee net a l'acceptation de la juridiction obligatoire de celle-ci. Par la suite, il y eut l'accord de Rabat de juin 1989 qui a abasourdi la brouille entre princes. Tel n'est pas le cas aujourd'hui.
101. Alors que M. R. Aron maintenait en 1984 <<l'exemple du Congo suggere que, dans la masse, la conscience tribale l'emporte encore, sur la conscience nationale . . .,>> n102 a la meme periode, Paul Reuter et Jean Combacau n'hesitaient pas a etablir un parallelisme entre le processus de formation de la nation parmi <<des Etats europeens les plus centralises d'aujourd'hui>> et le proces suivi par le Congo en ces termes: <<il en est ainsi d'un Etat africain etendu et peuple comme le Zaire pour lequel la constitution progressive d'une nation zairoise s'etablit quotidiennement aux depens des communautes ethniques dont le destin aurait pu etre different.>> n103 Il nous est apparu qu'<<on sous-estime, pour des raisons inavouees, le vouloir-vivre collectif des Zairois forge par des ans de resistance tantot ouverte, tantot silencieuse, a l'un des regimes politiques les plus feroces qu'ait connu le XX e siecle.>> n104

n102 Raymond Aron, Paix et guerre entre les nations, Paris, Calman-Levy, 1984, p. 389.
n103 Paul Reuter et Jean Combacau, Institutions et relations internationales, Paris, PUF, Coll. Themis, 1988, p. 24.
n104 Sayeman Bula-Bula, <<La doctrine d'ingerence humanitaire revisitee,>> Revue africaine de droit international et compare (Londres), t. 9, n<o> 3, septembre 1997, p. 626, note 109.

102. Comme les deux faces de Janus, l'arret constitue, d'un cote, l'acte de repudiation des relations malsaines dites d'amitie et de cooperation entre un Etat dominateur et un Etat domine, des le lendemain d'une decolonisation baclee; il forme, d'un autre cote, l'acte susceptible de fonder des relations saines, d'amitie et de cooperation durable mutuellement avantageuses entre partenaires souverains lies par l'histoire. Tot ou tard pareils rapports s'instaureront. Mieux vaudrait maintenant. Il faut souhaiter que les Parties, specialement l'Etat defendeur, saisissent la signification profonde de la presente decision. La contribution de la Cour au reglement pacifique du differend aura ete tres feconde. Pourvu que le defendeur adopte une nouvelle vision abandonnant ses conceptions surannees entretenues par des pesanteurs historiques et les rapports de force inegaux. A titre d'exemple, a la veille de la mise en orbite d'un de ces gouvernements inspires par la Belgique, des universitaires conseilleurs de leur pays alerterent ce dernier en ces termes:
<<Si elle ne se met pas en mesure, ne revendique pas, et n'obtient pas de jouer un role determinant dans la revitalisation de l'economie du pays, la Belgique risque l'affaiblissement de son leadership au Zaire et la perte de son principal atout en meme temps que celle de son outil le plus efficace d'expression de politique exterieure. C'est d'abord le Zai re qui nous permet d'emerger sur le plan international et d'etre assis, a maintes occasions, a la table des plus grands.>> n105

n105 Voir Societe nationale d'investissement et administration generale de la cooperation au developpement, Zaire, Secteur des parastataux, reactivation de l'economie. Contribution d'entreprise du portefeuille de l'Etat, rapport realise par M. Moll et J. P. Couvreur et M. Norro, professeurs a l'Universite catholique

de Louvain, Bruxelles, le 29 avril 1994, p. 231.
103. Les Etats africains notamment qui se manifestent de plus en plus comme les plaideurs <<ordinaires>> devant la Court ont des raisons de confier au corps des juristes eminents, independants et integres n106 leurs differends. Je pense ainsi particulierement a des plaintes analogues a celle contre le Congo introduites aupres d'un juge national au cas ou le defendeur poursuivrait sa politique de deux poids, deux mesures. D'autant plus que le grand nombre de dirigeants afro-latino-asiatiques traduits devant la justice belge laisserait croire, a tort, que les violations presumees du droit international humanitaire, notamment les crimes contre la paix, les crimes contre l'humanite et les crimes de guerre constituent le monopole de l'Afrique, l'Amerique latine et l'Asie.
n106 Voir article 2 du Statut de la Cour internationale de Justice.
[*616] 104. C'est la ou la competence dite universelle apparait sous son vrai jour de competence a geometrie variable exercee selectivement contre certains Etats a l'exclusion d'autres. Il ne faut pas etre grand clerc pour constater, a priori, que la rumeur publique sur des violations graves de droits humains ne s'abat pas, a l'echelle mondiale, que sur la brochette de personnalites accusees aupres du juge bruxellois.
105. Sans doute la mission de la Cour consiste a trancher les litiges interetatiques que lui soumettent les parties. Elle ne consiste pas a enseigner le droit. Neanmoins, par le reglement des differends, il peut resulter des enseignements precieux. Au demeurant, des la fin des plaidoiries, l'un des conseils de la Belgique a revise sa copie. L'un des merites de l'arret est d'avoir contribue a l'enseignement du droit international. Les apprehensions que nous avions ainsi exprimees lors de la phase de demande des mesures conservatoires n107 n'ont plus de raison d'etre a ce niveau. C'est un chapitre du droit international des immunites du ministre des affaires etrangeres que vient d'ebaucher la Cour. n108 A ce titre, il enrichit certainement les manuels de droit international public. Intervenant au beau milieu des debats doctrinaux, comme le montrent les travaux de l'Institut de droit international, de la session de Vancouver, en aout 2001, l'arret apporte beaucoup de lumiere sur cette question.
n107 Voir Sayeman Bula-Bula, opinion dissidente jointe a l'ordonnance du 8 decembre 2000 rendue en l'affaire du Mandat d'arret du 11 avril 2000 (Republique democratique du Congo c. Belgique), demande en indication de mesures conservatoires, par. 4.
n108 D'apres Dominique Carreau, Droit international, t. I, Paris, Pedone, 2001, p. 653, la Cour accomplit un <<role majeur>> dans <<le developpement du droit international contemporain.>>
106. La question de <<l'articulation juridique entre la competence dite universelle, et les immunites>> n109 qui suscitait ma curiosite a ete aussi reglee implicitement au profit de celles-ci. n110 Sans prejudice du caractere etabli de la categorie juridique alleguee, hors la competence de repression de certaines violations de dispositions conventionnelles reconnue entre Etats parties.
n109 Sayeman Bula-Bula, opinion dissidente jointe a l'ordonnance du 8 decembre 2000 rendue en l'affaire du Mandat d'arret du 11 avril 2000 (Republique democratique du Congo c. Belgique), demande en indication de mesures conservatoires, par. 7.
n110 Paragraphes 70 et 71 de l'arret.
107. La Cour a etabli l'existence en droit international coutumier des regles relatives a l'immunite et l'inviolabilite penales du ministre des affaires etrangeres. Elle les a appliquees au cas d'espece parce que M. A. Yerodia Ndombasi etait ministre des affaires etrangeres au moment des faits. Puisque le

differend international portait sur des pretentions contradictoires entre les immunites en question et la competence dite universelle, par sa decision, la Cour a implicitement rejete l'allegation de cette competence dans la presente affaire. Elle a ainsi juge la competence dite universelle, si elle etait etablie en droit international, de toute maniere inoperante a l'egard des immunites et de l'inviolabilite penales du ministre des affaires etrangeres, quels que soient les pretendus crimes allegues. Le requerant n'a guere sollicite un arret declaratoire. n111 Il a ete demande a la Cour de trancher un litige concret en disant le droit et en l'appliquant effectivement au differend. Mais, une reflexion generale, abstraite et donc impersonnelle de cette competence controversee et non sollicitee par l'Etat demandeur ne s'imposait pas, n112 encore qu'il aurait ete desirable, a mon avis, que le Congo maintint aussi ce point dans ses demandes finales ecrites et orales. Puisque le demandeur sollicitait que la Cour dise le droit et tranche le litige, ne lui appartenait-il pas de pourchasser tous les alibis possibles, dits universels, humanitaires et autres? Une chose est certaine, le pretexte tire du pretendu inflechissement des immunites a ete rejete dans le dispositif. Tout autre alibi qui s'appuierait sur d'autres bases du <<sans frontierisme>> est aussi virtuellement sanctionne dans les motifs. Face a <<une saine economie judiciaire,>> n113 observee par notre institution, il revenait aux opinions d'<<eclairer en contrepoint la motivation de l'arret,>> de maniere que <<l'on puisse extraire toute la substance de cette decision judiciaire et saisir tout ce qu'elle a apporte a la jurisprudence.>> n114

n111 Voir affaire du Plateau continental de la mer du Nord, C.I.J. Recueil 1969, p. 6 et suiv.

n112 Certains font remonter la <<competence universelle>> au Moyen Age europeen. En cette matiere, il faut peut-etre se garder de prendre pour universel ce qui n'est probablement que regional. Ainsi, selon E. Ogueri II <<the rules of conduct which, for example, governed relations between Ghana and Nigeria in Africa, or between nations in other parts of Africa and Asia, were regarded as universally, recognised customary laws>> avant la colonisation. Voir E. Ogueri II, Intervention, International Law Association Report, session de Varsovie, 1988, p. 969.

n113 Voir Manfred Lachs, opinion individuelle jointe a l'arret du 24 mai 1980 rendu dans l'affaire du Personnel diplomatique et consulaire des Etats-Unis a Teheran, C.I.J. Recueil 1980, p. 47.

n114 Mohammed Bedjaoui, La <<fabrication>> des arrets de la Cour internationale de Justice, Melanges Virally, Paris, Pedone, 1991, p. 105.

108. En definitive, on se rend compte que le Congo semble aussi avoir agi en maniere de <<dedoublement fonctionnel>> de Georges Scelle. Il a intente une action judiciaire internationale non seulement en son nom et pour son compte, mais aussi au profit de la <<communaute internationale.>> N'a-t-elle pas permis a la Cour de reaffirmer et de developper le mecanisme juridique des immunites qui facilite le commerce juridique entre l'universalite des Etats quel que soit l'alibi avance?

109. Il y a fort a parier que l'arret, petit par son volume, mais grand par sa substance juridique, sera accueilli favorablement par la <<communaute internationale.>> Bien entendu, si on entend par la l'ensemble des Etats, des organisations internationales et d'autres entites publiques internationales. Quelles que soient les divergences d'interet, la disparite du niveau de developpement et la diversite des cultures; il y a la un denominateur commun a tous qui a ete reaffirme.

110. La decision devrait aussi interpeller les manipulateurs de l'opinion auxquels doit etre denie le pouvoir de fait d'exploiter, a des fins inavouees,

<<le malheur des autres.>> n115
n115 Voir Bernard Kouchner, Le malheur des autres, Paris, Editions Odile Jacob, 1991 (241 pages).
[*617] 111. Elle devrait enfin appeler a plus de modestie les nouveaux croises de l'integrisme a pretention humanitaire <<habiles a mal poser les problemes pour justifier les odieuses solutions qu'on preconise,>> n116 y compris un certain courant du militantisme juridique. n117
n116 Voir Aime Cesaire, Discours sur le colonialisme, Paris, Presence africaine, 1995, p. 8.
n117 Sur le militantisme juridique, voir J. Combacau et Serge Sur, Droit international public, Paris, Montchrestien, 1993, p. 46; Nguyen Quoc Dinh, Patrick Dallier et Alain Pellet, Droit international public, Paris, LGDJ, 1992, p. 79. Les auteurs discernent un courant occidental du militantisme qui serait represente par l'Anglais Georg Schwarzenberger et les Americains Myres S. McDougal, Richard Falk et M. Reisman ainsi que l'Anglaise Rosalyn Higgins; un courant oriental sans en preciser les auteurs et un courant du vieux monde avec comme figures de proue, entre autres, Mohammed Bedjaoui, George Abi-Saab et Taslim Olawale Elias. A dire vrai, il y a toujours une coloration ideologique, donc militante, dans les travaux de chaque auteur. Pour ne citer que certains, J. Combacau et S. Sur, op. cit., p. XI ont beau avertir le lecteur sur leur choix du <<positivisme juridique>>; ils ne montrent pas moins leur inclination ideologique liberale. Voir par exemple au moment de la reunion du nombre des ratifications requises par la convention sur le droit de la mer, ils speculent encore <<a supposer meme qu'elle entre en vigueur>> (p. 452-453); ainsi que l'affirmation selon laquelle cette convention aurait inverse sur <<des bases purement formelles l'equilibre reel des interets et de la puissance>> (p. 446) ou encore l'affirmation selon laquelle ce texte ne serait pas <<a l'instar des conventions de Geneve de 1958, une convention de codification mais plutot de developpement progressif . . .>> (P. 452.) Voir aussi Nguyen Quoc Dinh et al., op. cit., p. 1093 evoquant <<l'entree en vigueur eventuelle de la convention.>>

(Signe) Sayeman BULA BULA.

[*622] **DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT**

Immunities under customary international law--Not applicable to Minister for Foreign Affairs--Principle of international accountability for war crimes and crimes against humanity--Role of civil society in the formation of opinio juris--Impunity--Extraterritorial jurisdiction for war crimes and crimes against humanity--Universal jurisdiction for such crimes--"Lotus" test applied to such crimes--Prescriptive jurisdiction--Rome Statute for an International Criminal Court--Complementarity principle--Internationally wrongful act--Enforcement jurisdiction--(International) arrest warrants--Remedies before the International Court of Justice--Abuse of immunities and Pandora's box.

CONTENTS

I. INTRODUCTORY OBSERVATIONS [ILM Page 623]
II. IMMUNITIES [ILM Page 624]
1. There is no rule of customary international law granting immunity to incumbent Foreign Ministers [ILM Page 625]
2. Incumbent Foreign Ministers are not immune from the jurisdiction of other States when charged with war crimes and crimes against humanity [ILM Page 628]
(a) The distinction between immunity as a procedural defence and immunity as a substantive defence is [ILM Page 630]

not relevant for the purposes of this dispute
(b) The Court's proposition that immunity does not necessarily lead to impunity is wrong [ILM Page 631]
3. Conclusion [ILM Page 633]
III. UNIVERSAL JURISDICTION [ILM Page 633]
1. Universal jurisdiction for war crimes and crimes against humanity is compatible with the "Lotus" test [ILM Page 635]
(a) International law does not prohibit universal jurisdiction for war crimes and crimes against humanity [ILM Page 636]
(b) International law permits universal jurisdiction for war crimes and crimes against humanity [ILM Page 637]
2. Universal jurisdiction is not contrary to the complementarity principle in the Statute for an International Criminal Court [ILM Page 638]
3. Conclusion [ILM Page 639]
IV. EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT [ILM Page 639]
1. The issuance of the disputed arrest warrant in Belgium was not in violation of international law [ILM Page 640]
2. The international circulation of the disputed arrest warrant was not in violation of international law [ILM Page 641]
3. Conclusion [ILM Page 642]
V. REMEDIES [ILM Page 642]
VI. FINAL OBSERVATIONS [ILM Page 643]

[*623] **I. INTRODUCTORY OBSERVATIONS**

1. I have voted against paragraphs (2) and (3) of the dispositif of this Judgment. International law grants no immunity from criminal process to incumbent Foreign Ministers suspected of war crimes and crimes against humanity. There is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international legal obligation (Judgment, para. 78(2)). Surely, the warrant based on charges of war crimes and crimes against humanity, cannot infringe rules on immunity today, given the fact that Mr. Yerodia has now ceased to be a Foreign Minister and has become an ordinary citizen. Therefore, the Court is wrong when it finds, in the last part of its dispositif, that Belgium must cancel the arrest warrant and so inform the authorities to which the warrant was circulated (Judgment, para. 78(3)).
I will develop the reasons for this dissenting view below. Before doing so, I wish to make some general introductory observations.

2. The case was about an arrest warrant based on acts allegedly committed by Mr. Yerodia in 1998 when he was not yet a Minister. These acts included various speeches inciting racial hatred, particularly virulent remarks, allegedly having the effect of inciting the population to attack Tutsi residents in Kinshasa, dragnet searches, manhunts and lynchings. Following complaints of a number of victims who had fled to Belgium, a criminal investigation was initiated in 1998, which eventually, in April 2000, led to the arrest warrant against Mr. Yerodia, who had meanwhile become a Minister for Foreign Affairs in the Congo. This warrant was not enforced when Mr. Yerodia visited Belgium on an official visit in June 2000, and Belgium, although it circulated the warrant internationally via an Interpol Green Notice, did not request Mr. Yerodia's extradition as long

as he was in office. The request for an Interpol Red Notice was only made in 2001, after Mr. Yerodia had ceased to be a Minister.

3. Belgium has, at present, very broad legislation that allows victims of alleged war crimes and crimes against humanity to institute criminal proceedings in its courts. This triggers negative reactions in some circles, while inviting acclaim in others. Belgium's conduct (by its Parliament, judiciary and executive powers) may show a lack of international courtesy. Even if this were true, it does not follow that Belgium actually violated (customary or conventional) international law. Political wisdom may command a change in Belgian legislation, as has been proposed in various circles. n1 Judicial wisdom may lead to a more restrictive application of the present statute, and may result from proceedings that are pending before the Belgian courts. n2 This does not mean that Belgium has acted in violation of international law by applying it in the case of Mr. Yerodia. I see no evidence for the existence of such a norm, not in conventional or in customary international law for the reasons set out below. n3

n1 The Belgian Foreign Minister, the Belgian Minister of Justice, and the Chairman of the Foreign Affairs Commission House of Representatives, have made public statements in which they called for a revision of the Belgian Act of 1993/1999. The Government referred the matter to the Parliament, where a bill was introduced in Dec. 2001 (Proposition de loi modifiant, sur le plan de la procedure, la loi du 16 juin 1993 relative a la repression des violations graves du droit international humanitaire, Doc. Parl. Chambre 2001-2002, No. 1568/001, available at http://www.lachambre.be/documents_parlementaires.html).

n2 A. Winants, Le Ministere Public et le droit penal international, Discours prononce a l'occasion de l'audience solennelle de rentree de la Cour d'Appel de Bruxelles du 3 septembre 2001, p. 45.

n3 Infra, paras. 11 et seq.

4. The Judgment is shorter than expected because the Court, which was invited by the Parties to narrow the dispute, did not decide the question of (universal) jurisdiction, and has only decided the question of immunity from jurisdiction, even though, logically the question of jurisdiction would have preceded that of immunity. n4 In addition, the Judgment is very brief in its reasoning and analysis of the arguments of the Parties. Some of these arguments were not addressed, others in a very succinct manner, certainly in comparison with recent judgments of national n5 and international courts n6 on issues that are comparable to those that were before the International Court of Justice.

n4 See further infra, para. 41.

n5 Prominent examples are the Pinochet cases in Spain and the United Kingdom (Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdiccion de Espana para conocer de los crimenes de genocidio y terrorismo cometidos durante la dictadura chilena, 5 Nov. 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html; R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ungarte, 24 Mar. 1999, All. ER (1999), p. 97), the Qaddafi case in France (Cour de Cassation, 13 Mar. 2001, http://courdecassation.fr/agenda/arrets/arrets/00-87215.htm) and the Bouterse case in the Netherlands (Hof Amsterdam, nr. R 97/163/12 Sv and R 97/176/12 Sv, 20 Nov. 2000; Hoge Raad, Strafkamer, Zaaknr. 00749/01 CW 2323, 18 Sep. 2001, http://www.rechtspraak.nl).

n6 ECHR (European Commission of Human Rights), Al-Adsani v. United Kingdom, 21 Nov. 2001, http://www.echr.coe.int.

[*624] 5. This case was to be a test case, probably the first opportunity for the International Court of Justice to address a number of questions that have not been considered since the famous "Lotus" case of the Permanent Court of

International Justice in 1927. n7
n7 "Lotus," Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.
In technical terms, the dispute was about an arrest warrant against an incumbent Foreign Minister. The warrant was, however, based on charges of war crimes and crimes against humanity, which the Court even fails to mention in the dispositif. In a more principled way, the case was about how far States can or must go when implementing modern international criminal law. It was about the question what international law requires or allows States to do as "agents" of the international community when they are confronted with complaints of victims of such crimes, given the fact that international criminal courts will not be able to judge all international crimes. It was about balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities.
6. The Court has not addressed the dispute from this perspective and has instead focused on the very narrow question of immunities of incumbent Foreign Ministers. In failing to address the dispute from a more principled perspective, the International Court of Justice has missed an excellent opportunity to contribute to the development of modern international criminal law.
Yet international criminal law is becoming a very important branch of international law. This is manifested in conventions, in judicial decisions of national courts, international criminal tribunals and of international human rights courts, in the writings of scholars and in the activities of civil society. There is a wealth of authority on concepts such as universal jurisdiction, immunity from jurisdiction and international accountability for war crimes and crimes against humanity. n8 It is surprising that the International Court of Justice does not use the term international criminal law and does not acknowledge the existence of these authorities.
n8 See further infra, footnote 98.
7. Although, as a matter of logic, the question of jurisdiction comes first, n9 I will follow the chronology of the reasoning of the Judgment and deal with immunities first.
n9 Infra, para. 41.

II. IMMUNITIES

8. The Court starts by observing that, in the absence of a general text defining the immunities of Ministers for Foreign Affairs, it is on the basis of customary international law that it must decide the questions relating to the immunities of Ministers for Foreign Affairs raised by the present case (Judgment, para. 52 in fine). It immediately continues by stating that "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States" (Judgment, para. 53). The Court then compares the functions of Foreign Ministers with those of Ambassadors and other diplomatic agents on the one hand, and those of Heads of State and Heads of Governments on the other, whereupon it reaches the following conclusion (Judgment, para. 54):
"The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."

9. On the other hand, the Court, looking at State practice in the field of war crimes and crimes against humanity (Judgment, para. 58), decides that:
"It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to [*625] incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."
10. I disagree with the reasoning of the Court, which can be summarized as follows: (a) there is a rule of customary international law granting "full" immunity to incumbent Foreign Ministers (Judgment, para. 54), and (b) there is no rule of customary international law departing from this rule in the case of war crimes and crimes against humanity (Judgment, para. 58). Both propositions are wrong.
First, there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity.
Secondly, international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.
Consequently, Belgium has not violated an obligation under international law by issuing and internationally circulating the arrest warrant against Mr. Yerodia.
I will explain the reasons for this conclusion in the following two paragraphs.

1. There is no rule of customary international law granting immunity to incumbent Foreign Ministers

11. I disagree with the proposition that incumbent Foreign Ministers enjoy immunities on the basis of customary international law for the simple reason that there is no evidence in support of this proposition. Before reaching this conclusion, the Court should have examined whether there is a rule of customary international law to this effect. It is not sufficient to compare the rationale for the protection from suit in the case of diplomats, Heads of State and Foreign Ministers to draw the conclusion that there is a rule of customary international law protecting Foreign Ministers: identifying a common raison d'etre for a protective rule is one thing, elevating this protective rule to the status of customary international law is quite another thing. The Court should have first examined whether the conditions for the formation of a rule of customary law were fulfilled in the case of incumbent Foreign Ministers. In a surprisingly short decision, the Court immediately reaches the conclusion that such a rule exists. A more rigorous approach would have been highly desirable.
12. In the brevity of its reasoning, the Court disregards its own case law on the subject on the formation of customary international law. In order to constitute a rule of customary international law, there must be evidence of state practice (usus) and opinio juris to the effect that this rule exists.
In one of the leading precedents on the formation of customary international law, the Continental Shelf case, the Court stated the following:
"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the

acts is not in itself enough. There are many international acts, e.g., in the field of ceremony and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty." n10

In the Nicaragua case, the Court held that:

"Bound as it is by Article 38 of its Statute to apply, inter alia, international custom 'as evidence of a general practice accepted as law,' the Court may not disregard the essential role played by general [*626] practice . . . The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice." n11

n10 North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 44, para. 77.

n11 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 97-98.

13. In the present case, there is no settled practice (usus) about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current n12 or former Heads of State n13 in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions. n14 Why this is so is a matter of speculation. The question, however, is what to infer from this "negative practice." Is this the expression of an opinio juris to the effect that international law prohibits criminal proceedings or, concomitantly, that Belgium is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

n12 Cour de Cassation (Fr.), 13 Mar. 2001 (Qaddafi).

n13 R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ungarte, 25 Nov. 1998, All. ER (1998), p. 897.

n14 Only one case has been brought to the attention of the Court: Chong Boon Kim v. Kim Yong Shik and David Kim, Circuit Court (First Circuit), 9 Sep. 1963, AJIL 1964, pp. 186-187. This case was about an incumbent Foreign Minister against whom process was served while he was on an official visit in the United States (see para. 1 of the "Suggestion of Interest Submitted on behalf of the United States," ibid.). Another case where immunity was recognised, not of a Minister but of a prince, was in the case of Kilroy v. Windsor (Prince Charles, Prince of Wales), District Court, 7 Dec. 1978, International Law Reports, Vol. 81, 1990, pp. 605-607. In that case, the judge observes:

"The Attorney-General . . . has determined that the Prince of Wales is immune from suit in this matter and has filed a 'suggestion of immunity' with the Court . . . The doctrine, being based on foreign policy considerations and the Executive's desire to maintain amiable relations with foreign States, applies with even more force to live persons representing a foreign nation on an official visit." (Emphasis added.)

A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an opinio juris. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction. n15 Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law. An important precedent is the 1927 "Lotus" case, where the French Government argued that there was a rule of customary international law to the effect that Turkey was not entitled to institute criminal proceedings with regard to offences committed by foreigners abroad. n16 The Permanent Court of International Justice rejected this argument and held:

"Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom." n17

n15 In some States, for example, the United States, victims of extraterritorial human rights abuses can bring civil actions before the Courts. See, for example, the Karadzic case (*Kadic v. Karadzic, 70 F. 3d 232 (2d Cir. 1995)*). There are many examples of civil suits against incumbent or former Heads of State, which often arose from criminal offences. Prominent examples are the Aristeguieta case (Jimenez v. Aristeguieta, ILR 1962, p. 353), the Aristide case (Lafontant v. Aristide, WL 20798 (EDNY), noted in AJIL 1994, pp. 528-532), the Marcos cases (Estate of Silme G. Domingo v. Ferdinand Marcos, No. C82-1055V, AJIL 1983, p. 305: Republic of the Philippines v. Marcos and Others (1986), ILR 81, p. 581 and Republic of the Philippines v. Marcos and others, 1987, 1988, ILR 81, pp. 609 and 642) and the Duvalier case (Jean-Juste v. Duvalier, No. 86-0459 Civ (US District Court, SD Fla.), AJIL 1988, p. 594), all mentioned and discussed by Watts (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," Recueil des Cours de l'Academie de droit international, 1994, III, pp. 54 et seq.). See also the American 1996 Antiterrorism and Effective Death Penalty Act which amended the Foreign Sovereign Immunities Act (FSIA), including a new exception to State immunity in case of torture for civil claims. See J. F. Murphy, "Civil liability for the Commission of International Crimes as an Alternative to Criminal Prosecution," Harvard Human Rights Journal, 1999, pp. 1-56.

n16 See also infra, para. 48.

n17 "Lotus," supra, footnote 7, p. 28. For a commentary, see McGibbon, "Customary international law and acquiescence," BYBIL, 1957, p. 129.

14. In the present case, the Judgment of the International Court of Justice proceeds from a mere analogy with immunities for diplomatic agents and Heads of State. Yet, as Sir Arthur Watts observes in his lectures published in the Recueil des Cours de l'Academie de droit international on the legal position in international law of Heads of States, Heads of Governments and Foreign Ministers: "analogy is not always a reliable basis on which to build rules of law." n18 Professor Joe Verhoeven, in his report on the same subject for the Institut de droit international likewise makes the point that courts and legal writers, while comparing the different categories, usually refrain from making "une analogie pure et simple." n19

n18 A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," Recueil des Cours de l'Academie de droit international 1994, III, p. 40.

n19 J. Verhoeven, "L'immunite de juridiction et d'execution des chefs d'Etat et anciens chefs d'Etat," Report of the 13th Commission of the Institut de droit international, p. 46, para. 18.

15. There are fundamental differences between the circumstances of diplomatic agents, Heads of State and Foreign Ministers. The circumstances of diplomatic agents are comparable, but not the same as those of Foreign Ministers. Under the 1961 Vienna Convention on Diplomatic Relations, n20 diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State. However, diplomats reside and exercise their functions on the territory of the receiving States whereas Ministers normally reside in the State where they exercise their functions. Receiving States may decide whether or not to accredit foreign

diplomats and may always declare them persona non grata. Consequently, they have a "say" in what persons they accept as a representative of the other State. n21 They do not have the same opportunity vis-a-vis Cabinet Ministers, who are appointed by their governments as part of their sovereign prerogatives.

n20 Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, United Nations, Treaty Series (UNTS), Vol. 500, p. 95.

n21 See, for example, the Danish hesitations concerning the accreditation of a new ambassador for Israel in 2001, after a new government had come to power in that State: The Copenhagen Post, 29 July 2001; The Copenhagen Post, 31 July 2001; The Copenhagen Post, 24 Aug. 2001 and "Prosecution of New Ambassador?," The Copenhagen Post, 7 Nov. 2001 (all available on the Internet: http://cphpost.periskop.dk).

16. Likewise, there may be an analogy between Heads of State, who probably enjoy immunity under customary international law, n22 and Foreign Ministers. But the two cannot be assimilated for the only reason that their functions may be compared. Both represent the State, but Foreign Ministers do not "impersonate" the State in the same way as Heads of State, who are the State's alter ego. State practice concerning immunities of (incumbent and former) Heads of State n23 does not, per se, apply to Foreign Ministers. There is no State practice evidencing an opinio juris on this point.

n22 In civil and administrative proceedings this immunity is, however, not absolute. See A. Watts, op. cit., pp. 36 and 54. See also supra, footnote 15.

n23 See supra, footnotes 12 and 13.

[*627] 17. Whereas the International Law Commission (ILC), in its mission to codify and progressively develop international law, has managed to codify customary international law in the case of diplomatic and consular agents, n24 it has not achieved the same result regarding Heads of State or Foreign Ministers. It is noteworthy that the International Law Commission's Special Rapporteur on Jurisdictional Immunities of States and their Property, in his 1989 report, expressed the view that privileges and immunities enjoyed by Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law. n25 This, according to Sir Arthur Watts, may explain why doubts as to the extent of jurisdictional immunities of Heads of Government and Foreign Ministers under customary international law have survived in the final version of the International Law Commission's 1991 Draft Articles on Jurisdictional Immunities of States and their Property, n26 which in Article 3, paragraph 2, only refer to Heads of State, not to Foreign Ministers.

n24 Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, UNTS, Vol. 500, p. 95 and Convention on Consular Relations, Vienna, 24 Apr. 1963, UNTS, Vol. 596, p. 262.

n25 YILC 1989, Vol. II (2), Part 2, para. 146.

n26 A. Watts, op. cit., p. 107.

In the field of the criminal law regarding international core crimes such as war crimes and crimes against humanity, the International Law Commission clearly adopts a restrictive view on immunities, which is reflected in Article 7 of the 1996 Draft Code of Offences against the Peace and Security of Mankind. These Articles are intended to apply, not only to international criminal courts, but also to national authorities exercising jurisdiction (Art. 8 of the Draft Code) or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes (Art. 9 of the Draft Code). I will further develop this when addressing the problem of immunities for incumbent Foreign Ministers charged with war crimes and crimes against humanity. n27

n27 See infra, paras. 24 et seq. and particularly para. 32.

18. The only text of conventional international law, which may be of relevance

to answer this question of the protection of Foreign Ministers, is the 1969 Convention on Special Missions. n28 Article 21 of this Convention clearly distinguishes between Heads of State (para. 1) and Foreign Ministers (para. 2): "1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law . . .
2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."
Legal opinion is divided on the question to what extent this Convention may be considered a codification of customary international law. n29 This Convention has not been ratified by the Parties to the dispute. It links the "facilities, privileges and immunities" of Foreign Ministers' official visits (when they take part in a special mission of the sending State). There may be some political wisdom in the proposition that a Foreign Minister should be accorded the same privileges and immunities as a Head of State, but this may be a matter of courtesy, and does not necessarily lead to the conclusion that there is a rule of customary international law to this effect. It certainly does not follow from the text of the Special Missions Convention. Applying this to the dispute between the Democratic Republic of the Congo and Belgium, the only conclusion that follows from the Special Missions Convention, were it to be applicable between the two States concerned, is that an arrest warrant against an incumbent Foreign Minister cannot be enforced when he is on an official visit (immunity from execution). n30
n28 United Nations Convention on Special Missions, New York, 16 Dec. 1969, Ann. to UNGA res. 2530 (XXIV) of 8 Dec. 1969.
n29 J. Salmon observes that the limited number of ratifications of the Convention can be explained because of the fact that the Convention sets all special missions on the same footing, according the same privileges and immunities to Heads of State on a official visit and to the members of an administrative commission which comes negotiating over technical issues. See J. Salmon, Manuel de droit diplomatique, Brussels, Bruylant, 1994, p. 546.
n30 See also infra, para. 75 (inviolability).
19. Another international Convention that mentions Foreign Ministers is the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. n31 This Convention indeed defines "internationally protected persons" so as to include Heads of State, Heads of Government and Foreign Ministers and other representatives of the State, and may hereby create the impression that the different categories mentioned can be assimilated (Art. 1). This assimilation, however, is not relevant for the purposes of the present dispute. The 1973 Convention is not about immunities from criminal proceedings in another State, but about the protection of the high foreign officials it enumerates when they are victims of certain acts of terrorism such as murder, kidnapping or other attacks on their person or liberty (Art. 2). It is not about procedural protections for these persons when they are themselves accused of being perpetrators of war crimes and crimes against humanity.
n31 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, New York, 14 Dec. 1973, 78 UNTS, p. 277.
[*628] 20. There is hardly any support in legal doctrine for the International Court of Justice's postulated analogy between Foreign Ministers and Heads of State on the subject of immunities. Oppenheim and Lauterpacht write: "members of a Government have not the exceptional position of Heads of States . . . ." n32

This view is shared by A. Cavaglieri, n33 P. Cahier, n34 J. Salmon, n35 B. S. Murty n36 and J. S. Erice Y. O'Shea. n37

n32 L. Oppenheim, and H. Lauterpacht, (eds.), International Law, a Treatise, Vol. I, 1955, p. 358. See also the 1992 Edition (by Jennings and Watts) at p. 1046.

n33 A. Cavaglieri, Corso di Diritto Internazionale, Second Edition, pp. 321-322.

n34 P. Cahier, Le droit diplomatique contemporain, 1964, pp. 359-360.

n35 J. Salmon, Manuel de droit diplomatique, 1994, p. 539.

n36 B. S. Murty, The International Law of Diplomacy, 1989, pp. 333-334.

n37 J. S. de Erice Y O'Shea, Derecho Diplomatico, 1954, pp. 377-378.

Sir Arthur Watts is adamant in observing that principle "suggests that a head of government or Foreign Minister who visits another State for official purposes is immune from legal process while there." n38 Commenting further on the question of "private visits," he writes:

"Although it may well be that a Head of State, when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same is true of heads of governments and foreign ministers. Although they may be accorded certain special treatment by the host State, this is more likely to be a matter of courtesy and respect for the seniority of the visitor, than a reflection of any belief that such a treatment is required by international law." n39

n38 A. Watts, op. cit., p. 106 (emphasis added). See also p. 54 "So far as concerns criminal proceedings, a Head of State's immunity is generally accepted as being absolute, as it is for ambassadors, and as provided in Article 31 (1) of the Convention on Special Missions for Heads of States coming within its scope."

n39 A. Watts, op. cit., pp. 109.

21. More recently, the Institut de droit international, at its 2001 Vancouver session, addressed the question of the immunity of Heads of State and Heads of Government. The draft resolution explicitly assimilated Heads of Government and Foreign Ministers with Heads of State in Article 14, entitled "Le Chef de gouvernement et le ministre des Affaires etrangeres." This draft Article does not appear in the final version of the Institut de droit international resolution. The final resolution only mentions Heads of Government, not Foreign Ministers. The least one can conclude from this difference between the draft resolution and the final text is that the distinguished members of the Institut considered, but did not decide to place Foreign Ministers on the same footing as Heads of State. n40

n40 See the Report of J. Verhoeven, supra, footnote 19 (draft resolutions) and the final resolutions adopted at the Vancouver meeting on 26 Aug. 2001 (publication in the Yearbook of the Institute forthcoming). See further H. Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government," ICLQ 2002, p. 119-125.

The reasons behind the final version of the resolution are not clear. It may or may not reflect the Institut de droit international's view that there is no customary international law rule that assimilates Heads of State and Foreign Ministers. Whatever may be the Institut de droit international's reasons, it was a wise decision. Proceeding to assimilations of the kind proposed in the draft resolution would dramatically increase the number of persons that enjoy international immunity from jurisdiction. There would be a potential for abuse. Male fide governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States.

22. Victims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction. Today, they

may, by virtue of the application of the principle contained in Article 21 of the 1969 Special Missions Convention, n41 face the obstacle of immunity from execution while the Minister is on an official visit, but they would not be barred from bringing an action altogether. Taking immunities further than this may even lead to conflict with international human rights rules as appears from the recent Al-Adsani case of the European Court of Human Rights. n42

n41 Supra, para. 18.

n42 ECHR, Al-Adsani v. United Kingdom, 21 Nov. 2001, http://www.echr.coe.int. In that case, the Applicant, a Kuwaiti/British national, claimed to have been the victim of serious human rights violations (torture) in Kuwait by agents of the Government of Kuwait. In the United Kingdom, he complained about the fact that he had been denied access to court in Britain because the courts refused to entertain his complaint on the basis of the 1978 State Immunity Act. Previous cases before the ECHR had usually arisen from human rights violations committed on the territory of the respondent State and related to acts of torture allegedly committed by the authorities of the respondent State itself, not by the authorities of third States. Therefore, the question of international immunities did not arise. In the Al-Adsani case, the alleged human rights violation was committed abroad, by authorities of another State and so the question of immunity did arise. The ECHR (with a 9/8 majority), has rejected Mr. Al-Adsani's application and held that there has been no violation of Article 6, paragraph 1, of the Convention (right of access to court). However, the decision was reached with a narrow majority (9/8 and 8 dissenting opinions) and was itself very narrow: it only decided the question of immunities in a civil proceeding, leaving the question as to the application of immunities in a criminal proceeding unanswered. Dissenting judges, Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic and also Loucaides read the decision of the majority as implying that the court would have found a violation had the proceedings in the United Kingdom been criminal proceedings against an individual for an alleged act of torture (para. 60 of the judgment, as interpreted by the dissenting judges in para. 4 of their opinion).

23. I conclude that the International Court of Justice, by deciding that incumbent Foreign Ministers enjoy full immunity from foreign criminal jurisdiction (Judgment, para. 54), has reached a conclusion which has no basis in positive international law. Before reaching this conclusion, the Court should have satisfied itself of the existence of usus and opinio juris. There is neither State practice nor opinio juris establishing an international custom to this effect. There is no treaty on the subject and there is no legal opinion in favour of this proposition. The Court's conclusion is reached without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the par in parem principle has become more and more restricted and deprived of its mystique, n43 but also in the field of criminal law, when there are allegations of serious international crimes. n44 Belgium may have acted contrary to international comity, but has not infringed international law. The Judgment is therefore based on flawed reasoning.

n43 Supra, footnote 22.

n44 Infra, paras. 24 et seq.

2. Incumbent Foreign Ministers are not immune from the jurisdiction of other States when charged with war crimes and crimes against humanity

24. On the subject of war crimes and crimes against humanity, the Court reaches the following decision: it holds that it is unable to decide that there exists under customary international law any form of exception to the rule [*629] according immunity from criminal process and inviolability to incumbent

Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity (Judgment, para. 58, first alinea).
It goes on by observing that there is nothing in the rules concerning the immunity or the criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals that enables it to find that such an exception exists under customary international law before national criminal tribunals (Judgment, para. 58, second alinea).
This immunity, it concludes, "remain[s] opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions" (Judgment, para. 59 in fine).
25. I strongly disagree with these propositions. To start with, as set out above, the Court starts from a flawed premise, assuming that incumbent Foreign Ministers enjoy full immunity from jurisdiction under customary international law. This premise taints the rest of the reasoning. It leads to another flaw in the reasoning: in order to "counterbalance" the postulated customary international law rule of "full immunity," there needs to be evidence of another customary international law rule that would negate the first rule. It would need to be established that the principle of international accountability has also reached the status of customary international law.
The Court finds no evidence for the existence of such a rule in the limited sources it considers n45 and concludes that there is a violation of the first rule, the rule of immunity.
n45 In para. 58 of the Judgment, the Court only refers to instruments that are relevant for international criminal tribunals (the statutes of the Nuremberg and the Tokyo tribunals, statutes of the ad hoc criminal tribunals and the Rome Statute for an International Criminal Court). But there are also other instruments that are of relevance, and that refer to the jurisdiction of national tribunals. A prominent example is Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946. See also Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind.
26. Immunity from criminal process, the International Court of Justice emphasizes, does not mean the impunity of a Foreign Minister for crimes that he may have committed, however serious they may be. It goes on by making two points showing its adherence to this principle: (a) jurisdictional immunity, being procedural in nature, is not the same as criminal responsibility, which is a question of substantive law and the person to whom jurisdictional immunity applies is not exonerated from all criminal responsibility (Judgment, para. 60); (b) immunities enjoyed by an incumbent Foreign Minister under international law do not represent a bar to criminal prosecution in four sets of circumstances, which the Court further examines (Judgment, para. 61).
This is a highly unsatisfactory rebuttal of the arguments in favour of international accountability for war crimes and crimes against humanity, which moreover disregards the higher order of the norms that belong to the latter category. I will address both points in the next two subparagraphs below. Before doing so, I wish to make a general comment on the approach of the Court.
27. Apart from being wrong in law, the Court is wrong for another reason. The more fundamental problem lies in its general approach, that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes. The Court does not completely ignore this, but it takes an extremely minimalist approach by adopting a very narrow interpretation of the "no immunity-clauses" in

international instruments.
Yet, there are many codifications of this principle in various sources of law, including the Nuremberg Principles n46 and Article IV of the Genocide Convention. n47 In addition, there are several United Nations resolutions n48 and reports n49 on the subject of international accountability for war crimes and crimes against humanity.
n46 Nuremberg Principles, Geneva, 29 July 1950, UNGAOR, 5th Session, Supp. No. 12, United Nations doc. A/1316 (1950).
n47 Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 Dec. 1948, UNTS, Vol. 78, p. 277. See also Art. 7 of the Nuremberg Charter (Charter of the International Military Tribunal, London, 8 Aug. 1945, UNTS, Vol. 82, p. 279); Art. 6 of the Tokyo Charter (Charter of the Military Tribunal for the Far East, Tokyo, 19 Jan. 1946, TIAS, No. 1589); Art. II (4) of the Control Council Law No. 10 (Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Berlin, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946); Art. 7, para. 2, of the ICTY Statute (Statute of the International Tribunal for the Former Yugoslavia, New York, 25 May 1993, ILM 1993, p. 1192); Art. 6, para. 2, of the ICTR Statute (Statute of the International Tribunal for Rwanda, New York, 8 Nov. 1994, ILM 1994, p. 1598); Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind (Draft Code of Crimes against the Peace and Security of Mankind, Geneva, 5 July 1996, YILC 1996, Vol. II (2)) and Art. 27 of the Rome Statute for an International Criminal Court (Statute of the International Criminal Court, Rome, 17 July 1998, ILM 1998, p. 999).
n48 See, for example, Sub-Commission on Human Rights, Res. 2000/24, Role of Universal or Extraterritorial Competence in Preventive Action against Impunity, 18 Aug. 2000, E/CN.4/SUB.2/RES/2000/24; Commission on Human Rights, Res. 2000/68, Impunity, 27 Apr. 2000, E/CN.4/RES/2000/68; Commission on Human Rights, Res. 2000/70, Impunity, 25 Apr. 2001, E/CN.4/RES/2000/70 (taking note of Sub-Commission Res. 2000/24).
n49 Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, 2 Oct. 1997, E/CN.4/Sub.2/1997/20/Rev.1; Commission on Human Rights, Civil and political rights, including the questions of: independence of the judiciary, administration of justice, impunity, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission res. 1999/33, E/CN.4/2000/62.
In legal doctrine, there is a plethora of recent scholarly writings on the subject. n50 Major scholarly organizations, including the International Law Association n51 and the Institut de droit international have adopted resolutions n52 and newly established think tanks, such as the drafters of the "Princeton principles" n53 and of the "Cairo principles" n54 have made statements on the issue. Advocacy organizations, such as Amnesty International, n55 Avocats sans Frontieres, n56 Human Rights Watch, The International Federation of Human Rights Leagues (FIDH) and the International Commission of Jurists, n57 have taken clear positions on the subject of international accountability. n58 This may be seen as the opinion of civil society, an opinion that cannot be completely discounted in the formation of customary [*630] international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions. n59 Well-known examples are the 1968 Convention

on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, n60 which can be traced back to efforts of the International Association of Penal law, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, probably triggered by Amnesty International's Campaign against Torture, the 1997 Treaty banning Landmines, n61 to which the International Campaign to Ban Landmines gave a considerable impetus n62 and the 1998 Statute for the International Criminal Court, which was promoted by a coalition of non-governmental organizations.

n50 See infra, footnote 98.

n51 International Law Association (Committee on International Human Rights Law and Practice), Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences, 2000.

n52 See also the Institut de droit international's Resolution of Santiago de Compostela, 13 Sep. 1989, commented by G. Sperduti, "Protection of human rights and the principle of non-intervention in the domestic concerns of States. Rapport provisoire," Yearbook of the Institute of International Law, Session of Santiago de Compostela, 1989, Vol. 63, Part I, pp. 309-351.

n53 Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction, 23 July 2001, with a foreword by Mary Robinson, United Nations High Commissioner for Human Rights, http://www.princeton.edu/lapa/unive_jur.pdf. See M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," Virginia Journal of International Law, 2001, Vol. 42, pp. 1-100.

n54 Africa Legal Aid (AFLA), Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective, Cairo, 31 July 2001, http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm.

n55 Amnesty International, Universal Jurisdiction. The Duty of States to Enact and Implement Legislation, Sep. 2001, AI Index IOR 53/2001.

n56 Avocats sans frontieres, "Debat sur la loi relative a la repression des violations graves de droit international humanitaire," discussion paper of 14 Oct. 2001, available on http://www.asf.be.

n57 K. Roth, "The Case For Universal Jurisdiction," Foreign Affairs, Sep./Oct. 2001, responding to an article written by an ex Minister of Foreign Affairs in the same review (Henry Kissinger, "The Pitfalls of Universal Jurisdiction," Foreign Affairs, July/Aug. 2001).

n58 See the joint Press Report of Human Rights Watch, the International Federation of Human Rights Leagues and the International Commission of Jurists, "Rights Group Supports Belgium's Universal Jurisdiction Law," 16 Nov. 2000, available at http://www.hrw.org/press/2000/11/world-court.htm or http://www.icj.org/press/press01/english/belgium11.htm. See also the efforts of the International Committee of the Red Cross in promoting the adoption of international instruments on international humanitarian law and its support of national implementation efforts (http://www.icrc.org/eng/advisory_service_ihl; http://www.icrc.org/eng/ihl).

n59 M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," Virginia Journal of International Law, 2001, Vol. 42, p. 92.

n60 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 Nov. 1968, ILM 1969, p. 68.

n61 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Oslo, 18 Sep. 1997, ILM 1997, p. 1507.

n62 The International Campaign to Ban Landmines (ICBL) is a coalition of

non-governmental organisations, with Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians for Human Rights, and Vietnam Veterans of America Foundation as founding members.

28. The Court fails to acknowledge this development, and does not discuss the relevant sources. Instead, it adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the--wrongly postulated--rule of immunity for incumbent Ministers under customary international law (Judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity). By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the Pinochet case n63 and the European Court of Human Rights in the Al-Adsani case, n64 have given more thought and consideration to the balancing of the relative normative status of international ius cogens crimes and immunities.

n63 R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ungarte, 24 Mar. 1999, All. ER (1999), p. 97.

n64 Al-Adsani case: ECHR, Al-Adsani v. United Kingdom, 21 Nov. 2001, http://www.echr.coe.int.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes? n65 Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are ius cogens crimes, n66 which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of ius cogens. n67

n65 See American Law Institute, Restatement of the Law Third. The Foreign Relations Law of the United States, St. Paul, Minn., American Law Institute Publishers, Vol. 1, para. 404, Comment; M. C. Bassiouni, Crimes Against Humanity in International Criminal Law, The Hague, Kluwer Law International, 1999, p. 610; T. Meron, Human Rights and Humanitarian Norms As Customary Law, Oxford, Clarendon Press, 1989, p. 263; T. Meron, "International Criminalization of Internal Atrocities," AJIL 1995, p. 558; A. H. J. Swart, De berechting van internationale misdrijven, Deventer, Gouda Quint, 1996, p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, Tadic, paras. 96-127 and 134 (common Art. 3).

n66 M. C. Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," 59 Law and Contemporary Problems, 1996, pp. 63-74; M. C. Bassiouni, Crimes against Humanity in International Criminal Law, The Hague, Kluwer Law International, 1999, pp. 210-217; C. J. R. Dugard, Opinion In: Re Bouterse,

para. 4.5.5, to be consulted at: http://www.icj.org/objectives/opinion.htm; K. C. Randall, "Universal Jurisdiction Under International Law," Texas Law Review, 1988, pp. 829-832; ICTY, Judgment, 10 Dec. 1998, Furundzija, para. 153 (torture).

n67 See the conclusion of Professor J. Verhoeven in his Vancouver report for the Institut de droit international, supra, footnote 19, p. 70.

Having made these general introductory observations, I will now turn to the two specific propositions of the International Court of Justice referred to above, i.e., the distinction between substantive and procedural defences and the idea that immunities are not a bar to prosecution. n68

n68 See also supra, para. 26.

(a) The distinction between immunity as a procedural defence and immunity as a substantive defence is not relevant for the purposes of this dispute

29. The distinction between jurisdictional immunity and criminal responsibility of course exists in all legal systems in the world, but is not an argument in support of the proposition that incumbent Foreign Ministers cannot be subject to the jurisdiction of other States when they are suspected of war crimes and crimes against humanity. There are a host of sources, including the 1948 Genocide Convention, n69 the 1996 International Law Commission's Draft Code of Offences against the Peace and Security of Mankind, n70 the Statutes of the ad hoc international criminal tribunals n71 and the Rome Statute for an International Criminal Court. n72 All these sources confirm the proposition contained in the Principle 3 of the Nuremberg principles n73 which states: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."

n69 Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 Dec. 1948, UNTS, Vol. 78, p. 277.

n70 "Draft Code of Crimes against the Peace and Security of Mankind," ILCR 1996, United Nations doc. 1/51/10.

n71 Statute of the International Tribunal for the former Yugoslavia, New York, 25 May 1993, ILM 1993, p. 1192; Statute of the International Tribunal for Rwanda, 8 Nov. 1994, ILM 1994, p. 1598.

n72 Rome Statute of the International Criminal Court, Rome, 17 July 1998, ILM 1998, p. 999.

n73 Supra, footnote 46.

[*631] 30. The Congo argued that these sources only address substantive immunities, not procedural immunities and that therefore they offer no exception to the principle that incumbent Foreign Ministers are immune from the jurisdiction of other States. Although some authorities seem to support this view, n74 most authorities do not mention the distinction at all and even reject it.

n74 See, e.g., Principle 5 of The Princeton Principles on Universal Jurisdiction. The Commentary states that "There is an extremely important distinction, however, between 'substantive' and 'procedural' immunity," but goes on by saying that "None of these statutes [Nuremberg, ICTY, ICTR] addresses the issue of procedural immunity." (supra, footnote 53, pp. 48-51).

31. Principle 3 of the Nuremberg principles (and the subsequent codifications of this principle), in addition to addressing the issue of (procedural or substantive) immunities, deals with the attribution of criminal acts to individuals. International crimes are indeed not committed by abstract entities, but by individuals who, in many cases, may act on behalf of the State. n75 Sir Arthur Watts very pertinently writes:

"States are artificial legal persons: they can only act through the institutions

and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice." n76

n75 See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Proceedings, Vol. 22, p. 466 "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

n76 A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," Recueil des Cours de l'Academie de droit international, 1994, III, p. 82.

At the heart of Principle 3 is the debate about individual versus State responsibility, not the discussion about the procedural or substantive nature of the protection for government officials. This can only mean that, where international crimes such as war crimes and crimes against humanity are concerned, immunity cannot block investigations or prosecutions to such crimes, regardless of whether such proceedings are brought before national or before international courts.

32. Article 7 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, n77 which is intended to apply to both national and international criminal courts, only confirms this interpretation. In its Commentary to this Article, the International Law Commission states:

"The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility." n78

n77 See also supra, para. 17.

n78 Draft Code of Crimes against the Peace and Security of Mankind, ILCR 1996, United Nations doc. A/51/10, at p. 41.

33. In adopting the view that the non-impunity clauses in the relevant international instruments only address substantive, not procedural immunities, the International Court of Justice has adopted a purely doctrinal proposition, which is not based on customary or conventional international law or on national practice and which is not supported by a substantial part of legal doctrine. It is particularly unfortunate that the International Court of Justice adopts this position without giving reasons.

(b) The Court's proposition that immunity does not necessarily lead to impunity is wrong

34. I now turn to the Court's proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: (1) he can be prosecuted in his own country; (2) he can be prosecuted in other States if the State whom he represents waives immunity; (3) he can be prosecuted after he ceases being a Minister for Foreign Affairs; and (4) he can be prosecuted before an international court (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and

the two concepts should therefore not be conflated. In practice, however, immunity leads to de facto impunity. All four cases mentioned by the Court are highly hypothetical.

[*632] 35. Prosecution in the first two cases presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction in absentia against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction in presentia in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect. n79

n79 Supra, footnotes 48 and 49.

The Congo was ill placed when accusing Belgium of exercising universal jurisdiction in the case of Mr. Yerodia. If the Congo had acted appropriately, by investigating charges of war crimes and crimes against humanity allegedly committed by Mr. Yerodia in the Congo, there would have been no need for Belgium to proceed with the case. Belgium repeatedly declared, and again emphasized in its opening and closing statements n80 before the Court, that it had tried to transfer the dossier to the Congo, in order to have the case investigated and prosecuted by the authorities of the Congo. Nowhere does the Congo mention that it has investigated the allegations of war crimes and crimes against humanity against Mr. Yerodia. Counsel for the Congo even perceived this Belgian initiative as an improper pressure on the Congo, n81 as if it were adding insult to injury.

n80 CR 2001/8, para. 5; CR 2001/11, paras. 3 and 11.

n81 CR 2001/10, p. 7.

The Congo did not come to the Court with clean hands. n82 In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" (Judgment, para. 42) was incompatible with its dignity. However, as Sir Hersch Lauterpacht observed in 1951, "the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it." n83 The International Court of Justice should at least have made it explicit that the Congo should have taken up the matter itself.

n82 G. Fitzmaurice, "The General Principles of International Law Considered from the standpoint of the Rule of Law," Recueil des Cours de l'Academie de droit international 1957, II (Vol. 92), p. 119 writes:

"'He who comes to equity for relief must come with clean hands.' Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality--in short were provoked by it."

See also S. M. Schwebel, "Clean Hands in the Court," in Brown, E. Weiss, et al. (eds.), The World Bank, International Financial Institutions, and the Development of International Law, American Society of International Law, 1999, pp. 74-78 and Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, dissenting opinion of Judge Schwebel, pp. 382-384 and 392-394.

n83 H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," BYBIL, 1951, p. 232.
36. The third case mentioned by the Court in support of its proposition that immunity does not necessarily lead to impunity is where the person has ceased to be a Foreign Minister (Judgment, para. 61, "Thirdly"). In that case, he or she will no longer enjoy all of the immunities accorded by international law in other States. The Court adds that the lifting of full immunity, in this case, is only for "acts committed prior or subsequent to his or her period of office." For acts committed during that period of office, immunity is only lifted "for acts committed during that period of office in a private capacity." Whether war crimes and crimes against humanity fall into this category the Court does not say. n84
n84 See also para. 55 of the Judgment, where the Court says that, from the perspective of his "full immunity," no distinction can be drawn between acts performed by a Minister of Foreign Affairs in an "official capacity" and those claimed to have been performed in a "private capacity."
It is highly regrettable that the International Court of Justice has not, like the House of Lords in the Pinochet case, qualified this statement. n85 It could and indeed should have added that war crimes and crimes against humanity can never fall into this category. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than "official" acts. Immunity should never apply to crimes under international law, neither before international courts nor national courts. I am in full agreement with the statement of Lord Steyn in the first Pinochet case, where he observed that: "It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of state. That is where the reasoning of the Divisional Court inexorably leads." n86
n85 See supra, footnotes 12 and 13.
n86 R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte, 25 Nov. 1998, All. ER (1998) 4, p. 945.
The International Court of Justice should have made it clearer that its Judgment can never lead to this conclusion and that such acts can never be covered by immunity.
[*633] 37. The fourth case of "non-impunity" envisaged by the Court is that incumbent or former Foreign Ministers can be prosecuted before "certain international criminal courts, where they have jurisdiction" (Judgment, para. 61, "Fourthly").
The Court grossly overestimates the role an international criminal court can play in cases where the State on whose territory the crimes were committed or whose national is suspected of the crime are not willing to prosecute. The current ad hoc international criminal tribunals would only have jurisdiction over incumbent Foreign Ministers accused of war crimes and crimes against humanity in so far as the charges would emerge from a situation for which they are competent, i.e., the conflict in the former Yugoslavia and the conflict in Rwanda.
The jurisdiction of an International Criminal Court, set up by the Rome Statute, is moreover conditioned by the principle of complementarity: primary responsibility for adjudicating war crimes and crimes against humanity lies with the States. The International Criminal Court will only be able to act if States which have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution (Art. 17).

And even where such willingness exists, the International Criminal Court, like the ad hoc international tribunals, will not be able to deal with all crimes that come under its jurisdiction. The International Criminal Court will not have the capacity for that, and there will always be a need for States to investigate and prosecute core crimes. n87 These States include, but are not limited to, national and territorial States. Especially in the case of sham trials, there will still be a need for third States to investigate and prosecute. n88

n87 See, for example, the trial of four Rwandan citizens by a Criminal Court in Brussels: Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capitale, Arret du 8 juin 2001, not published.

n88 See also infra, para. 65.

Not all international crimes will be justiciable before the permanent International Criminal Court. It will only be competent to try cases arising from criminal behaviour occurring after the entry into force of the Rome Statute. In addition, there is uncertainty as to whether certain acts of international terrorism or certain gross human rights violations in non-international armed conflicts would come under the jurisdiction of the Court. Professor Tomuschat has rightly observed that it would be a "fatal mistake" to assert that, in the absence of an international criminal court having jurisdiction, Heads of State and Foreign Ministers suspected of such crimes would only be justiciable in their own States, and nowhere else. n89

n89 C. Tomuschat, Intervention at the Institut de droit international's meeting in Vancouver, Aug. 2001, commenting on the draft resolution on Immunities from jurisdiction and Execution of Heads of State and of Government in International law, and giving the example of Iraqi dictator Sadam Hussein: Report of the 13th Commission of the Institut de droit international, Vancouver, 2001, p. 94, see further supra, footnote 19 and corresponding text.

38. My conclusion on this point is the following: the Court's arguments in support of its proposition that immunity does not, in fact, amount to impunity, are very unconvincing.

3. Conclusion

39. My general conclusion on the question of immunity n90 is as follows: the immunity of an incumbent Minister for Foreign Affairs, if any, is not based on customary international law but at most on international comity. It certainly is not "full" or absolute and does not apply to war crimes and crimes against humanity.

n90 On the subject of inviolability, see infra, para. 75.

III. UNIVERSAL JURISDICTION

40. Initially, when the Congo introduced its request for the indication of a provisional measure in 2000, the dispute addressed two questions: (a) universal jurisdiction for war crimes and crimes against humanity; and (b) immunities for incumbent Foreign Ministers charged with such crimes (see Judgment, paras. 1 and 42.). In the proceedings on the merits in 2001, the Congo reduced its case to the second point only (see Judgment, paras. 10-12), with no objection from Belgium, which even asked the Court not to judge ultra petita (Judgment, para. 41). The Court could, for that reason, not have made a ruling on the question of universal jurisdiction in general.

41. For their own reasons, the Parties thus invited the International Court of Justice to shortcut its decision and to address the question of the immunity from jurisdiction only. The Court, conceding that, as a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, nevertheless decided to address the second question only. It addressed this question assuming, for the purposes of its reasoning, [*634]

that Belgium had jurisdiction under international law to issue and circulate the arrest warrant (Judgment, para. 46 in fine).

42. While the Parties did not request a general ruling, they nevertheless developed extensive arguments on the subject of (universal) jurisdiction. The International Court of Justice, though it was not asked to rule on this point in its dispositif, could and should nevertheless have addressed this question as part of its reasoning. It confines itself to observing "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction" (Judgment, para. 59, first sentence). It goes on by observing that various international conventions impose an obligation on States either to extradite or to prosecute, "requiring them to extend their criminal jurisdiction," but immediately adds that "such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs" (Judgment, para. 59, second sentence). Adopting this narrow perspective, the Court does, again, not need to look at instruments giving effect to the principle of international accountability for war crimes and crimes against humanity. Yet most of the arguments of either Party to this dispute were based on these instruments. By not touching the subject of (universal) jurisdiction at all, the Court did not reply to these arguments and leaves the questions unanswered. I wish to briefly address them here.

43. The Congo accused Belgium of the "exercise of an excessive universal jurisdiction" (Judgment, para. 42; emphasis added) because, apart from infringing the rules on international immunities, Belgium's legislation on universal jurisdiction can be applied regardless of the presence of the offender on Belgian territory. This flows from Article 7 of the Belgian Act concerning the Punishment of Grave Breaches of International Humanitarian Law (hereinafter 1993/1999 Act). n91 The Congo found that this was excessive because Belgium in fact exercised its jurisdiction in absentia by issuing the arrest warrant of 11 September 2000 in the absence of Mr. Yerodia. To this accusation, Belgium answered it was entitled to assert jurisdiction in the present case because international law does not prohibit and even permits States to exercise extraterritorial jurisdiction for war crimes and crimes against humanity.

n91 Loi du 16 juin 1993 relative a la repression des violations graves du droit international humanitaire, Moniteur belge 5 aout 1993, as amended by Loi du 10 fevrier 1999, Moniteur belge 23 mars 1999; an English translation has been published in ILM 1999, pp. 921-925. See generally: A. Andries, C. Van den Wyngaert, E. David, and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative a la repression des infractions graves au droit international humanitaire," Rev. Dr. Pen., 1994, pp. 1114-1184; E. David, "La loi belge sur les crimes de guerre," RBDI, 1995, pp. 668-684; P. d'Argent, "La loi du 10 fevrier 1999 relative a la repression des violations graves du droit international humanitaire," Journal des Tribunaux 1999, pp. 549-555; L. Reydams, "Universal Jurisdiction over Attrocities in Rwanda: Theory and Practice," European Journal of Crime, Criminal Law and Criminal Justice, 1996, pp. 18-47; D. Vandermeersch, "La repression en droit belge des crimes de droit international," RIDP, 1997, pp. 1093-1135; Vandermeersch, "Les poursuites et le jugement des infractions de droit international humanitaire en droit belge" in D. H. Bosly et al., Actualite du droit international humanitaire, Bruxelles, La Charte, 2001, pp. 123-180; J. Verhoeven, "Vers un ordre repressif universel? Quelques observations," Annuaire Francais de Droit International, 1999, pp. 55-71.

44. There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the

principle in their domestic legislation have done so in very different ways. n92 Although there are many examples of States exercising extraterritorial jurisdiction for international crimes such as war crimes and crimes against humanity and torture, it may often be on other jurisdictional grounds such as the nationality of the victim. A prominent example was the Eichmann case which was in fact based, not on universal jurisdiction but on passive personality. n93 In the Spanish Pinochet case, an important connecting factor was the Spanish nationality of some of the victims. n94 Likewise, in the case against Mr. Yerodia, some of the complainants were of Belgian nationality, n95 even if there were, apparently, no Belgian nationals that were victims n96 of the violence that allegedly resulted from the hate speeches of which Mr. Yerodia was suspected (Judgment, para. 15). n97

n92 For a survey of the implementation of the principle of universal jurisdiction for international crimes in different countries, see, inter alia: Amnesty International, Universal Jurisdiction. The Duty of States to Enact and Implement Legislation, Sep. 2001, AI Index IOR 53/2001; International Law Association (Committee on International Human Rights Law and Practice), Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences, Ann., 2000; Redress, Universal Jurisdiction in Europe. Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide, 30 June 1999: http://www.redress.org/inpract.html; see also "Crimes internationaux et juridictions nationales" to be published by the Presses Universitaires de France (in print).

n93 Attorney-General of the Government of Israel v. Eichmann, *36 ILR 1961 p. 5.* See also US v. Yunis (No. 2), District Court, DC, 12 Feb. 1988, ILR 1990, Vol. 82, p. 343; Court of Appeals, DC, 29 January 1991, ILM 1991, Vol. 3, p. 403.

n94 Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdiccion de Espana para conocer de los crimenes de genocidio y terrorismo cometidos durante la dictadura chilena, 5 Nov. 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html. See also M. Marquez Carrasco and J. A. Fernandez, "Spanish National Court, Criminal Division (Plenary Session). Case 19/97, 4 Nov. 1998, Case 1/98, 5 Nov. 1998," AJIL 1999, pp. 690-696.

n95 CR 2001/8, p. 16.

n96 Some confusion arose over the difference between the notion of "victim" and the notion of "complainant" (partie civile). Belgian law does not provide an actio popularis, but only allows victims and their relatives to trigger criminal investigations through the procedure of a formal complaint (constitution de partie civile). On the Belgian system, see C. Van den Wyngaert, "Belgium," in C. Van den Wyngaert, et al. (ed.), Criminal Procedure Systems in the Member States of the European Community, Butterworth, 1993.

n97 The notion "victim" is wider than the direct victim of the crime only, and also includes indirect victims (e.g., the relatives of the assassinated person in the case of murder). Moreover, for crimes such as those with which Mr. Yerodia has been charged (incitement to war crimes and crimes against humanity), death or injury of the (direct) victim is not a constituent element of the crime. Not only those who were effectively killed or injured after the alleged hate speeches are victims, but all persons against whom the incitements were directed, including the victims of Belgian nationality who brought the case before the Belgian investigating judge by lodging a constitution de partie civile action. By focusing on the victims of the violence in para. 15 of the Judgment, the International Court of Justice seems to adopt a very narrow definition of the notion of victim.

45. Much has been written in legal doctrine about universal jurisdiction. Many

views exist as to its legal meaning n98 and its legal status under international law. n99 This is not the place to discuss them. What matters for the present dispute is the way in which Belgium has codified universal jurisdiction in its domestic legislation and whether it is, as applied in the case of Mr. Yerodia, compatible with international law. Article 7 of the 1993/1999 Belgian Act, which is at the centre of the dispute, states the following: "The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed . . ." n100

n98 For a very thorough recent analysis of the various positions, diachronically and synchronically, see M. Henzelin, Le principe de l'universalite en droit penal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalite, Brussel, Bruylant, 2000, p. 527. Other recent publications are M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," Virginia Journal of International Law 2001, Vol. 42, pp. 1-100; L. Benavides, "The Universal Jurisdiction Principle," Annuario Mexicano de Derecho Internacional 2001, pp. 20-96; J. I. Charney, "International Criminal Law and the Role of Domestic Courts," AJIL 2001, pp. 120-124; G. de La Pradelle, "La Competence Universelle," in H. Ascensio, et al. (eds.), Droit International Penal, Paris, A. Pedone, 2000, pp. 905-918; A. Hays Butler, "Universal Jurisdiction: A Review of the Literature," Criminal Law Forum 2000, pp. 353-373; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions," LJIL 2000, pp. 815-854. See also the proceedings of the symposium on Universal Jurisdiction: myths, realities, and prospects, New England Law Review 2001, Vol. 35.

n99 For example, some writers hold the view that an independent theory of universal jurisdiction exists with respect to jus cogens international crimes. See, for example, M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," Virginia Journal of International Law, 2001, Vol. 42, p. 28.

n100 "Les juridictions belges sont competentes pour connaitre des infractions prevues a la presente loi, independamment du lieu ou celles-ci auront ete commises." See footnote 91 for further reference.

46. Despite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the ratio legis of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its raison d'etre is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries. Scholarly organizations that participated in the debate have emphasized this, for example in the Princeton principles, n101 the Cairo principles n102 and the Kamminga report on behalf of the International Law Association. n103

n101 Supra, footnote 53.

n102 Supra, footnote 54.

n103 Supra, footnote 51.

[*635] 47. It may not have been the International Court of Justice's task to define universal jurisdiction in abstract terms. What it should, however, have considered is the following question: was Belgium under international law, entitled to assert extraterritorial jurisdiction against Mr. Yerodia (apart from the question of immunity) in the present case? The Court did not consider this question at all.

1. Universal jurisdiction for war crimes and crimes against humanity is compatible with the "Lotus" test

48. The leading case on the question of extraterritorial jurisdiction is the

1927 "Lotus" case. In that case, the Permanent Court of International Justice was asked to decide a dispute between France and Turkey, which arose from a criminal proceeding in Turkey against a French national. This person, the captain of a French ship, was accused of involuntary manslaughter causing Turkish casualties after a collision between his ship and a Turkish ship on the high seas. Like in the present dispute, the question was whether the respondent State, Turkey, was entitled to conduct criminal proceedings against a foreign national for crimes committed outside Turkey. France argued that Turkey was not entitled to prosecute the French national before its domestic courts because there was no permission, and indeed a prohibition under customary international law for a State to assume extraterritorial jurisdiction. Turkey argued that it was entitled to exercise jurisdiction under international law.

49. The Permanent Court of International Justice decided that there was no rule of conventional or customary international law prohibiting Turkey from asserting jurisdiction over facts committed outside Turkey. It started by saying that, as a matter of principle, jurisdiction is territorial and that a State cannot exercise jurisdiction outside its territory without a permission derived from international custom or from a convention. It however immediately added a qualification to this principle in a famous dictum that students of international law know very well:

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." n104

A distinction must be made between prescriptive jurisdiction and enforcement jurisdiction. The above-mentioned dictum concerns prescriptive jurisdiction: it is about what a State may do on its own territory when investigating and prosecuting crimes committed abroad, not about what a State may do on the territory of other States when prosecuting such crimes. Obviously, a State has no enforcement jurisdiction outside its territory: a State may, failing permission to the contrary, not exercise its power on the territory of another State. This is "the first and foremost restriction imposed by international law upon a State." n105 In other words, the permissive rule only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A may, on its own territory, prosecute offences committed in State B (permissive rule); failing a permission, State A may not act on the territory of State B.

n104 "Lotus," Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 19.

n105 Ibid., p. 18.

50. Does the arrest warrant of 11 April 2000 come under the first species of jurisdiction, under the second, or under both? In other words: has Belgium, by asserting jurisdiction in the form of the issuing and circulation of an arrest warrant on charges of war crimes and crimes against humanity against a foreign national for crimes committed abroad, engaged in prescriptive jurisdiction, in enforcement jurisdiction, or in both?

Given the fact that the warrant has never been enforced, the dispute is in the first place about prescriptive jurisdiction. However, the title of the warrant ("international arrest warrant") gave rise to questions about enforcement

jurisdiction also.
I believe that Belgium, by issuing and circulating the warrant, violated neither the rules on prescriptive jurisdiction nor the rules on enforcement jurisdiction. My views on enforcement jurisdiction will be part of my reasoning in [*636] Section IV, where I will consider whether there was an internationally wrongful act in the present case. n106 In the present Section, I will deal with prescriptive jurisdiction. I will measure the statutory provision that is at the centre of the dispute, Article 7 of the 1993/1999 Belgian Act, against the yardstick of the "Lotus" test on prescriptive jurisdiction.
n106 See infra, paras. 68 et seq.
51. It follows from the "Lotus" case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law. I believe that there is no prohibition under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad.
It has often been argued, not without reason, that the "Lotus" test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today. n107 In the Nuclear Weapons case, there were two groups of States each giving a different interpretation of "Lotus" on this point n108 and President Bedjaoui, in his separate opinion, expressed hesitations about "Lotus." n109 Even under the more restrictive view, Belgian legislation stands. There is ample evidence in support of the proposition that international law clearly permits States to provide extraterritorial jurisdiction for such crimes.
n107 Cf. American Law Institute, Restatement (Third) Foreign Relations Law of the United States, (1987), pp. 235-236; I. Cameron, The Protective Principle of International Criminal Jurisdiction, Aldershot, Dartmouth, 1994, p. 319; F. A. Mann, "The Doctrine of Jurisdiction in International Law," Recueil des Cours de l'Academie de droit international Vol. 111, 1964, I, p. 35; R. Higgins, Problems and Process. International Law and How We Use It, Oxford, Clarendon Press, 1994, p. 77. See also Council of Europe, Extraterritorial jurisdiction in criminal matters, Strasbourg, 1990, pp. 20 et seq.
n108 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 16-17, para. 21.
n109 I.C.J. Reports 1996, p. 270, para. 12.
I will give reasons for both propositions in the next paragraphs. I believe that (a) international law does not prohibit universal jurisdiction for war crimes and crimes against humanity (b) clearly permits it.

(a) International law does not prohibit universal jurisdiction for war crimes and crimes against humanity

52. The Congo argued that the very concept of universal jurisdiction presupposes the presence of the defendant on the territory of the prosecuting State. Universal jurisdiction in absentia, it submitted, was contrary to international law. This proposition needs to be assessed in the light of conventional and customary international law and of legal doctrine.
53. As a preliminary observation, I wish to make a linguistic comment. The term "universal jurisdiction" does not necessarily mean that the suspect should be present on the territory of the prosecuting State. Assuming the presence of the accused, as some authors do, does not necessarily mean that it is a legal requirement. The term may be ambiguous, but precisely for that reason one should refrain from jumping to conclusions. The Latin maxims that are sometimes used, and that seem to suggest that the offender must be present (judex deprehensionis--ubi te invenero ibi te judicabo) have no legal value and do not necessarily coincide with universal jurisdiction.

54. There is no rule of conventional international law to the effect that universal jurisdiction in absentia is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IVth Geneva Convention of 1949, n110 which lays down the principle aut dedere aut judicare. n111 A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo's reasoning in this respect is interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IVth Geneva Convention a limitation on a State's right to exercise universal jurisdiction would fly in the face of a teleological interpretation of the Geneva Conventions. The purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law.

n110 Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, UNTS, Vol. 75, p. 287. See also Art. 49 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949, UNTS, Vol. 75, p. 31; Art. 50 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949, UNTS, Vol. 75, p. 85; Art. 129 Convention relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, UNTS, Vol. 75, p. 135; Art. 85 (1) Protocol Additional (I) to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, UNGAOR, doc. A/32/144, 15 Aug. 1977.

n111 See further infra, para. 62.

55. There is no customary international law to this effect either. The Congo submits there is a State practice, evidencing an opinio juris asserting that universal jurisdiction, per se, requires the presence of the offender on the territory of the prosecuting State. Many national systems giving effect to the obligation aut dedere aut judicare and/or the Rome Statute for an International Criminal Court indeed require the presence of the offender. This appears from legislation n112 and from a number of national decisions including the Danish Saric case, n113 the French Javor case n114 and the German Jorgic case. n115 However, there are also examples of national systems that do not require the presence of [*637] the offender on the territory of the prosecuting State. n116 Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the opinio juris in that State. n117

n112 See, e.g., the Swiss Penal Code, Art. 6bis, 1; the French Penal Code, Art. 689-1; the Canadian Crimes against Humanity and War Crimes Act (2000), Art. 8.

n113 Public Prosecutor v. T., Supreme Court (Hojesteret), Judgment, 15 Aug. 1995, Ugeskrift for Retsvaesen, 1995, p. 838, reported in Yearbook of International Humanitarian Law, 1998, p. 431 and in R. Maison, "Les premiers cas d'application des dispositions penales des Conventions de Geneve: commentaire des affaires danoise et francaise," EJIL 1995, p. 260.

n114 Cour de Cassation (Fr.), 26 Mar. 1996, Bull. Crim., 1996, pp. 379-382.

n115 Bundesgerichtshof 30 Apr. 1999, *3 StR 215/98*, NStZ 1999, p. 396. See also the critical note (Anmerkung) by Ambos, ibid., pp. 405-406, who doesn't share the view of the judges that a "legitimizing link" is required to allow Germany to exercise its jurisdiction over crimes perpetrated outside its territory by foreigners against foreigners, even if these amount to serious crimes under international law (in casu genocide). In a recent judgment concerning the application of the Geneva Conventions, the Court, however, decided that such a

link was not required, since German jurisdiction was grounded on a binding norm of international law instituting a duty to prosecute, so there could hardly be a violation of the principle of non-intervention (*Bundesgerichtshof, 21 Feb. 2001, 3 StR 372/00*, retrievable on http://www.hrr-strafrecht.de).

n116 See, for example, the prosecutions instituted in Spain on the basis of Art. 23.4 of the Ley Organica del Poder Judicial (Law 6/1985 of 1 July 1985 on the Judicial Power) against Senator Pinochet and other South-American suspects whose extradition was requested. In New Zealand, proceedings may be brought for international "core crimes" regardless of whether or not the person accused was in New Zealand at the time a decision was made to charge the person with an offence (Sec. 8, (1)(c) (iii) of the International Crimes and International Criminal Court Act 2000).

n117 The German Government very recently reached agreement on a text for an "International Crimes Code" (Volkerstrafgesetzbuch) (see Bundesministerium der Justiz, Mitteillung fur die Presse 02/02, Berlin, 16 Jan. 2002). The new code would allow the German Public Ministry to prosecute cases without any link to Germany and without the presence of the offender on the national territory. The Prosecutor would only be obliged to defer prosecution in such a case when an International Court or the Courts of a State basing its jurisdiction on territoriality or personality were in fact prosecuting the suspect (see Bundesministerium der Justiz, Entwurf eines Gesetzes zur Einfuhrung des Volkerstrafgesetzbuches, pp. 19 and 89, to be consulted on the Internet: http://www.bmj.bund.de/images/11222.pdf).

And even where national law requires the presence of the offender, this is not necessarily the expression of an opinio juris to the effect that this is a requirement under international law. National decisions should be read with much caution. In the Bouterse case, for example, the Dutch Supreme Court did not state that the requirement of the presence of the suspect was a requirement under international law, but only under domestic law. It found that, under Dutch law, there was no such jurisdiction to prosecute Mr. Bouterse but did not say that exercising such jurisdiction would be contrary to international law. In fact, the Supreme Court did not follow the Advocate General's submission on this point. n118

n118 See supra, footnote 5. The Court of Appeal of Amsterdam had, in its judgment of 20 Nov. 2000, decided, inter alia, that Mr. Bouterse could be prosecuted in absentia on charges of torture (facts committed in Surinam in 1982). This decision was reversed by the Dutch Supreme Court on 18 Sep. 2001, inter alia on the point of the exercise of universal jurisdiction in absentia. The submissions of the Dutch Advocate General are attached to the judgment of the Supreme Court, loc. cit., paras. 113-137 and especially para. 138.

56. The "Lotus" case is not only an authority on jurisdiction, but also on the formation of customary international law as was set out above. A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an opinio juris. Only if this abstinence was based on a conscious decision of the States in question can this practice generate customary international law. n119 As in the case of immunities, such abstinence may be attributed to other factors than the existence of an opinio juris. There may be good political or practical reasons for a State not to assert jurisdiction in the absence of the offender.

n119 See supra, para. 13.

It may be politically inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.

A practical consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system. This was stated by the Court of Appeal in the United Kingdom in the Al-Adsani case n120 and seems to have been an explicit reason for the Assemblee nationale in France to refrain from introducing universal jurisdiction in absentia when adopting universal jurisdiction over the crimes falling within the Statute of the Yugoslavia Tribunal. n121 The concern for a linkage with the national order thus seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an opinio juris to the effect that this form of universal jurisdiction is contrary to international law.

n120 ECHR, Al-Adsani v. United Kingdom, 21 Nov. 2001, para. 18 and the concurring opinions of Judges Pellonpaa and Bratza, retrievable at: http://www.echr.coe.int. See the discussion in Marks, "Torture and the Jurisdictional Immunities of Foreign States," CLJ 1997, pp. 8- 10.

n121 See Journal Officiel de l'Assemblee nationale, 20 decembre 1994, 2 e seance, p. 9446.

57. There is a massive literature of learned scholarly writings on the subject of universal jurisdiction. n122 I confine myself to three studies, which emanate from groups of scholars: the Princeton principles, n123 the Cairo principles n124 and the Kamminga report on behalf of the ILA, n125 and look at one point: do the authors support the Congo's proposition that universal jurisdiction in absentia is contrary to international law? The answer is: no. n126

n122 For recent sources see supra, footnote 98.

n123 Supra, footnote 53.

n124 Supra, footnote 54.

n125 Supra, footnote 51.

n126 Although the wording of Princeton Principle 1(2) may appear somewhat confusing, the authors definitely did not want to prevent a State from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition when the accused is not present, as is confirmed by Principle 1(3). See the Commentary on the Princeton Principles at p. 44.

58. I conclude that there is no conventional or customary international law or legal doctrine in support of the proposition that (universal) jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting State.

(b) International law permits universal jurisdiction for war crimes and crimes against humanity

59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists. For crimes against humanity, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction. n127 In the case of war crimes, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IVth Geneva Convention, n128 which lays down the principle aut dedere aut judicare for war crimes committed against civilians. n129

n127 On the subject of genocide and the Genocide Convention of 1948, the International Court of Justice held that "the rights and obligations enshrined by the Convention are rights and obligations erga omnes" and "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (Application of the Convention on

the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996 (II), p. 616, para. 31.

n128 See supra, footnote 110.

n129 See International Committee of the Red Cross, National Enforcement of International Humanitarian Law: Universal Jurisdiction Over War Crimes, retrievable at: http://www.icrc.org/; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions," LJIL 2000, pp. 815-854.

From the perspective of the drafting history of international criminal law conventions, this is probably one of the first codifications of this principle, which, in legal doctrine, goes back at least to Hugo Grotius but has probably much [*638] older roots. n130 However, it had not been codified in conventional international law until 1949. There are older Conventions such as the 1926 Slavery Convention n131 or the 1929 Convention on Counterfeiting, n132 which require States to lay down rules on jurisdiction but which do not provide an aut dedere aut judicare obligation. The 1949 Conventions are probably the first to lay down this principle in an article that is meant to cover both jurisdiction and prosecution.

n130 G. Guillaume, "La competence universelle. Formes anciennes et nouvelles," X, Melanges offerts a Georges Levasseur, Paris, Editions Litec, 1992, p. 27.

n131 Slavery Convention, Geneva, 25 Sep. 1926, 60 League of Nations, Treaty Series (LNTS), p. 253.

n132 International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 Apr 1929, LNTS, p. 371, para. 112.

Subsequent Conventions have refined this way of drafting and have laid down distinctive provisions on jurisdiction on the one hand and on prosecution (aut dedere aut judicare) on the other. Examples are the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Arts. 4 and 7 respectively) n133 and the 1984 Convention against Torture (Arts. 5 and 7 respectively). n134

n133 Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 Dec. 1970, ILM 1971, p. 134.

n134 Convention against Torture and other Cruel, Inhuman of Degrading Treatment of Punishment, New York, 10 Dec. 1984, ILM 1984, p. 1027, with changes in ILM 1985, p. 535.

60. In order to assess the "permissibility" of universal jurisdiction for international crimes, it is important to distinguish between jurisdiction clauses and prosecution (aut dedere aut judicare) clauses in international criminal law conventions.

61. The jurisdiction clauses in these Conventions usually oblige States to provide extraterritorial jurisdiction, but do not exclude States from exercising jurisdiction under their national laws. Even where they do not provide universal jurisdiction, they do not exclude it either, nor do they require States to refrain from providing this form of jurisdiction under their domestic law. The standard formulation of this idea is that "this Convention does not exclude any criminal jurisdiction exercised in accordance with national law." This formula can be found in a host of Conventions, including the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Art. 4, para. 3) and the 1984 Convention against Torture (Art. 5, para. 3).

62. The prosecution clauses (aut dedere aut judicare), however, sometimes link the prosecution obligation to extradition, in the sense that a State's duty to prosecute a suspect only exists "if it does not extradite him." Examples are Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and Article 7 of the 1984 Convention against Torture. This, however, does not mean that prosecution is only possible in cases where extradition has

been refused.
Surely, this formula cannot be read into Article 146 of the IVth Geneva Convention which according to some authors even prioritizes prosecution over extradition: primo prosequi, secundo dedere. n135 Even if one adopts the doctrinal viewpoint that the notion of universal jurisdiction assumes the presence of the offender, there is nothing in Article 146 that warrants the conclusion that this is an actual requirement. n136
n135 The Geneva Conventions of 1949 are unique in that they provide a mechanism which goes further than the "aut dedere, aut judicare" model and which can be described as "aut judicare, aut dedere," or, even more poignantly, as "primo prosequi, secundo dedere." See, respectively, R. van Elst, loc. cit., pp. 818-819; M. Henzelin, op. cit., p. 353, para. 1112.
n136 See M. Henzelin, op. cit., p. 354, para. 1113.
2. Universal jurisdiction is not contrary to the complementarity principle in the Statute for an International Criminal Court
63. Some argue that, in the light of the Rome Statute for an International Criminal Court, it will be for the International Criminal Court, and not for States acting on the basis of universal jurisdiction, to prosecute suspects of war crimes and crimes against humanity. National statutes providing universal jurisdiction, like the Belgian Statute, would be contrary to this new philosophy and could paralyse the International Criminal Court. This was also the proposition of the Congo in the present dispute. n137
n137 See Memorial of the Congo, p. 59, "Obligation de ne pas priver le Statut de la C.P.I. de son objet et de son but."
64. This proposition is wrong. The Rome Statute does not prohibit universal jurisdiction. It would be absurd to read the Rome Statute in such a way that it limits the jurisdiction for core crimes to either the national State or the territorial State or the International Criminal Court. The relevant clauses are about the preconditions for the International Criminal Court to exercise jurisdiction (Art. 17, Rome Statute--the complementarity principle), and cannot be construed as containing a general limitation for third States to investigate and prosecute core crimes. Surely, the Rome Statute does not preclude third States (other than the territorial State and the State of nationality) from exercising universal jurisdiction. The preamble, which unequivocally states the objective of avoiding impunity, does [*639] not allow this inference. In addition, the opinio juris, as it appears from United Nations resolutions, n138 focuses on impunity, individual accountability and the responsibility of all States to punish core crimes.
n138 See footnotes 48 and 49.
65. An important practical element is that the International Criminal Court will not be able to deal with all crimes; there will still be a need for States to investigate and prosecute core crimes. These States include, but are not limited to, national and territorial States. As observed previously, there will still be a need for third States to investigate and prosecute, especially in the case of sham trials. Also, the International Criminal Court will not have jurisdiction over crimes committed before the entry into force of its Statute (Art. 11, Rome Statute). In the absence of other mechanisms for the prosecution of these crimes, such as national courts exercising universal jurisdiction, this would leave an unacceptable source of impunity. n139
n139 See also supra, para. 37.
66. The Rome Statute does not establish a new legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either. This means that, as far as crimes in the Rome Statute are concerned (war crimes, crimes against humanity, genocide and in the future perhaps

aggression and other crimes), pre-existing sources of international law retain their importance.

3. Conclusion

67. Article 7 of Belgium's 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens. It is not in conflict with the principle of complementarity in the Statute for an International Criminal Court.

IV. EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT

68. Having concluded that incumbent Ministers for Foreign Affairs are fully immune from foreign criminal jurisdiction (Judgment, para. 54), even if charged with war crimes and crimes against humanity (Judgment, para. 58), the International Court of Justice examines whether the issuing and circulating of the warrant of 11 April 2000 constituted a violation of those rules. On the subject of the issuance and the circulation of the warrant respectively, the Court concludes:

"that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law

. . .

that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law." (Judgment, paras. 70-71.)

69. As stated at the outset, I find it highly regrettable that neither of these crucial sentences in the Court's reasoning mention the fact that the arrest warrant was about war crimes and crimes against humanity. The dispositif (para. 78(2)) also fails to mention this fact.

70. I disagree with the conclusion that there was a violation of an obligation of Belgium towards the Congo, because I reject its premise. Mr. Yerodia was not immune from Belgian jurisdiction for war crimes and crimes against humanity for the reasons set out above. As set out before, this may be contrary to international courtesy, but there is [*640] no rule of customary or conventional international law granting immunity to incumbent Foreign Ministers who are suspected of war crimes and crimes against humanity.

71. Moreover, Mr. Yerodia was never actually arrested in Belgium, and there is no evidence that he was hindered in the exercise of his functions in third countries. Linking the foregoing with my observations on the question of universal jurisdiction in the preceding section of my dissenting opinion, I wish to distinguish between the two different "acts" that, in the International Court of Justice's Judgment, constitute a violation of customary international law: on the one hand, the issuing of the disputed arrest warrant, on the other its circulation.

1. The issuance of the disputed arrest warrant in Belgium was not in violation of international law

72. Mr. Yerodia was never arrested, either when he visited Belgium officially in

June 2000 n140 or thereafter. Had it applied the only relevant provision of conventional international law to the dispute, Article 21, paragraph 2, of the Special Missions Convention, the Court could not have reached its decision. According to this article, Foreign Ministers "when they take part in a special mission of the sending State, shall enjoy in the receiving State or in third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law." n141 In the present dispute, this could only lead to the conclusion that there was no violation: the warrant was never executed, either in Belgium, or in third countries. n140 Mr. Yerodia's visit to Belgium is not mentioned in the judgment because the parties were rather unclear on this point. Yet, it seems that Mr. Yerodia effectively visited Belgium on 17 June 2000. This was reported in the media (see the statement by the Minister of Foreign Affairs in De Standaard, 7 July 2000) and also in a question that was put in Parliament to the Minister of Justice. See Question orale de M. Tony Van Parys au ministre de la Justice sur "l'intervention politique du gouvernement dans le dossier a charge du ministre congolais des Affaires etrangeres, M. Yerodia," Chambre des representants de la Belgique, Compte Rendu Integral avec compte rendu analytique, Commission de la Justice, 14 Nov. 2000, CRIV 50 COM 294, p. 12. Despite the fact that this fact is not, as such, recorded in the documents that were before the International Court of Justice, I believe the Court could have taken judicial notice of it.

n141 Supra, para. 18.

73. Belgium accepted, as a matter of international courtesy, that the warrant could not be executed against Mr. Yerodia were he to have visited Belgium officially (immunity from execution, Judgment, para. 49). This was explicitly mentioned in the warrant: the warrant was not enforceable and was in fact not served on him or executed when Mr. Yerodia came to Belgium on an official visit in June 2001. Belgium thus respected the principle, contained in Article 21 of the Special Missions Convention that is not a statement of customary international law but only of international courtesy. n142

n142 See the statement of the International Law Commission's special rapporteur, referred to supra, para. 17.

74. These are the only objective elements the Court should have looked at. The subjective elements, i.e., whether the warrant had a psychological effect on Mr. Yerodia or whether it was perceived as offensive by the Congo (cf. the term iniuria used by Maitre Rigaux throughout his pleadings in October 2001 n143 and the term capitis diminutio used by Maitre Verges during his pleadings in November 2000) n144 was irrelevant for the dispute. The warrant only had a potential legal effect on Mr. Yerodia as a private person in case he would have visited Belgium privately, quod non.

n143 CR 2001/5, p. 14.

n144 CR 2000/32.

75. In its dispositif (Judgment, para. 78(2)), the Court finds that Belgium failed to respect the immunity from criminal jurisdiction and inviolability for incumbent Foreign Ministers. I have already explained why, in my opinion, there has been no infringement of the rules on immunity from criminal jurisdiction. I find it hard to see how, in addition (the Court using the word "and"), Belgium could have infringed the inviolability of Mr Yerodia by the mere issuance of a warrant that was never enforced.

The Judgment does not explain what is meant by the word "inviolability," and simply juxtaposes it to the word "immunity." This may give rise to confusion. Does the Court put the mere issuance of an order on the same footing as the actual enforcement of the order? Would this also mean that the mere act of investigating criminal charges against a Foreign Minister would be contrary to

the principle of inviolability?
Surely, in the case of diplomatic agents, who enjoy absolute immunity and inviolability under the 1961 Vienna Convention on Diplomatic Relations, n145 allegations of criminal offences may be investigated as long as the agent is not interrogated or served with an order to appear. This view is clearly stated by Jean Salmon. n146 Jonathan Brown notes that, in the case of a diplomat, the issuance of a charge or summons is probably contrary to the diplomat's immunity, whereas its execution would be likely to infringe the agent's inviolability. n147
n145 Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, UNTS, Vol. 500, p. 95.
n146 J. Salmon, Manuel de droit diplomatique, Brussels, Bruylant, 1994, p. 304.
n147 J. Brown, "Diplomatic immunity: State Practice Under the Vienna Convention on Diplomatic Relations," 37 ICLQ 1988, p. 53.
If the Court's dispositif were to interpreted as to mean that mere investigations of criminal charges against Foreign Ministers would infringe their inviolability, the implication would be that Foreign Ministers enjoy greater protection [*641] than diplomatic agents under the Vienna Convention. This would clearly go beyond what is accepted under international law in the case of diplomats.

2. The international circulation of the disputed arrest warrant was not in violation of international law

76. The question of the circulation of the warrant may be somewhat different, because it might be argued that circulating a warrant internationally brings it within the realm of enforcement jurisdiction, which, under the "Lotus" test, is in principle prohibited. Under that test, States can only act on the territory of other States if there is permission to this effect in international law. This is the "first and foremost restriction" that international law imposes on States. n148
n148 Supra, para. 49.
77. Even if one would accept, together with the Court, the premise there is a rule under customary law protecting Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process of other States, it still remains to be established that Belgium actually infringed this rule by asserting enforcement jurisdiction. Much confusion arose from the title that was given to the warrant, which was called "international arrest warrant" on the document issued by the Belgian judge. However, this is a very misleading term both under Belgian law and under international law. International arrest warrants do not exist as a special category under Belgian law. It is true that the title of the document was misleading, but giving a document a misleading name does not actually mean that this document also has the effect that it suggests it has.
78. The term international arrest warrant is misleading, in that it suggests that arrest warrants can be enforced in third countries without the validation of the local authorities. This is not the case: there is always a need for a validation by the authorities of the State where the person, mentioned in the warrant, is found. Accordingly, the Belgian arrest warrant against Mr. Yerodia, even after being circulated in the Interpol system, could not be automatically enforced in all Interpol member States. It may have caused an inconvenience that was perceived as offensive by Mr. Yerodia or by the Congolese authorities. It is not per se a limitation of the Congolese Foreign Minister's right to travel and to exercise his functions.
I know of no State that automatically enforces arrest warrants issued in other States, not even in regional frameworks such as the European Union. Indeed, the discussions concerning the European arrest warrant were about introducing

something that does not exist at present: a rule by which member States of the European Union would automatically enforce each other's arrest warrants. n149 At present, warrants of the kind that the Belgian judge issued in the case of Mr. Yerodia are not automatically enforceable in Europe.

n149 See the Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, COM(2001)522, available on the Internet: http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf. An amended version can be found in: Council of the European Union, Outcome of proceedings, 10 Dec. 2001, 14867/1/01 REV 1 COPEN 79 CATS 50.

In inter-State relations, the proper way for States to obtain the presence of offenders who are not on their territory is through the process of extradition. The discussion about the legal effect of the Belgian arrest warrant in third States has to be seen from that perspective. When a judge issues an arrest warrant against a suspect whom he believes to be abroad, this warrant may lead to an extradition request. This is not automatic: it is up to the Government whether or not to request extradition. n150 Extradition requests are often preceded by a request for provisional arrest for the purposes of extradition. This is what the Interpol Red Notices are about. Red Notices are issued by Interpol on the request of a State which wishes to have the person named in the warrant provisionally arrested in a third State for the purposes of extradition. Not all States, however, give this effect to an Interpol Red Notice. n151

n150 Often, governments refrain from requesting extradition for political reasons, as was shown in the case of Mr. Ocalan, where Germany decided not to proceed to request Mr. Ocalan's extradition from Italy. See Press Reports: "Bonn stellt Auslieferungsersuchen fur Ocalan zuruck," Frankfurter Allgemeine, 21 Nov. 1998 and "Die Bundesregierung verzichtet endgultig auf die Auslieferung des Kurdenfuhrers Ocalan," Frankfurter Allgemeine, 28 Nov. 1998.

n151 Interpol, Secretariat general, Rapport sur la valeur juridique des notices rouges, ICPO--Interpol--General Assembly, 66th Session, New Delhi, 15-21 Oct. 1997, AGN/66/RAP/8, No. 8 Red Notices, as amended pursuant to res. No. AGN/66/RES/7.

Requests for the provisional arrest are, in turn, often preceded by an international tracing request, which aims at localizing the person named in the arrest warrant. This "communication" does not have the effect of a Red Notice, and does not include a request for the provisional arrest of the person named in the warrant. Some countries may refuse access to a person whose name has been circulated in the Interpol system or against whom a Red Notice has been requested. This is, however, a question of domestic law.

States may also prohibit the official visits of persons who are suspected of international crimes refusing a visa, or by refusing accreditation if such persons are proposed for a diplomatic function, n152 but this, again, is a domestic matter for third States to consider, and not an automatic consequence of a judge's arrest warrant.

n152 See the Danish hesitations concerning the accreditation of an Ambassador for Israel, supra, footnote 21.

[*642] 79. In the case of Mr. Yerodia, Belgium communicated the warrant to Interpol (end of June 2000), but did not request an Interpol Red Notice until September 2001, which was when Mr. Yerodia had ceased to be a Minister. It follows that Belgium never requested any country to arrest Mr. Yerodia provisionally for the purposes of extradition while he was a Foreign Minister. The Congo claims that Mr. Yerodia was, in fact, restricted in his movements as a result of the Belgian arrest warrant. Yet, it fails to adduce evidence to prove this point. It appears, on the contrary, that Mr. Yerodia has made a number of

foreign travels after the warrant had been circulated in the Interpol system (2000), including an official visit to the United Nations. During the hearings, it was said that, when attending this United Nations Conference in New York, Mr. Yerodia chose the shortest way between the airport and the United Nations building, because he feared being arrested. n153 This fear, which he may have had, was based on psychological, not on legal grounds. Under the 1969 Special Missions Convention, he could not be arrested in third countries when on an official visit. On his official visits in third States, no coercive action was taken against him on the basis of the Belgian warrant.

n153 CR 2001/10/20.

3. Conclusion

80. The warrant could not be and was not executed in the country where it was issued (Belgium) or in the countries to which it was circulated. The warrant was not executed in Belgium when Mr. Yerodia visited Belgium officially in June 2000. Belgium did not lodge an extradition request to third countries or a request for the provisional arrest for the purposes of extradition. The warrant was not an "international arrest warrant," despite the language used by the Belgian judge. It could and did not have this effect, neither in Belgium nor in third countries. The allegedly wrongful act was a purely domestic act, with no actual extraterritorial effect.

V. REMEDIES

81. On the subject of remedies, the Congo asked the Court for two different actions: (a) a declaratory judgment to the effect that the warrant and its circulation through Interpol was contrary to international law and (b) a decision to the effect that Belgium should withdraw the warrant and its circulation. The Court granted both requests: it decided (a) that the issue and international circulation of the arrest warrant were in breach of a legal obligation of Belgium towards the Congo (Judgment, para. 78 (2) of the dispositif) and (b) that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom the warrant was issued (Judgment, para. 78(3) of the dispositif).

82. I have, in Sections II (Immunities), III (Jurisdiction) and IV (Existence of an internationally wrongful act) of my dissenting opinion, given the reasons why I voted against paragraph 78 (2) of the dispositif relating to the illegality, under international law, of the arrest warrant: I believe that Belgium was not, under positive international law, obliged to grant immunity to Mr. Yerodia on suspicions of war crimes and crimes against humanity and, moreover, I believe that Belgium was perfectly entitled to assert extraterritorial jurisdiction against Mr. Yerodia for such crimes.

83. I still need to give reasons for my vote against paragraph 78 (3) of the dispositif, calling for the cancellation and the "decirculation" of the disputed arrest warrant. Even assuming, arguendo, that the arrest warrant was illegal in the year 2000, it was no longer illegal on the moment when the Court gave Judgment in this case. Belgium's alleged breach of an international obligation did not have a continuing character: it may have lasted as long as Mr. Yerodia was in office, but it did not continue in time thereafter. n154 For that reason, I believe the International Court of Justice cannot ask Belgium to cancel and "de-circulate" an act that is not illegal today.

n154 See Art. 14 of the 2001 ILC Draft Articles on State Responsibility, United Nations doc. A/CN.4/L.602/Rev.1, concerning the extension in time of the breach of an international obligation, which states the following:

"1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its

effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation . . ."
84. In its Counter-Memorial and pleadings, Belgium formulated three preliminary objections based on Mr. Yerodia's change of position. It argued that, due to Mr. Yerodia's ceasing to be a Minister today, the Court (a) no longer had jurisdiction to try the case, (b) that the case had become moot, and (c) that the Congo's Application was inadmissible. The Court dismissed all these preliminary objections.
[*643] I voted with the Court on these three points. I agree with the Court that Belgium was wrong on the points of jurisdiction and admissibility. There is well-established case law to the effect that the Court's jurisdiction to adjudicate a case and the admissibility of the Application must be determined on the date on which the Application was filed (when Mr. Yerodia was still a Minister), not on the date of the Judgment (when Mr. Yerodia had ceased to be a Minister). This follows from several precedents, the most important of which is the Lockerbie case. n155 I therefore agree with paragraph 78(1)(B) and (D) of the Judgment.
n155 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, I.C.J. Reports 1998, p. 23, para. 38 (jurisdiction) and p. 26, para. 44 (admissibility). See further, S. Rosenne, The Law and Practice of the International Court, 1920-1996, Vol. II, The Hague, Martinus Nijhoff Publishers, 1997, pp. 521-522.
I was, however, more hesitant on the subject of mootness, where the Court held that the Congo's Application was "not without object" (Judgment, para. 78(1)(C)). It does not follow from Lockerbie that the question of mootness must be assessed on the date of the filing of the application. n156 An event subsequent to the filing of an application can still render a case moot. The question therefore was whether, given the fact that Mr. Yerodia is no longer a Foreign Minister today, there was still a case for the respondent State to answer. I think there was, for the following reason: it is not because an allegedly illegal act has ceased to continue in time that the illegality disappears. From that perspective, I think the case was not moot. This, however, is only true for the Congo's first claim (a declaratory Judgment solemnly declaring the illegality of Belgium's act). However, I think the case might have been moot regarding the Congo's second claim, given the fact that Mr. Yerodia is no longer a Minister today.
n156 In the Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) case the Court only decided on the points of jurisdiction (ibid., Preliminary Objections, I.C.J. Reports 1998, p. 30, para. 53(1)) and admissibility (ibid., para. 53 (2)), not on mootness (ibid., p. 31, para. 53(3)). The ratio decidendi for paras. 53(1) and (2) is that the relevant date for the assessment of both jurisdiction and admissibility are the date of the filing of the Application. The Court did not make such a statement in relation to mootness.
If there was an infringement of international law in the year 2000 (which I do not think exists, for the reasons set out above), it has certainly ceased to exist today. Belgium's alleged breach of an international obligation, if such an obligation existed--which I doubt--was in any event a breach of an obligation not of a continuing character. If the Court would take its own reasoning about immunities to its logical conclusion (the temporal linkage between the

protection of immunities and the function of the Foreign Minister), then it should have reached the conclusion that the Congo's third and fourth submissions should have been rejected. This is why I have voted with the Court on paragraph 78(1)(C) concerning Belgium's preliminary objection regarding mootness, but against the Court on paragraph 78(3) of the dispositif.

I also believe, assuming again that there has been an infringement of an international obligation by Belgium, that the declaratory part of the Judgment should have sufficed as reparation for the moral injury suffered by Congo. If there was an act constituting an infringement, which I do not believe exists (a Belgian arrest warrant that was not contrary to customary international law and that was moreover never enforced), it was trivial in comparison with the Congo's failure to comply with its obligation under Article 146 of the IVth Geneva Convention (investigating and prosecuting charges of war crimes and crimes against humanity committed on its territory). The Congo did not come to the International Court with clean hands, n157 and its Application should have been rejected. De minimis non curat lex. n158

n157 See supra, para. 35.

n158 This expression is not synonymous to de minimis non curat praetor in civil law systems. See Black's Law Dictionary, West Publishing Co.

VI. FINAL OBSERVATIONS

85. For the reasons set out in this opinion, I think the International Court of Justice has erred in finding that there is a rule of customary international law protecting incumbent Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process in other States. No such rule of customary international law exists. The Court has not engaged in the balancing exercise that was crucial for the present dispute. Adopting a minimist and formalistic approach, the Court has de facto balanced in favour of the interests of States in conducting international relations, not the international community's interest in asserting international accountability of State officials suspected of war crimes and crimes against humanity.

86. The Belgian 1993/1999 Act may go too far and it may be politically wise to provide procedural restrictions for foreign dignitaries or to restrict the exercise of universal jurisdiction. Proposals to this effect are under study in Belgium. Belgium may be naive in trying to be a forerunner in the suppression of international crimes and in substantiating the view that, where the territorial State fails to take action, it is the responsibility of third States to offer a forum to victims. It may be politically wrong in its efforts to transpose the "sham trial" exception to complementarity in the Rome Statute for an International Criminal Court (Art. 17) n159 into "aut dedere aut judicare" situations. However, the question that was before the Court was not whether Belgium is naive or has acted in a [*644] politically wise manner or whether international comity would command a stricter application of universal jurisdiction or a greater respect for foreign dignitaries. The question was whether Belgium had violated an obligation under international law to refrain from issuing and circulating an arrest warrant on charges of war crimes and crimes against humanity against an incumbent Foreign Minister.

n159 See supra, para. 37.

87. An implicit consideration behind this Judgment may have been a concern for abuse and chaos, arising from the risk of States asserting unbridled universal jurisdiction and engaging in abusive prosecutions against incumbent Foreign Ministers of other States and thus paralysing the functioning of these States. The "monstrous cacophony" argument, n160 was very present in the Congo's Memorial and pleadings. The argument can be summarized as follows: if a State

would prosecute members of foreign governments without respecting their immunities, chaos will be the result; likewise, if States exercise unbridled universal jurisdiction without any point of linkage to the domestic legal order, there is a danger for political tensions between States.

n160 J. Verhoeven, "M. Pinochet, la coutume internationale et la competence universelle," Journal des Tribunaux, 1999, p. 315; J. Verhoeven, "Vers un ordre repressif universel? Quelques observations," AFDI 1999, p. 55.

In the present dispute, there was no allegation of abuse of process on the part of Belgium. Criminal proceedings against Mr. Yerodia were not frivolous or abusive. The warrant was issued after two years of criminal investigations and there were no allegations that the investigating judge who issued it acted on false factual evidence. The accusation that Belgium applied its War Crimes Statute in an offensive and discriminatory manner against a Congolese Foreign Minister was manifestly ill founded. Belgium, rightly or wrongly, wishes to act as an agent of the world community by allowing complaints brought by foreign victims of serious human rights abuses committed abroad. Since the infamous Dutroux case (a case of child molestation attracting great media attention in the late 1990s), Belgium has amended its laws in order to improve victims' procedural rights, without discriminating between Belgian and foreign victims. In doing so, Belgium has also opened its courts to victims bringing charges based on war crimes and crimes against humanity committed abroad. This new legislation has been applied, not only in the case against Mr. Yerodia but also in cases against Mr. Pinochet, Mr. **Sharon,** Mr. Rafzanjani, Mr. Hissen Habre, Mr. Fidel Castro, etc. It would therefore be wrong to say that the War Crimes Statute has been applied against a Congolese national in a discriminatory way.

In the abstract, the chaos argument may be pertinent. This risk may exist, and the Court could have legitimately warned against this risk in its Judgment without necessarily reaching the conclusion that a rule of customary international law exists to the effect of granting immunity to Foreign Ministers. However, granting immunities to incumbent Foreign Ministers may open the door to other sorts of abuse. It dramatically increases the number of persons that enjoy international immunity from jurisdiction. Recognizing immunities for other members of government is just one step further: in present-day society, all cabinet members represent their countries in various meetings. If Foreign Ministers need immunities to perform their functions, why not grant immunities to other cabinet members as well? The International Court of Justice does not state this, but doesn't this flow from its reasoning leading to the conclusion that Foreign Ministers are immune? The rationale for assimilating Foreign Ministers with diplomatic agents and Heads of State, which is at the centre of the Court's reasoning, also exists for other Ministers who represent the State officially, for example, Ministers of Education who have to attend UNESCO conferences in New York or other Ministers receiving honorary doctorates abroad. Male fide governments may appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes. Perhaps the International Court of Justice, in its effort to close one box of Pandora for fear of chaos and abuse, has opened another one: that of granting immunity and thus de facto impunity to an increasing number of government officials.

(Signed) Christine VAN DEN WYNGAERT

ANNEX 2

P. Gaeta, "*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The Hissène Habré Case" (2003) 1 *Journal of International Criminal Justice* 186.

Journal of International Criminal Justice 1, 1 © Oxford University Press, 2003.

Ratione Materiae Immunities of Former Heads of State and International Crimes: The *Hissène Habré* Case

Paola Gaeta*

1. Introduction

In a 7 October 2002 letter to Daniel Fransen, the Belgian judge who was investigating *inter alia* the charges of crimes against humanity and torture against Hissène Habré, Chad's Minister of Justice, Djimnain Kouddj-Gaou, wrote that the former dictator 'may not claim any immunity from the Chadian authorities'.[1] Human rights groups enthusiastically welcomed the stand taken by Mr. Kouddj-Gaou, noting that it was the first time that a country had waived the immunity of a former President, to permit criminal human rights charges in another country. But was such a waiver really necessary? Or can one contend that, from a strictly legal point of view, international law provides for the derogation from the rule of immunity *ratione materiae* in the case of charges of international crimes?

To answer these questions, the judgment of 14 February 2002 delivered by the International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*[2] might be useful. As is well known, the Court had been called upon to pronounce on whether or not *incumbent* Ministers of Foreign Affairs enjoy immunity from the criminal jurisdiction of foreign States even when charged with international crimes. This issue clearly concerned the international rules on immunities *ratione personae*. In its ruling, however, the Court did not confine itself to this specific issue, but also found it necessary to consider, albeit incidentally, the current status of international law concerning the applicability of

* PhD, European University Institute, Associate Professor of International Law, University of Florence; member of the Editorial Committee.

1 The text of the letter was made public, further to the authorization of the Chad's Minister of Justice, by Human Rights Watch and is available on its website, at the following address: <http://www.hrw.org>, home page.

2 The text of the ICJ judgment is available on the website of the Court, at <http://icj-cij.org>, home page.

immunities *ratione materiae* in criminal proceedings for international crimes initiated before foreign national courts. In this respect, the Court took a stand that is not entirely convincing and that – if accepted – may give rise to doubts about the possible application of the provision of the Rome Statute on immunities *ratione materiae* (i.e. Article 27) against *former* senior State officials of non-contracting States.

2. The Waiver of Immunities by Chad's Authorities: a Comedy of Errors?

The letter Chad's Minister of Justice wrote to the Belgian judge investigating the crimes allegedly committed by Hissène Habré is puzzling. It contains what could be held to be a waiver, by Chad's authorities, of the immunities of the former President of Chad. Nonetheless, this waiver was grounded in the relevant internal statute lifting Hissène Habré's *immunities from national jurisdiction* for the crimes he allegedly committed in Chad when he was Head of State. In other words, the Minister of Justice, in clarifying that former President Habré could not claim immunity from the criminal jurisdiction of Belgian courts, relied upon Chad's internal legislation removing the immunities of the former dictator before Chad's courts.[3] It thus seems that the Government of Chad confused immunities before Chad's national courts, i.e. the immunities granted to some State officials by virtue of *public internal law*, with immunities before foreign national courts, i.e. the immunities that *international law* confers on some specific categories of State officials before foreign courts.

Clearly, the former category of immunities has no bearing whatsoever on criminal proceedings instituted before foreign courts; they are a matter of internal law and can only be claimed before the national courts of the State to which the acting or former State official belongs. Therefore, assuming that under Chad's national law former President Hissein Habré was still enjoying immunities before the courts of his own country, such national immunities would have not barred *per se* the initiation of criminal proceedings against him before the courts of a foreign State (in this case, Belgium). On the other hand, immunities accruing to State officials under international law could certainly prevent the exercise of jurisdiction by foreign courts. What category of international immunities could have barred the exercise of criminal jurisdiction in Belgium against Hissène Habré? Clearly, since he is no longer Chad's Head of State, Hissène Habré no longer enjoys the so-called *ratione personae* immunities, also referred to as personal immunities. This category of immunities, embracing *inter alia* inviolability from arrest and exemption from the criminal jurisdiction of a foreign State, are forfeited once a person leaves office. However,

3 In his letter, the Chad's Minister of Justice wrote: 'La conférence Nationale Souveraine tenue à N'Djaména du 15 Janvier au 7 avril 1993 avait officiellement levé toute immunité de juridiction à Monsieur Hissein Habré. Cette position a été confortée par la Loi n 010/PR/95 du 9 juin accordant l'amnistie aux détenus et exilés politiques et aux personnes en opposition armée, à l'exclusion de 'l'ex-Président de la République, Hissein Habré, ses co-auteurs et/ou complices. Dès lors, il est clair que Monsieur Hissein Habré ne peut prétendre à une quelconque immunité de la part des Autorités Tchadiennes et ce, depuis la fin de la Conférence Nationale Souveraine.'

international law provides that a person who was entitled to *ratione personae* immunities still enjoys, after leaving office, immunity from foreign jurisdiction for the official acts accomplished in the exercise of his functions while in office. For this class of acts, the former State official is entitled to the so-called *ratione materiae* immunities. Could this category of immunity prevent the exercise of jurisdiction by Belgian courts against former President Habré? As stated above, the question was resolved in the negative: the formal clarification Chad's authorities set out in their letter of 7 October 2002 that Habré is not entitled to any immunity, must be interpreted as a formal renunciation by the Government of Chad to claim *ratione materiae* immunities for the former Head of State. It thus paves the way for the possible institution of criminal proceedings against Habré for the crimes he allegedly committed in Chad during his dictatorship. However, it is worth asking whether such renunciation was really required by international law or whether current international law provides instead for a derogation from the rules on *ratione materiae* immunities whenever a former Head of State (or any other former high ranking State official) faces charges of international crimes. This is a very topical question, as shown by the increasing number of proceedings initiated abroad against former or active high ranking State officials accused of international crimes.

3. *Rationae Materiae* Immunities and International Crimes in the Light of the *Arrest Warrant* Case

In the judgment delivered on 14 February 2002, the ICJ – although it was asked to rule on the applicability of *ratione personae* immunities for incumbent Ministers of Foreign Affairs charged with international crimes before foreign national courts – also considered it appropriate to consider the issue of *ratione materiae* immunities and their possible application in criminal proceedings for international crimes. In paragraph 61 of the judgment the Court clarified that 'the immunities enjoyed under international law by an incumbent *or former* Minister for Foreign Affairs do not represent a bar to criminal prosecution'[4] in certain circumstances. Among such circumstances, the Court mentioned: (i) the fact that the State which a Minister of Foreign Affairs represents or *has represented* decides *to waive that immunity*; and (ii) with respect to *former* Ministers of Foreign Affairs, their possible accountability in respect of acts committed prior or subsequent to their period of office, as well as *in respect of acts committed during that period of office in a private capacity*.

The two scenarios considered by the Court are closely related. The first hypothesis concerns not only the issue of immunities *ratione personae* enjoyed by incumbent Ministers of Foreign Affairs, but also that of immunities *ratione materiae* eventually accruing to Ministers of Foreign Affairs who have ceased to hold office. This is made clear by the fact that the Court refers to persons who represent or *have represented* a State as Ministers of Foreign Affairs; in both cases, according to the Court, criminal immunity under international law does not prevent the exercise of foreign jurisdiction

4 Emphasis added.

if the State *decides to waive that immunity*. Clearly, as *former* Ministers of Foreign Affairs are not entitled to personal immunities after they have left office, the only possible category of immunities pertaining to them, and for which the Court required an express *waiver* on the part of the State they once represented, is that of *ratione materiae immunity* (i.e. the immunity embracing the official acts performed by the State agent in the exercise of his or her official functions).

The second hypothesis only concerns the issue of *ratione materiae* immunity. Here the Court referred explicitly to persons who had left the office of Minister for Foreign Affairs, specifying that they will no longer enjoy all the immunities accorded by international law in other States. Therefore, according to the Court, foreign courts may try former Ministers of Foreign Affairs, but for certain acts. In particular, the Court decided that for acts accomplished *during* the period of office, former Ministers of Foreign Affairs are accountable to foreign national courts only with respect to the acts they performed *in a private capacity*.

Thus, in an *obiter dictum* of a few lines, the Court expressed its view on the current status of international law concerning the applicability of the rules on *ratione materiae* immunities in cases involving charges of international crimes. The stand taken by the Court is clear: unless the State which a former Minister of Foreign Affairs has represented gives its consent, the courts of a foreign State cannot hold such person accountable for international crimes allegedly committed *in an official capacity during his or her period of office*. In addition, the general thrust of the judgment indicates that the reasoning of the Court is equally applicable to other former high-ranking State officials, such as Heads of State and Government. In sum, in the Court's opinion the general rule on *ratione materiae* immunities, whereby States cannot exercise jurisdiction over a foreign State official for acts he or she executed in his or her public capacity, without the consent of the State to which the State official belonged, also applies to alleged international crimes.

The view set forth by the Court has raised criticisms among scholars, who argue that customary international law allows for an exception to the rule of *ratione materiae* immunity in the context of international crimes. According to those commentators, national case law and other instances of international practice clearly show that this exception is firmly established in customary international law and applies to *any State organ*, including former high-ranking State officials such as former Heads of State and Government.[5] As a result, customary international law would permit foreign States to derogate from the rule on *ratione materiae* immunity for acts amounting to international crimes. It would also allow them to exercise jurisdiction over the State official who performed those acts in his or her official capacity, even without the consent of the State he or she represented.

These arguments seem convincing. Indeed, one fails to understand why the ICJ

5 See in particular A. Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, in 13 *European Journal of International Law* (2002), 853, 870–874, and S. Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, *ibid.*, 877.

ignored or underestimated the various instances of international practice that point to the existence of an exception to the customary rule on *ratione materiae* immunity for former Heads of State or Government. In addition, it is not clear whether the Court considers that the customary rule granting *ratione materiae* immunity remains unfettered only with regard to those who represented a State at its highest political level or, instead, whether customary international law provides for an exception, in the context of international crimes, for lower-ranking State officials and military officers as well.

State practice is replete with instances supporting the existence of a derogation from the rule on *ratione materiae* immunities with regard to soldiers, other military personnel and low-ranking State officials. In other words, it seems indisputable that foreign States may call such persons to account for international crimes committed in their public capacity during the exercise of their functions, without the consent of the State they represented. It would therefore be incongruous, at least from a logical point of view, to maintain that the derogation from the customary rule on *ratione materiae* immunity crystallized with respect to official acts constituting international crimes only applies when those acts are committed by some State officials, i.e. members of the military or low-ranking State officials, whereas all other State agents, including the highest political authorities of a State would not be covered by that derogation. Why, in the case of international crimes, should one grant that *ratione materiae* immunities are removed with respect to acts perpetrated by soldiers or senior military officers in their public capacity, possibly in obedience to orders issued by the highest political authorities of their country, while at the same time arguing that the rule on *ratione materiae* immunities continues to apply with regard to the highest political authorities? As has been aptly noted, to maintain that customary law provides for a derogation from *rationae materiae* immunities only with regard to some State officials would lead 'to the preposterous conclusion that lower-ranking State agents could be punished for [international crimes], while those in power ... who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, *only on account of their seniority*'.[6] This proposition is all the more convincing if one considers that, whatever the rationale behind the removal of *ratione materiae* immunities for low-ranking State officials, the same rationale can certainly justify the lifting of those immunities for former Heads of State and Government or other former senior Cabinet members.[7] These persons, as long as they no longer hold office, no longer need

6 A. Cassese, *When May Senior State Officials Be Tried for International Crimes?*, *supra* note 5, 874.

7 According to one view, the removal of immunities *ratione materiae* in the case of international crimes can be justified as a countermeasure against the State which the State official represents or has represented (see, for instance, F. Lattanzi, *Garanzie dei diritti dell'nomo nel diritto internazionale generale* (Milano: Giuffré, 1983), at 357 and 533). According to another view, which can be considered to be the prevailing one, the whole logic behind the notion of international criminal responsibility of individuals would require 'a declassification of the act, which ceases being associated with the public function covered by the ordinary system of immunities from jurisdiction and enforcement'. In other words, the removal of immunities would be justified on account of the gravity of the act, which would take

protection under international law from interferences by other States. As can any person who has committed international crimes under the colours of State authority, they can therefore be called to account before foreign courts for the international crimes they allegedly perpetrated while in office.

A possible explanation of the ICJ's prudent approach is that, once a derogation from *ratione materiae* immunities for persons who represented a State at its highest political level (such as former Heads of State or Government and perhaps other senior Cabinet officials such as Ministers of Foreign Affairs) is admitted, foreign courts could abuse such derogation for political purposes by accusing them of international crimes.[8] This risk has perhaps become all the more serious in the last decades, when the notion of universal jurisdiction has been increasingly upheld in national courts with regard to international crimes. However, despite the risks of such abuse, one also ought to consider that first, only few States (essentially Spain and Belgium) have adopted the absolute universality principle, that is, the principle whereby the exercise of universal jurisdiction over extraterritorial crimes is not contingent upon the presence of the accused as a prerequisite for the initiation of investigations and prosecution. Most States require instead not only the presence of the accused on the territory, but also, quite often, the existence of a treaty ratified by the State, related to the crime over which jurisdiction is exercised. These factors should considerably reduce the potential for abuse. Second, one could insist on some of the various requirements set out by three Judges of the ICJ (Higgins, Koojimans and Buergenthal) in their Joint Separate

---

precedence over the person's legal position. (P.-M. Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in A. Cassese, P. Gaeta, J. R.W. D. Jones (eds), *The Rome Statute of the International Criminal Court. A Commentary* (Oxford: Oxford University Press, 2002) Vol. II, 1085, at 1093.

8 In *Pinochet* (*R. v. Bow Street Stipendiare Magistrate and others, ex parte Pinocher Ugarte*, House of Lords, Judgment of 24 March 1999, in (1999) 2 All ER, also available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm.$am), Lord Goff of Chievely expressed similar concerns in respects of alleged acts of torture in the context of the UN 1984 Torture Convention. According to his Lordship if, under the Torture Convention, 'immunity *ratione materiae* was excluded, *former heads of State and senior State officials would have to think twice about travelling abroad, for fear of being the subject or unfounded allegations emanating from States of a different political persuasion.* In this connection, it is a mistake to assume that State parties to the Convention would only wish to preserve State immunity in cases of torture in order to shield public officials guilty of torture from prosecution elsewhere in the world. Such an assumption is based on a misunderstanding of the nature and function of State immunity, which is a rule of public international law restraining one sovereign State from sitting in judgment on the sovereign behaviour of another ... State immunity *ratione materiae* operates ... to protect former heads of State, and (where immunity is asserted) public officials, even minor public officials, from legal process in foreign countries in respect of acts done in the exercise of their functions as such, including accusation and arrest in respect of alleged crimes. *It can therefore be effective to preclude any such process in respect of alleged crimes, including allegations which are misguided or even malicious – a matter which can be of great significance where, for example, a former head of State is concerned and political passion are aroused. Preservation of State immunity id therefore a matter of particular importance to powerful countries whose heads of State perform an executive role, and who may therefore be regarded as possible targets by governments of States which, for deeply felt political reasons, deplore their actions while in office.*' (Emphasis added.)

Opinion, as a pre-condition for the exercise of universal jurisdiction.[9] Compliance with those requirements could constitute a useful safeguard against abuses by national courts.

Be that as it may, the Court's *dictum* on *ratione materiae* immunities, if accepted by States as authoritatively stating the existing law, could bring to a standstill the recent trend in State practice to call former senior political officials and dictators to account for egregious violations of human rights that constitute international crimes. This *dictum* could therefore weaken or seriously dilute the practical importance of the landmark decision of the House of Lords in *Pinochet*[10] and its enormous effects in the struggle against impunity.

4. The Impact of the Court's Judgment on the Application of Article 27 of the Rome Statute

After having clarified that a foreign court cannot exercise its criminal jurisdiction for international crimes over former Ministers of Foreign Affairs without the consent of the State they represented (unless the acts they performed during the exercise of their functions constituted *private acts*), the Court found it necessary to dwell on the issue of *ratione materiae* immunities of this category of former State organs *before international courts*. In paragraph 61 of the judgment, the Court states that 'an incumbent or *former* Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction'.[11] It expressly referred to such international courts as the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as to the International Criminal Court (ICC). With regard to the ICC, the Court noted that Article 27, para. 2 of its Statute, provides that 'immunities . . . which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

One can leave aside the ICTY and ICTR, whose Statutes, having been adopted by the Security Council acting under Chapter VII of the UN Charter, bind all UN members and may certainly contain rules providing for a derogation from any rule of international law devoid of *jus cogens* nature, including those on *ratione materiae*

9 See paras 59–60 and 79–85 of the Joint Separate Opinion, available at the ICJ's website: <http://www.icj-cij.org> (home page). For example, one can require that the State intending to prosecute a person must first 'offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned' (however, as pointed out by A. Cassese, *When May Senior State Officials Be Tried for International Crimes?*, *supra* note 5, at footnote 9, the same offer should be addressed to the territorial State (normally the *forum conveniens*) and the State of which the victim is a national). In addition, as the three judges maintained, it can be required that the charges are laid by a prosecutor or investigating judge who is fully independent of the government and that the prosecution is initiated at the request of the persons concerned (i.e. the victims or their relatives).

10 *Supra* note 8.

11 Emphasis added.

immunities. It is instead more appropriate to focus on the ICC Statute and the possible scope and purport of Article 27 in the light of the ICJ judgment in the *Arrest Warrant* case.

It is obvious that the contracting States, by establishing the ICC, could endow the new institution with powers derogating from customary international law, only, however, as between such contracting States. Assuming that the position taken by the Court in the *Arrest Warrant* case on *ratione materiae* immunities of former Ministers of Foreign Affairs is correct, let us consider what its possible effect on the application of Article 27 may be with regard to former Ministers of Foreign Affairs (and other former senior political State officials) of non-contracting States. Article 27, para. 1, not mentioned by the Court in paragraph 61 of its judgement, provides that the official capacity as Head of State or Government etc. of an individual shall be of no avail for the purpose of establishing criminal responsibility, nor may it be considered *per se* a ground for mitigation of penalty.[12] This provision clearly excludes the availability of the doctrine of *ratione materiae* immunities for official acts in the case of crimes within the jurisdiction of the Court. If the views of the ICJ on the customary rule on *ratione materiae* immunities are sound, this provision, being of a conventional nature, would allow the courts of contracting States to disregard the *ratione materiae* immunities of former Heads of State or Government and former Ministers of Foreign Affairs only in their mutual relationship, namely, only if the State they have represented is a party to the Rome Statute.[13] What about criminal proceedings before the ICC? Would it be possible to contend that, as the ICC was established by virtue of a treaty, all the provisions of the Rome Statute derogating from customary international law cannot be applied by the ICC in such a way as to be prejudicial to the rights accruing to non-contracting States under customary international law? In other words, would it be possible to argue that, on account of the view set forth by the ICJ in *Arrest Warrant*, the ICC could not exercise its jurisdiction over acts that the highest political authorities of *non-contracting States* executed in their official capacity?

A close examination of the ICJ judgment in the *Arrest Warrant* case is of no avail if one endeavours to ascertain the position of the Court in this respect. As pointed out before, the Court limited itself to noting that 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts', including *inter alia* the ICC. However, the Court did not differentiate between incumbent or former Ministers of Foreign Affairs of contracting States and those of non-contracting States. It merely drew attention to the fact that Article 27, para. 2, of the Rome Statute provides that immunities which may attach to the official capacity

12 According to this provision, the ICC Statute: 'shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

13 The same reasoning would apply, *mutatis mutandis*, with regard to other provisions on the removal of immunities *ratione materiae* contained in international treaties on international crimes, such as the 1948 Genocide Convention.

of a person under international law shall not bar the ICC from exercising its jurisdiction over such a person.[14] Clearly, if one admits that under customary international law former senior (non-military) State officials enjoy *ratione materiae* immunities also when accused of international crimes, this provision – as well as the previous paragraph 1 – should not be construed and applied so as to prejudice the rights belonging to non-contracting States under customary international law, including those stemming from the rule on *ratione materiae* immunities of State agents.

Nonetheless, one can also propose a different construction. The customary rule on *ratione materiae* immunities intends to safeguard the sovereign equality of States: it aims at preventing foreign States from interfering with sovereign prerogatives and functions by calling State officials to account for acts performed in their public capacity. Obviously, before the ICC, the need to protect States from undue interferences on the part of other States, does not arise at all. The Rome Statute established a truly *international judicial institution*, endowed with international legal personality and able to act in an independent and impartial manner. Almost half the States composing the international community have so far ratified the ICC Statute, which has a truly universal vocation. It can therefore be contended that, whatever the scope of the customary rule lifting *ratione materiae* immunities in the case of international crimes, such a rule does not apply in proceedings before the ICC: indeed, its very rationale, usually expressed with the Latin formula *par in parem non habet judicium*, is only valid with regard to *interstate* relations, not however in relations between States and international judicial institutions. In addition, even assuming that one ought to be cautious in admitting that customary international law allows for a derogation from the doctrine of *ratione materiae* immunities with regard to high-ranking State officials, on account of the risk that foreign courts may abuse such derogation, that risk does not arise when the judicial body exercising criminal jurisdiction is *truly* international in character, as is the case with the ICC.

In sum, it can be argued that, at least in proceedings before an international tribunal, *ratione materiae* immunities are removed across the board, without any distinction as between contracting or non-contracting parties.

5. Concluding Remarks

Although *Pinochet*, in the view of the majority of the Judges of the House of Lords sitting on the case, was based on an international *treaty* (the 1984 Convention Against Torture), following that seminal judgment national courts[15] and authoritat-

14 Article 27, para. 2, of the Rome Statute provides: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person.'

15 See for instance the decisions of the Spanish *Audencia Nacional* in *Pinochet* and *Fidel Castro*, quoted by A. Cassese, *When May Senior State Officials Be Tried for International Crimes?*, *supra* note 5, at footnotes 19 and 21.

ive scholarly bodies[16] have deemed indisputable that former Heads of State or Government are no longer shielded by *ratione materiae* immunities in the context of international crimes. The ICJ's opposite view, grounded on what the Court held to be the applicable *customary* law, has now caused uncertainties among States, as a few elements of recent international practice clearly show. For example, as pointed out above, the Belgian judge investigating the crimes allegedly committed by Hissène Habré felt it necessary to address Chad's authorities on the issue of the immunities, if any, accruing to the former dictator. Furthermore, in the course of debates within the Committee of Legal Advisers on Public International Law of the Council of Europe, the delegations of some States expressed different views over the interpretation of the ICJ judgment and the proper content of the rule on *ratione materiae* immunities of heads of State and government.[17] In addition, some delegations voiced misgivings about the bearing of the ICJ judgment on the domestic legislation of various countries, general international law and Article 27 of the Rome Statute.[18] Following a proposal by delegates from the United Kingdom, Israel and Spain, the Chair of the Committee decided that discussion on the matter should be postponed until the reaction of States to the Court's decision was known.

It is advisable, and indeed necessary, to dispel as soon as possible the uncertainty caused by the ICJ judgment. This need arises in particular with regard to the admissibility of national criminal proceedings against former senior State officials, as well as with respect to the proper interpretation of Article 27 of the ICC Statute. The extremely cautious attitude taken by the Court, although motivated by the need to prevent abuses in national proceedings against former Heads of State or former foreign ministers, could eventually become a 'remedy worse than the disease'. The risk of abuses should indeed not make us oblivious to a more serious consequence of

16 See the Resolution on *Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law*, adopted by the *Institut de droit international* at the session of Vancouver (August 2001), whose Article 13, para. 2, provides that former heads of State (or government), although enjoying immunity in respect of acts performed in the exercise of their official functions and related to the exercise thereof, may be prosecuted and tried 'when the acts alleged constitute a crime under international law'. It seems that this provision was included by the committee of the *Institut* which prepared the draft resolution further to 'the approval demonstrated in legal circles for the decision in *Pinochet* . . . , if not for the reasoning set out in its support' (H. Fox, *The Resolution of the Institute of International Law on the Immunities of Heads of State and Government*, 51 *International Comparative Law Quarterly* (2002), 119, at 121).

17 CAHDI (2002) 8, 23rd meeting, Strasbourg, 4 and 5 March 2002, Meeting Report, Secretariat Memorandum drafted by the Directorate General of Legal Affaire, available at: <http//www.coe.int> (home page of the Council of Europe). According to the French delegate, in the light of the ICJ decision Foreign Ministers would enjoy absolute immunity from criminal prosecution for the whole duration of their term of office. With regard to former Foreign Ministers, the French delegate noted that, in the light of paragraph 61 of the decision, they continue to enjoy immunity from criminal prosecution for acts committed while they were in post and in the performance of their duties. The Swiss and Norwegian delegation concurred with the French interpretation of the decision. For the Belgian delegate, the Court had instead limited its decision to immunity *ratione personae*. The German and the Greek delegates maintained that a number of questions had not been settled by the ICJ judgment; in particular, they wondered what regime should apply to heads of State, heads of government and other ministers.

18 See the position adopted by the Italian, German and Israeli delegates.

national courts' inability to prosecute those former State officials: very serious violations of human rights amounting to international crimes would be left unpunished. This state of affairs would send the wrong signal to present dictators and other political leaders bent on vicious crimes: they would feel free to continue their intolerable practices, thereby disregarding fundamental values of the international community, that is, the imperative need to protect human dignity against serious abuses.

ANNEX 3

Prosecutor v. Delalic et al. (Celebici case), Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001

UNITED
NATIONS

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

Case No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

CONTENTS

I. INTRODUCTION 2

II. GROUNDS OF APPEAL RELATING TO ARTICLE 2 OF THE STATUTE 4

A. Whether the Trial Chamber Erred in Holding that the Armed Conflict in Bosnia and Herzegovina at the Time Relevant to the Indictment was of an International Character 4
1. What is the Applicable Law? 5
2. Has the Trial Chamber Applied the "Overall Control" Test? 10
3. The Nature of the Conflict Prior to 19 May 1992 11
4. The Nature of the Conflict After 19 May 1992 12

B. Whether the Bosnian Serbs Detained in the ^elebi}i Camp were Protected Persons Under Geneva Convention IV 16
1. What is the Applicable Law? 17
2. Did the Trial Chamber Apply the Correct Legal Principles? 25
3. Conclusion 30

C. Whether Bosnia and Herzegovina was a Party to the Geneva Conventions at the Time of the Events Alleged in the Indictment 31

III. GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE 34

A. Whether Common Article 3 of the Geneva Conventions Falls Within the Scope of Article 3 of the Statute 36
1. What is the Applicable Law? 36
2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision? 41

B. Whether Common Article 3 is Applicable to International Armed Conflicts 42
1. What is the Applicable Law? 42
2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision? 46

C. Whether Common Article 3 Imposes Individual Criminal Responsibility 46
1. What is the Applicable Law? 46
2. Did the Trial Chamber Apply the Correct Legal Principles? 52

IV. GROUNDS OF APPEAL CONCERNING COMMAND RESPONSIBILITY 54

A. The Ninth Ground of Appeal of Muci} 54
1. *De Facto* Authority as a Basis for a Finding of Superior Responsibility in International Law 55
2. The Trial Chamber's Factual Findings 59
3. Discussion 60
4. Conclusion 64

B. The Prosecution Grounds of Appeal 64
1. Mental Element – "Knew or had Reason to Know" 64
2. Whether Delali} Exercised Superior Responsibility 73
3. Deli}'s Acquittal under Article 7(3) 96

V. UNLAWFUL CONFINEMENT OF CIVILIANS 105

A. Introduction 105

B. The Prosecution appeals 112
1. Article 7(3) Liability 112
2. Article 7(1) Liability 113

C. Muci}'s Appeal 125

D. Conclusion 131

VI. MULTIPLE CONVICTIONS BASED ON THE SAME ACTS 132

A. Discussion 135
1. Cumulative Charging 135
2. Cumulative Convictions 135

B. Conclusion 144

C. Impact on Sentencing 146

VII. DELIC GROUNDS OF APPEAL ALLEGING ERRORS OF FACT 148

A. Introduction 148

B. Issues 9 and 10: Convictions under Counts 1 and 2 149

C. Issues 11 and 12: Convictions Under Counts 3 and 4 156

D. Issues 13 and 14: Convictions Under Counts 18 and 19 165

E. Issues 15 and 16: Convictions under Counts 21 and 22 169

F. Issues 17 and 18: Convictions Under Counts 46 and 47 172

VIII. THE PROSECUTION INTERVIEWS WITH MUCIC 179

IX. DIMINISHED MENTAL RESPONSIBILITY 194

A. Background 194

B. The Issues on Appeal 197

C. The Trial Chamber's Refusal to Define Diminished Mental Responsibility 197

D. Does Diminished Responsibility Constitute a Defence? 200

E. The Trial Chamber's Rejection of Diminished Mental Responsibility 204

X. SELECTIVE PROSECUTION 206

XI. JUDGE KARIBI-WHYTE 214

A. The Allegations as to the Presiding Judge's Conduct 215

B. Applicable Legal Principles 216

C. Was the Allegation Proved? 217

D. Absence of Identifiable Prejudice 218

E. Obligation to Raise the Issue at Trial 222

F. Conclusion 226

XII. JUDGE ODIO BENITO AND VICE-PRESIDENCY OF COSTA RICA 227

A. Background 227

B. Was Judge Odio Benito No Longer Qualified as a Judge of the Tribunal? 229

C. Should Judge Odio Benito Have Disqualified Herself as a Judge of the Tribunal? 237

D. Conclusion 240

XIII. JUDGE ODIO BENITO AND THE VICTIMS OF TORTURE FUND 244

XIV. GROUNDS OF APPEAL RELATING TO SENTENCING 251

A. Introduction 251

B. Prosecution's Appeal Against Mucic's Sentence 256
1. Failure to take into account the gravity of the offences 258
2. Failure to have regard to crimes not alleged in the Indictment 270
3. The determination that all sentences should be served concurrently 273

C. Mucic's Appeal Against Sentence 276
1. Consideration of aggravating and mitigating factors 276
2. Comparison to the case of *Wilhelm Von Leeb* 285
3. Weight to be given to the element of deterrence 286

D. Delic's Appeal Against Sentence 289
1. Violation of the Principle *Nulla Poena Sine Lege* and failure to properly consider the sentencing practice of the courts of the former Yugoslavia 291
2. The sentence imposed was excessive 294

E. Esad Land'o 296
1. Comparison with other sentences imposed by the Tribunal 296
2. Insufficient weight given to mitigating factors 299

F. Significance of Respective Roles in the Broader Context of the Conflict – Ground of Appeal Submitted by Land'o, Delic and Mucic 301

G. Conclusion 304

XV. DISPOSITION 306

XVI. SEPARATE AND DISSENTING OPINION OF JUDGE DAVID HUNT AND JUDGE MOHAMED BENNOUNA 309

A. Introduction 309

B. Background 309

C. Analysis 312
1. Cumulative Charging 312
2. Cumulative Convictions 313

D. Application of these principles to the present case 325
1. Whether the crimes charged are legally distinct crimes 326
2. The determination of which of the duplicative convictions should be retained 328

E. Disposition 331

F. Sentencing Consequences 333

ANNEX A 335

A. Procedural Background 335
1. Notices of Appeal 335
2. Filings 335
3. Grounds of Appeal 337
4. Hearing 342
5. Status Conferences 342

B. Issues Relating to the Composition of the Appeals Chamber 342
1. Assignment of Judges 342
2. Disqualification 343

C. Issues Relating to Defence Counsel 345
1. Provisional Release 346
2. Severance 347

D. Issues Relating to Evidence 348
1. Motions to "Preserve and Provide" Evidence 348
2. Production of Documents 351
3. Admission of Evidence and Related Issues 351

ANNEX B - GLOSSARY OF TERMS 354

The Appeals 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 appeals against the Judgement rendered by Trial Chamber II on 16 November 1998 in the case of *Prosecutor v Zejnil Delali}, Zdravko Muci} also known as "Pavo", Hazim Deli}, Esad Land`o also known as "Zenga"* ("Trial Judgement").[1]

Having considered the written and oral submissions of the Parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

[1] *Prosecutor v Zejnil Delali}, Zdravko Muci} also known as "Pavo", Hazim Deli}, Esad Land`o also known as "Zenga"*, Case No: IT-96-21-T, Trial Chamber, 16 Nov 1998 ("Trial Judgement"). (For a list of designations and abbreviations used in this Judgement, see Annex B).

I. INTRODUCTION

1. The Indictment against *Zejnil Delali}, Zdravko Muci}, Hazim Deli}* and *Esad Land`o*, confirmed on 21 March 1996, alleged serious violations of humanitarian law that occurred in 1992 when Bosnian Muslim and Bosnian Croat forces took control of villages within the Konjic municipality in central Bosnia and Herzegovina. The present appeal concerns events within the Konjic municipality, where persons were detained in a former Yugoslav People's Army ("JNA") facility: the Celebici camp. The Trial Chamber found that detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment by Muci}, Deli} and Land`o.[2] Muci} was found to have been the commander of the ^elebi}i camp, Deli} the deputy commander and Land`o a prison guard.

2. In various forms, Delali} was co-ordinator of Bosnian Muslim and Bosnian Croat forces in the Konjic area between approximately April and September 1992. He was found not guilty of twelve counts of grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war. The Trial Chamber concluded that Delali} did not have sufficient command and control over the Celebici camp or the guards that worked there to entail his criminal responsibility for their actions.[3]

3. Muci} was found guilty of grave breaches of the Geneva Conventions and of violations of the laws or customs of war for crimes including murder, torture, inhuman treatment and unlawful confinement, principally on the basis of his superior responsibility as commander of the Celebici camp, but also, in respect of certain counts, for his direct participation in the crimes.[4] Muci} was sentenced to seven years imprisonment.[5] Delic was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war for his direct participation in crimes including murder, torture, and inhuman treatment.[6] Delic was sentenced to twenty years imprisonment.[7] Landžo was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war, for crimes including murder, torture, and cruel treatment, and sentenced to fifteen years imprisonment.[8]

4. The procedural background of the appeal proceedings is found in Annex A, which also contains a complete list of the grounds of appeal. Certain of the grounds of appeal of the

---

2 Trial Judgement, pp 290-394.
3 Trial Judgement, para 721.
4 Trial Judgement, pp 424-428.
5 Trial Judgement, pp 441-443.
6 Trial Judgement, pp 429-434.
7 Trial Judgement, pp 443-446.

individual parties dealt with substantially the same subject matter, and certain grounds of appeal of Land`o were joined by Muci} and Deli}. For that reason, this judgement considers the various grounds of appeal grouped by subject matter, which was also the way the different grounds of appeal were dealt with during oral argument.

[8] Trial Judgement, pp 447-449.

II. GROUNDS OF APPEAL RELATING TO ARTICLE 2 OF THE STATUTE

5. Deli}, Muci} and Landžo have raised two closely related issues in relation to the findings of the Trial Chamber based on Article 2 of the Statute. The first is the question of the legal test for determining the nature of the conflict, and the second, that of the criteria for establishing whether a person is "protected" under Geneva Convention IV. Delic has raised a third issue as to whether Bosnia and Herzegovina was a party to the Geneva Conventions at the time of the events alleged in the Indictment.

A. Whether the Trial Chamber Erred in Holding that the Armed Conflict in Bosnia and Herzegovina at the Time Relevant to the Indictment was of an International Character

6. Deli},[9] Muci},[10] and Land`o[11] challenge the Trial Chamber's finding that the armed conflict in Bosnia and Herzegovina was international at all times relevant to the Indictment. Relying upon the reasoning of the majority in the *Tadi}* and *Aleksovski* first instance Judgements, the appellants argue that the armed conflict was internal at all times. It is submitted that the Trial Chamber used an incorrect legal test to determine the nature of the conflict and that the test set out by the majority of the *Tadi}* Trial Chamber, the "effective control" test, based on *Nicaragua*,[12] is the appropriate test. In the appellants' opinion, applying this correct test, the facts as found by the Trial Chamber do not support a finding that the armed conflict was international. Consequently, the appellants seek a reversal of the verdict of guilty on the counts of the Indictment based upon Article 2 of the Statute.[13]

---

[9] Hazim Deli}'s Ground 8, as set out in the Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, reads: Whether the Trial Chamber erred in holding that the conflict in Bosnia-Herzegovina was an international armed conflict at the times relevant to this indictment. Counsel for Deli} presented the arguments in relation to this ground of appeal on behalf of all appellants at the hearing.

[10] Zdravko Muci}'s Ground 5, as set out in Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, reads: Whether the Trial Chamber erred in holding that the conflict as described in this case in Bosnia-Herzegovina was an International Armed Conflict at the times relevant to this indictment.

[11] Esad Land`o's Ground 5, as set out in the Land`o Brief, reads: The Trial Chamber erred in law and fact in finding that an international armed conflict existed with reference to the events alleged to have occurred at the ^elebi}i camp.

[12] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v U.S.)* (Merits), 1986 ICJ Reports 14 (*"Nicaragua"*).

[13] In addition, Deli} argues that the Prosecution included the allegation of international armed conflict in each count of the Indictment. Consequently in his view, all the counts should be dismissed, as this allegation has become an element of each offence charged. Moreover, it is argued that because the Prosecution relied on the allegation of an international conflict to invoke the Tribunal's jurisdiction, the Appeals Chamber should dismiss the entire indictment for lack of subject-matter jurisdiction. Deli} Brief, paras 227-248.

7. The Prosecution submits that these grounds of appeal should be dismissed. It submits that the correct legal test for determining whether an armed conflict is international was set forth by the Appeals Chamber in the *Tadi}* Appeal Judgement, which rejected the "effective control" test in relation to acts of armed forces or paramilitary units. Relying upon the *Aleksovski* Appeal Judgement, the Prosecution contends that the Appeals Chamber should follow its previous decision.

8. As noted by the Prosecution, the issue of the correct legal test for determining whether an armed conflict is international was addressed by the Appeals Chamber in the *Tadi}* Appeal Judgement. In the *Aleksovski* Appeal Judgement, the Appeals Chamber found that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice".[14] Elaborating on this principle, the Chamber held:

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."
>
> It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.
>
> What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.[15]

In light of this finding, the *Aleksovski* Appeals Chamber followed the legal test set out in the *Tadic* Appeal Judgement in relation to internationality.

9. Against this background, the Appeals Chamber will turn to the question of the applicable law for determining whether an armed conflict is international.

1. What is the Applicable Law?

10. The Appeals Chamber now turns to a consideration of the *Tadi}* Appeal Judgement, and to the relevant submissions of the parties in this regard, in order to determine whether, applying

[14] *Aleksovski* Appeal Judgement, para 107.
[15] *Aleksovski* Appeal Judgement, paras 108-110 (footnote omitted).

the principle set forth in the *Aleksovski* Appeal Judgement, there are any cogent reasons in the interests of justice for departing from it.[16]

11. From the outset, the Appeals Chamber notes that the findings of the Trial Chamber majorities in the *Tadi}* and *Aleksovski* Judgements, upon which the appellants rely, were overturned on appeal.

12. In the *Tadi}* case, the Appeals Chamber was concerned with, *inter alia*, the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power, thereby rendering the conflict international.

13. The Appeals Chamber saw the question of internationality as turning on the issue of whether the Bosnian Serb forces "could be considered as *de iure* or *de facto* organs of a foreign power, namely the FRY".[17] The important question was "*what degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal".[18] The Chamber considered, after a review of various cases including *Nicaragua*, that international law does not always require the same degree of control over armed groups or private individuals for the purpose of determining whether they can be regarded as a *de facto* organ of the State. The Appeals Chamber found that there were three different standards of control under which an entity could be considered *de facto* organ of the State, each differing according to the nature of the entity. Using this framework, the Appeals Chamber determined that the situation with which it was concerned fell into the second category it identified,[19] which was that of the acts of armed forces or militias or paramilitary units.

14. The Appeals Chamber determined that the legal test which applies to this category was the "overall control" test:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields *overall control* over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. [...] However, it is not necessary that, in addition, the State should also issue, either to the head or

[16] Although the appellants' and the Prosecution's Briefs were filed prior to the issue of the *Aleksovski* Appeal Judgement, the appellants and the Prosecution were given an opportunity to present submissions on these issues at the hearing.

[17] *Tadi}* Appeal Judgement, para 87.

[18] *Ibid*, para 97 (emphasis in original).

[19] The other categories identified by the Appeals Chamber were (1) acts by a single private individual or a group that is not militarily organised, to which the applicable standard is that of "specific instructions" or public endorsement or approval *ex post facto* by the State, para 137; and (3) acts of individuals assimilated to State organs on account of their actual behaviour within the structure of a State, regardless of the existence of State instructions, paras 141-144.

> to members of the group, instructions for the commission of specific acts contrary to international law.[20]

15. Overall control was defined as consisting of more than "the mere provision of financial assistance or military equipment or training".[21] Further, the Appeals Chamber adopted a flexible definition of this test, which allows it to take into consideration the diversity of situations on the field in present-day conflicts:

> This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[22]

16. The Appeals Chamber in *Tadi}* considered *Nicaragua* in depth, and based on two grounds, held that the "effective control" test enunciated by the ICJ was not persuasive.

17. Firstly, the Appeals Chamber found that the *Nicaragua* "effective control" test did not seem to be consonant with the "very logic of the entire system of international law on State responsibility",[23] which is "not based on rigid and uniform criteria".[24] In the Appeals Chamber's view, "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities".[25] Thus, regardless of whether or not specific instructions were issued, the international responsibility of the State may be engaged.[26]

18. Secondly, the Appeals Chamber considered that the *Nicaragua* test is at variance with judicial and State practice. Relying on a number of cases from claims tribunals, national and international courts, and State practice, the Chamber found that, although the "effective control" test was upheld by the practice in relation to individuals or unorganised groups of individuals acting on behalf of States, it was not the case in respect of military or paramilitary groups.[27]

---

20 *Tadi}* Appeal Judgement, para 131 (emphasis added).
21 *Tadi}* Appeal Judgement, para 137.
22 *Id* (emphasis in original).
23 *Tadi}* Appeal Judgement, para 116.
24 *Ibid*, para 117.
25 *Ibid*, para 121.
26 *Ibid*, para 123.
27 *Ibid*, paras 124, and 125-136.

19. The Appeals Chamber found that the armed forces of the Republika Srpska were to be regarded as acting under the overall control of, and on behalf of, the FRY, sharing the same objectives and strategy, thereby rendering the armed conflict international.

20. The Appeals Chamber, after considering in depth the merits of the *Nicaragua* test, thus rejected the "effective control" test, in favour of the less strict "overall control" test. This may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the "overall control" test is utilised to ascertain the foreign intervention, and consequently, to conclude that a conflict which was *prima facie* internal is internationalised.

21. The appellants argue that the findings of the *Tadi}* Appeal Judgement which rejected the "correct legal test" set out in *Nicaragua* are erroneous as the Tribunal is bound by the ICJ's precedent.[28] It is submitted that when the ICJ has determined an issue, the Tribunal should follow it, (1) because of the ICJ's position within the United Nations Charter, and (2) because of the value of precedent.[29] Further, even if the ICJ's decisions are not binding on the Tribunal, the appellants submits that it is "undesirable to have two courts (...) having conflicting decisions on the same issue".[30]

22. The Prosecution rebuts this argument with the following submissions: (1) The two courts have different jurisdictions, and in addition, the ICJ Statute does not provide for precedent. It would thus be odd that the decisions of the ICJ which are not strictly binding on itself would be binding on the Tribunal which has a different jurisdiction.[31] (2) The Appeals Chamber in the *Tadi}* appeal made specific reference to *Nicaragua* and held it not to be persuasive.[32] (3) Judge Shahabuddeen in a dissenting opinion in an ICTR decision found that the differences between the Tribunal and the ICJ do not prohibit recourse to the relevant

---

[28] Deli} Reply, para 99; also adopted by Land`o.
[29] At the appeal hearing counsel for Deli} submitted that the Tribunal is bound by the ICJ's decisions because the ICJ is the "primary judicial organ of the organisation of the United Nations" (Appeal Transcript, p 375), and "essentially the Supreme Court of the United Nations" (*ibid*, p 376), whereas the Tribunal is "an organ of another principal organ, the Security Council" (*ibid*, p 375).
[30] Appeal Transcript, p 379.
[31] Appeal Transcript, p 379.
[32] Appeal Transcript, p 380.

jurisprudence on relevant matters, and that the Tribunal can draw some persuasive value from the ICJ's decisions, without being bound by them.[33]

23. The Appeals Chamber is not persuaded by the appellants' argument. The Appeals Chamber in *Tadi}*, addressing the argument that it should not follow the *Nicaragua* test in relation to the issue at hand as the two courts have different jurisdiction, held:

> What is at issue is not the distinction between two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State.[34]

24. The Appeals Chamber agrees that "so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. [...] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern".[35] However, this Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ"[36] within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.

25. An additional argument submitted by Land`o is that the Appeals Chamber in the *Tadi}* Jurisdiction Decision accurately decided that the conflict was internal. The Appeals Chamber notes that this argument was previously raised by the appellants at trial. The Trial Chamber then concluded that it is "incorrect to contend that the Appeals Chamber has already settled the matter of the nature of the conflict in Bosnia and Herzegovina. In the *Tadi} Jurisdiction Decision* the Chamber found that 'the conflicts in the former Yugoslavia have both internal and international aspects' and deliberately left the question of the nature of particular conflicts open for the Trial Chamber to determine".[37] The Appeals Chamber fully agrees with this conclusion.

26. Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in the *Tadi}* was arrived at on the basis of the

---

[33] Appeal Transcript, p 380. The transcript records the Prosecution as referring to the decision as being made in the case of *Anatole Nsengiyumva v Prosecutor.* No date was provided for the decision but it appears that it was a reference to the Dissenting Opinion of Judge Shahabuddeen in *Anatole Nsengiyumva v Prosecutor,* Case No. ICTR-96-12-A, 3 June 1999. However, the intention appears to have been to refer to the Separate Opinion of Judge Shahabuddeen in *Le Procureur v Laurent Semanza*, ICTR, Case No ICTR-97-20-A, 31 May 2000.

[34] *Tadi}* Appeal Judgement, para 104 (emphasis removed).

[35] Separate Opinion of Judge Shahabuddeen, appended to Decision, *Le Procureur v Laurent Semanza*, ICTR, Case No ICTR-97-20-A, App Ch, 31 May 2000, para 25.

[36] Charter of the United Nations, Article 92.

application of a wrong legal principle, or arrived at *per incuriam*. After careful consideration of the arguments put forward by the appellants, this Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadi}* Appeal Judgement.[38] The "overall control" test set forth in the *Tadi}* Appeal Judgement is thus the applicable criteria for determining the existence of an international armed conflict.

27. The Appeals Chamber will now examine the Trial Judgement in order to ascertain what test was applied.

2. Has the Trial Chamber Applied the "Overall Control" Test?

28. The Appeals Chamber first notes that the *Tadi}* Appeal Judgement which set forth the "overall control" test had not been issued at the time of the delivery of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although not, from a formal viewpoint, having applied the "overall control" test as enunciated by the Appeals Chamber in *Tadi}*, based its conclusions on a legal reasoning consistent with it.

29. The issue before the Trial Chamber was whether the armed forces of the Bosnian Serbs could be regarded as acting on behalf of the FRY, in order to determine whether after its withdrawal in May 1992[39] the conflict continued to be international or instead became internal. More specifically, along the lines of *Tadi}*, the relevant issue is whether the Trial Chamber came to the conclusion that the Bosnian Serb armed forces could be regarded as having been under the overall control of the FRY, going beyond the mere financing and equipping of such forces, and involving also participation in the planning and supervision of military operations after 19 May 1992.[40]

30. The Prosecution submits that the test applied by the Trial Chamber is consistent with the "overall control" test.[41] In the Prosecution's submission, the Trial Chamber adopted the "same approach" as subsequently articulated by the Appeals Chamber in *Tadi}* and *Aleksovski*. Further, the Trial Judgement goes through the "exact same facts, almost as we found in the

---

37 Trial Judgement, para 229 (footnote omitted).
38 The same conclusion was reached by the *Aleksovski* Appeals Chamber, at para 134 of the *Aleksovski* Appeal Judgement.
39 The date commonly accepted as the reference in time is 19 May 1992. *Tadic* Trial Judgement, paras 569 and 571. *^elebi}i* Trial Judgement, para 231.
40 *Tadi}* Appeal Judgement, para 145.
41 Appeal Transcript, p 383.

Tadi} decision".[42] The Prosecution contends that the Appeals Chamber has already considered the same issues and facts in the *Tadi}* appeal, and found that the same conflict was international after May 1992. In the Prosecution's opinion, the Trial Chamber's conclusion that "the government of the FRY was the [...] controlling force behind the VRS"[43] is consistent with *Tadi}*.

3. The Nature of the Conflict Prior to 19 May 1992

31. The Trial Chamber first addressed the question of whether there was an international armed conflict in Bosnia and Herzegovina in May 1992 and whether it continued throughout the rest of that year, *i.e.*, at the time relevant to the charges alleged in the Indictment.[44]

32. The Trial Chamber found that a "significant numbers of [JNA] troops were on the ground when the [BH] government declared the State's independence on 6 March 1992".[45] Further, "there is substantial evidence that the JNA was openly involved in combat activities in Bosnia and Herzegovina from the beginning of March and into April and May of 1992."[46] The Trial Chamber therefore concluded that:

> [...] an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence to indicate that the hostilities which occurred in the Konjic municipality at that time were part of a separate armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there.[47]

33. The Trial Chamber's finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in *Tadi}* that it "is indisputable that an armed conflict is international if it takes place between two or more States",[48] which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict was international prior to 19 May 1992.

---

[42] Appeal Transcript, pp 383-384.
[43] *Id.*
[44] Trial Judgement, para 211. The Trial Chamber relied upon the ICRC Commentary (GC IV) to hold: "We are not here examining the Konjic municipality and the particular forces involved in the conflict in that area to determine whether it was international or internal. Rather, should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities."
[45] *Ibid*, para 212.
[46] *Ibid*, para 213.
[47] *Ibid*, para 214.
[48] *Tadi}* Appeal Judgement, para 84.

4. The Nature of the Conflict After 19 May 1992

34. The Trial Chamber then turned to the issue of the character of the conflict after the alleged withdrawal of the external forces it found to be involved prior to 19 May 1992.[49] Based upon, amongst other matters, an analysis of expert testimony and of Security Council resolutions, it found that after 19 May 1992, the aims and objectives of the conflict remained the same as during the conflict involving the FRY and the JNA prior to that date, *i.e.*, to expand the territory which would form part of the Republic. The Trial Chamber found that "[t]he FRY, at the very least, despite the purported withdrawal of its forces, maintained its support of the Bosnian Serbs and their army and exerted substantial influence over their operations".[50]

35. The Trial Chamber concluded that "[d]espite the formal change in status, the command structure of the new Bosnian Serb army was left largely unaltered from that of the JNA, from which the Bosnian Serbs received their arms and equipment as well as through local SDS organisations".[51]

36. In discussing the nature of the conflict, the Trial Chamber did not rely on *Nicaragua*, noting that, although "this decision of the ICJ constitutes an important source of jurisprudence on various issues of international law", the ICJ is "a very different judicial body concerned with rather different circumstances from the case in hand".[52]

37. The Trial Chamber described its understanding of the factual situation upon which it was required to make a determination as being

> [...] characterised by the breakdown of previous State boundaries and the creation of new ones. Consequently, the question which arises is one of *continuity of control of particular forces*. The date which is consistently raised as the turning point in this matter is that of 19 May 1992, when the JNA apparently withdrew from Bosnia and Herzegovina.[53]

38. It continued:

> The Trial Chamber must keep in mind that the forces constituting the VRS had a prior identity as an actual organ of the SFRY, as the JNA. When the FRY took control of this organ and subsequently severed the formal link between them, by creating the VJ and VRS, the

---

[49] Trial Judgement, para 215.
[50] *Ibid*, para 224.
[51] *Ibid*, para 227.
[52] *Ibid*, para 230.
[53] *Ibid*, para 231 (emphasis added).

> *presumption* remains that these forces retained their link with it, unless otherwise demonstrated.[54]

39. Along the lines of Judge McDonald's Dissenting Opinion in the *Tadi}* case (which it cited), the Trial Chamber found that:

> [...] the withdrawal of JNA troops who were not of Bosnian citizenship, and the creation of the VRS and VJ, constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law.[55]

40. The appellants submit that the Trial Chamber did not rely on any legal test to classify the conflict, *i.e.*, it failed to pronounce its own test to determine whether an intervening State has sufficient control over insurgents to render an internal conflict international.[56] On the other hand, the Prosecution submits that the Trial Chamber classified the conflict on the basis of whether the Prosecution had proved that the FRY/VJ was the "controlling force behind the Bosnian Serbs".[57]

41. The Appeals Chamber disagrees with the appellants' submission that the Trial Chamber did not rely on any legal test to determine the issue. The Trial Chamber appears to have relied on a "continuity of control" test in considering the evidence before it, in order to determine whether the nature of the conflict in Bosnia and Herzegovina, which was international until a point in May 1992, had subsequently changed. The Trial Chamber thus relied on a "control" test, evidently less strict than the "effective control" test. The Trial Chamber did not focus on the issuance of specific instructions, which underlies the "effective control" test.[58] In assessing the evidence, however, the Trial Chamber clearly had regard to all the elements pointing to the influence and control retained over the VRS by the VJ, as required by the "overall control" test.

42. The method employed by the Trial Chamber was later considered as the correct approach in *Aleksovski*. The *Aleksovski* Appeals Chamber indeed interpreted the "overall control" test as follows:

> The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadi}* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the

---

54 *Ibid*, para 232 (footnote omitted and emphasis added).
55 *Ibid*, para 234.
56 Deli} Brief, paras 214-220.
57 Prosecution Response, p 44.
58 *See Tadi}* Appeal Judgement, para 125.

> ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in *Tadi}*, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests.[59]

43. The Appeals Chamber finds that the Trial Chamber's assessment of the effect in reality of the formal withdrawal of the FRY army after 19 May 1992 was based on a careful examination of the evidence before it. That the Trial Chamber indeed relied on this approach is evidenced by the use of phrases such as "despite the attempt at camouflage by the authorities of the FRY",[60] or "despite the formal change in status"[61] in the discussion of the evidence before it.

44. An additional argument submitted by Land`o in support of his contention that the Trial Chamber decided the issue wrongly is based on the agreement concluded under the auspices of the ICRC on 22 May 1992. In Land`o's opinion, this agreement, which was based on common Article 3 of the Geneva Conventions, shows that the conflict was considered by the parties to it to be internal.[62] The Appeals Chamber fully concurs with the Trial Chamber's finding that the *Tadi}* Jurisdiction Decision's reference to the agreement "merely demonstrates that some of the norms applicable to international armed conflicts were specifically brought into force by the parties to the conflict in Bosnia and Herzegovina, some of whom may have wished it to be considered internal, and does not show that the conflict must therefore have been internal in nature".[63]

45. The appellants further argue that the Trial Chamber relied on a "presumption" that the FRY/VJ still exerted control over the VRS after 19 May 1992 to determine the nature of the conflict. The Trial Chamber thus used an "incorrect legal test" when it concluded that because of the former existing links between the FRY and the VRS, the FRY/VJ retained control over the VRS.[64] The Prosecution responds that it is unfounded to suggest that the Trial Chamber shifted to the Defence the burden of proving that the conflict did not remain international after the withdrawal of the JNA.

46. The Appeals Chamber is of the view that although the use of the term "presumption" by the Trial Chamber may not be appropriate, the approach it followed, *i.e.*, assessing all of the relevant evidence before it, including that of the previous circumstances, is correct. This approach is clearly in keeping with the Appeals Chamber's holding in *Tadi}* that in determining

---

59 *Aleksovski* Appeal Judgement, para 145 (footnote omitted).
60 Trial Judgement, para 221.
61 *Ibid*, para 227.
62 Land`o also relies on the *Tadi}* Jurisdiction Decision in support of his contention; Land`o Brief, p 45.
63 Trial Judgement, para 229.

the issue of the nature of the conflict, structures put in place by the parties should not be taken at face value. There it held:

> Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.[65]

47. The Trial Chamber's finding is also consistent with the holding of the Appeals Chamber in *Tadi}* that "[w]here the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold".[66] The "overall control" test could thus be fulfilled even if the armed forces acting on behalf of the "controlling State" had autonomous choices of means and tactics although participating in a common strategy along with the "controlling State".

48. Although the Trial Chamber did not formally apply the "overall control" test set forth by the *Tadi}* Appeal Judgement, the Appeals Chamber is of the view that the Trial Chamber's legal reasoning is entirely consistent with the previous jurisprudence of the Tribunal. The Appeals Chamber will now turn to an additional argument of the parties concerning the Trial Chamber's factual findings.

49. Despite submissions in their briefs that suggested that the appellants wished the Appeals Chamber to review the factual findings of the Trial Chamber in addition to reviewing its legal conclusion,[67] the appellants submitted at the hearing that they "just ask the Court to apply the proper legal test to the facts that were found by the Trial Chamber".[68] The Appeals Chamber will thus not embark on a general assessment of the Trial Chamber's factual findings.

50. The Trial Chamber came to the conclusion, as in the *Tadi}* case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international

---

[64] Deli} Brief, paras 208-213.
[65] *Tadi}* Appeal Judgement, para 154.
[66] *Tadi}* Appeal Judgement, para 140.
[67] In the Deli} Brief at p 85 it is argued "while the FRY may have supported the Bosnian Serbs and even given general guidance, (it) lacked sufficient control over (them) to impute the actions of the Bosnian Serbs to the FRY." Deli} also submits at p 99 that the Appeals Chamber "should conduct a *de novo* review of the Trial Chamber's holding, giving due weight to the historical facts as found by the Trial Chamber and recited in its judgement but determining the legal test itself." At the same time, Deli} accepts that, at p 86, "many of the factual findings of the Trial Chamber are not controversial". Land`o submits that the evidence clearly shows that the conflict which resulted in the events at the ^elebi}i camp was not international, Land`o Brief pp 43-47.

because the FRY remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992. It is argued by the parties[69] that the facts relied upon in the present case are very similar to those found in the *Tadi}* case. As observed previously, however, a general review of the evidence before the Trial Chamber does not fall within the scope of this appeal. It suffices to say that this Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfil the legal conditions as set forth in the *Tadi}* case.

51. The Appeals Chamber therefore finds that Deli}'s Ground 8, Muci}'s Ground 5, and Land`o's Ground 5 must fail.

B. Whether the Bosnian Serbs Detained in the ^elebi}i Camp were Protected Persons Under Geneva Convention IV

52. Delali}, Muci}, Deli} and Land`o[70] submit that the Trial Chamber erred in law in finding that the Bosnian Serbs detainees at the ^elebi}i camp could be considered not to be nationals of Bosnia and Herzegovina for the purposes of the category of persons protected under Geneva Convention IV. They contend that the Trial Chamber's conclusions are inconsistent with international law and Bosnian law. The appellants request that the Appeals Chamber enter judgements of acquittal on all counts based on Article 2 of the Statute.

53. The Prosecution submits that the appellants' grounds of appeal have no merit and that the Appeals Chamber should follow its previous jurisprudence on the issue, as set out in the *Tadi}* Appeal Judgement, and confirmed by the *Aleksovski* Appeal Judgement. It submits that it is now settled in that jurisprudence that in an international conflict victims may be considered as not being nationals of the party in whose hands they find themselves, even if, as a matter of national law, they were nationals of the same State as the persons by whom they are detained.

---

[68] Appeal Transcript, p 385.

[69] Prosecution Response, p 46; Deli} Brief, p 60; Landžo Brief, pp 44-47.

[70] Delali}'s Ground of Contention 3, as set out in the Delali} Brief, reads: The Trial Chamber committed errors of both law and fact in its determination that the ^elebi}i detainees were persons protected by the Geneva Conventions of 1949. Muci}'s Ground 4, as set out in Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, reads: Whether the Trial Chamber erred at[*sic*] holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention IV. Deli}'s Ground 4, as set out in the Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, reads Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Land`o's Ground 6, as set out in the Land`o Brief, reads: The Trial Chamber erred in law by finding that the victims of the alleged crimes were "protected persons" for the purpose of the Geneva Conventions.

Further, the Prosecution submits that the test applied by the Trial Chamber is consistent with the *Tadi}* Appeal Judgement.

54. As noted by the Prosecution, the Appeals Chamber in *Tadi}* has previously addressed the issue of the criteria for establishing whether a person is "protected" under Geneva Convention IV. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow the law in relation to protected persons as identified in the *Tadi}* Appeal Judgement, unless cogent reasons in the interests of justice exist to depart from it.

55. After considering whether cogent reasons exist to depart from the *Tadi}* Appeal Judgement, the Appeals Chamber will turn to an analysis of the Trial Chamber's findings so as to determine whether it applied the correct legal principles to determine the nationality of the victims for the purpose of the application of the grave breaches provisions.

1. What is the Applicable Law?

56. Article 2 of the Statute of the Tribunal provides that it has the power to prosecute persons who committed grave breaches of the Geneva Conventions "against persons or property *protected under the provisions of the relevant Geneva Conventions*".[71] The applicable provision to ascertain whether Bosnian Serbs detained in the *^elebi}i* camp can be regarded as victims of grave breaches is Article 4(1) of Geneva Convention IV on the protection of civilians, which defines "protected persons" as "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Appeals Chamber in *Tadi}* found that:

> [...] the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection....[72]

57. The Appeals Chamber held that "already in 1949 *the legal bond of nationality was not regarded as crucial* and allowance was made for special cases".[73] Further, relying on a teleological approach, it continued:

---

[71] Emphasis added.
[72] *Tadi}* Appeal Judgement, para 164 (footnote omitted).
[73] *Tadi}* Appeal Judgement, para 165 (emphasis added). In this context, the Appeals Chamber referred to the situation of refugees and nationals of neutral States who do not enjoy diplomatic protection.

> [...] Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. [...] In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[74]

58. The Appeals Chamber in *Aleksovski* endorsed the *Tadi}* reasoning holding that "Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors."[75]

59. The appellants submit that the Appeals Chamber decisions in *Tadi}* and *Aleksovski* wrongly interpreted Article 4 of Geneva Convention IV, and that the *Tadi}* and *Aleksovski* Trial Chamber Judgements are correct. It is essentially submitted that in order for victims to gain "protected persons" status, Geneva Convention IV requires that the person in question be of a different nationality than the perpetrators of the alleged offence, based on the national law on citizenship of Bosnia and Herzegovina. This interpretation is based on a "strict" interpretation of the Convention which is, in the appellants' view, mandated by the "traditional rules of treaty interpretation".

60. The Prosecution contends that the Appeals Chamber in *Aleksovski* already adopted the approach used in the *Tadi}* Appeal Judgement,[76] and that the appellants in this case have not demonstrated any "cogent reasons in the interests of justice" that could justify a departure by the Appeals Chamber from its previous decisions on the issue.

61. Before turning to these arguments, the Appeals Chamber will consider an additional argument submitted by the appellants which goes to the status of the *Tadi}* Appeal Judgement statement of the law and may be conveniently addressed as a preliminary matter.

62. The appellants submit that the *Tadi}* statements on the meaning of protected persons are *dicta*, as in their view the Appeals Chamber in *Tadi}* and *Aleksovski* cases derived the protected persons status of the victims from the finding that the perpetrators were acting on behalf of the FRY or Croatia.[77] The Prosecution on the other hand submits that the Appeals Chamber's statement in *Tadi}* was part of the *ratio decidendi*.[78]

63. While the Appeals Chamber in *Tadi}* appears to have reached a conclusion as to the status of the victims as protected persons based on the previous finding that the Bosnian Serbs

---

74 *Tadi}* Appeal Judgement, para 168.
75 *Aleksovski* Appeal Judgement, para 151.
76 Appeal Transcript, p 426.
77 Appeal Transcript, pp 395-396. The appellants' submission in respect of *Aleksovski* is similar.

acted as *de facto* organs of another State, the FRY,[79] it set forth a clear statement of the law as to the applicable criteria to determine the nationality of the victims for the purposes of the Geneva Conventions. The Appeals Chamber is satisfied that this statement of the applicable law, which was endorsed by the Appeals Chamber in *Aleksovski*, falls within the scope of the *Aleksovski* statement in relation to the practice of following previous decisions of the Appeals Chamber.

64. The Appeals Chamber now turns to the main arguments relied upon by the appellants, namely that the Appeals Chamber's interpretation of the nationality requirement is wrong as it is (1) contrary to the "traditional rules of treaty interpretation"; and (2) inconsistent with the national laws of Bosnia and Herzegovina on citizenship.

65. The appellants submit that "the traditional rules of treaty interpretation" should be applied to interpret strictly the nationality requirement set out in Article 4 of Geneva Convention IV.[80] The word "national" should therefore be interpreted according to its natural and ordinary meaning.[81] The appellants submit in addition that if the Geneva Conventions are now obsolete and need to be updated to take into consideration a "new reality", a diplomatic conference should be convened to revise them.[82]

66. The Prosecution on the other hand contends that the Vienna Convention on the Law of Treaties of 1969[83] provides that the ordinary meaning is the meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.[84] It is submitted that the Appeals Chamber in *Tadi}* found that the legal bond of nationality was not regarded as crucial in 1949, *i.e.*, that there was no intention at the time to determine that nationality was the sole criteria.[85] In addition, adopting the appellants' position would result in the removal of protections from the Geneva Conventions contrary to their very object and purpose.[86]

67. The argument of the appellants relates to the interpretative approach to be applied to the concept of nationality in Geneva Convention IV. The appellants and the Prosecution both rely

---

78 Prosecution Response to Supplementary Brief, pp 8-9.
79 *Tadi}* Appeal Judgement, para 167.
80 Appeal Transcript, p 401. Counsel for Delali} presented the arguments on behalf of all appellants.
81 Appeal Transcript, p 394.
82 Appeal Transcript, p 400.
83 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 331 ("the Vienna Convention").
84 Appeal Transcript, p 426.
85 Appeal Transcript, p 427.
86 Appeal Transcript, p 429.

on the Vienna Convention in support of their contentions. The Appeals Chamber agrees with the parties that it is appropriate to refer to the Vienna Convention as the applicable rules of interpretation, and to Article 31 in particular, which sets forth the general rule for the interpretation of treaties. The Appeals Chamber notes that it is generally accepted that these provisions reflect customary rules.[87] The relevant part of Article 31 reads as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

68. The Vienna Convention in effect adopted a textual, contextual *and* a teleological approach of interpretation, allowing for an interpretation of the natural and ordinary meaning of the terms of a treaty in their context, while having regard to the object and purpose of the treaty.

69. In addition, Article 32 of the Vienna Convention, entitled "Supplementary means of interpretation", provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous and obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

70. Where the interpretative rule set out in Article 31 does not provide a satisfactory conclusion recourse may be had to the *travaux préparatoires* as a subsidiary means of interpretation.

71. In finding that ethnicity may be taken into consideration when determining the nationality of the victims for the purposes of the application of Geneva Convention IV, the Appeals Chamber in *Tadi}* concluded:

> Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, *not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose* suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[88]

72. This reasoning was endorsed by the Appeals Chamber in *Aleksovski*:

---

[87] The ICJ in the *Case concerning the Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgement of 3 February 1994, ICJ Reports (1994), p 21 at para 41, held that Article 31 reflected customary international law. Its statement on the customary status of Article 31 was endorsed in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility), Judgement of 15 February 1995, ICJ Reports (1995), p 18 at para 33.

[88] *Tadi}* Appeal Judgement, para 166 (emphasis added).

> The Appeals Chamber considers that this extended application of Article 4 *meets the object and purpose of Geneva Convention IV*, and is particularly apposite in the context of present-day inter-ethnic conflicts.[89]

73. The Appeals Chamber finds that this interpretative approach is consistent with the rules of treaty interpretation set out in the Vienna Convention. Further, the Appeals Chamber in *Tadi}* only relied on the *travaux préparatoires* to reinforce its conclusion reached upon an examination of the overall context of the Geneva Conventions. The Appeals Chamber is thus unconvinced by the appellants' argument and finds that the interpretation of the nationality requirement of Article 4 in the *Tadi}* Appeals Judgement does not constitute a rewriting of Geneva Convention IV or a "re-creation" of the law.[90] The nationality requirement in Article 4 of Geneva Convention IV should therefore be ascertained within the context of the object and purpose of humanitarian law, which "is directed to the protection of civilians to the maximum extent possible".[91] This in turn must be done within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds.

74. The other set of arguments submitted by the appellants relates to the national laws of Bosnia and Herzegovina on citizenship, and the applicable criteria to ascertain nationality. The appellants contend that the term "national" in Geneva Convention IV refers to nationality as defined by domestic law. It is argued that according to the applicable law of Bosnia and Herzegovina on citizenship at the time relevant to the Indictment, the Bosnian Serbs were of Bosnian nationality. In the appellants' submission, all former citizens of the former Socialist Republic of Bosnia and Herzegovina (including those of Serbian ethnic origin), one of the constituent republics of the SFRY, became Bosnian nationals when the SFRY was dissolved and Bosnia and Herzegovina was recognised as an independent State in April 1992.[92] Further, FRY citizenship was limited to residents in its constituent parts, and the law of Bosnia and Herzegovina did not provide a possibility for its citizens of Serb ethnic background to opt for FRY citizenship.[93] Delali} submits that in addition, the Bosnian Serbs subsequently agreed to the Dayton Agreement, which provides that they are nationals of Bosnia and Herzegovina.[94]

75. The appellants' arguments go to the issue of whether domestic laws are relevant to determining the nationality of the victims for the purpose of applying the Geneva Conventions.

---

89 *Aleksovki* Appeal Judgement, para 152 (emphasis added).
90 Delali} Brief, p 59. Deli} Brief, p 23.
91 *Tadi}* Appeal Judgement, para 168.
92 Appeal Transcript, p 408.
93 Appeal Tra nscript, p 409.

As observed above, however, the nationality requirement of Article 4 of Geneva Convention IV is to be interpreted within the framework of humanitarian law.

76. It is a settled principle of international law that the effect of domestic laws on the international plane is determined by international law. As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[95] In relation to the admissibility of a claim within the context of the exercise of diplomatic protection based on the nationality granted by a State, the ICJ held in *Nottebohm*:[96]

> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.[97]

77. The ICJ went on to state that "[i]nternational practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect".[98] To paraphrase the ICJ in *Nottebohm*, the question at issue must thus be decided on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Tribunal's own functions. Consequently, the nationality granted by a State on the basis of its domestic laws is not automatically binding on an international tribunal which is itself entrusted with the task of ascertaining the nationality of the victims for the purposes of the application of international humanitarian law. Article 4 of Geneva Convention IV, when referring to the absence of national link between the victims and the persons in whose hands they find themselves, may therefore be considered as referring to a nationality link defined for the purposes of international humanitarian law, and not as referring to the domestic legislation as such. It thus falls squarely within the competence of this Appeals

---

[94] The Prosecution submits that the Trial Chamber did not act unreasonably in not giving due weight to the Defence arguments based on national legislation. Prosecution Response, p 36. Delali} Brief, pp 54-55.

[95] *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Reports, Series A, No 7, p 19. *See* also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia*, 29 November 1991, which states that "the form of internal political organisation and the constitutional provisions are mere facts" (para 1 c).

[96] *Nottebohm Case* (Liechtenstein v Guatemala), (Second Phase), Judgement of 6 April 1955, ICJ Reports 1955.

[97] *Nottebohm* at pp 20-21.

[98] *Nottebohm* at p 21.

Chamber to ascertain the effect of the domestic laws of the former Yugoslavia within the international context in which this Tribunal operates.

78. Relying on the ICRC Commentary to Article 4 of Geneva Convention IV, the appellants further argue that international law cannot interfere in a State's relations with its own nationals, except in cases of genocide and crimes against humanity.[99] In the appellants' view, in the situation of an internationalised armed conflict where the victims and the perpetrators are of the same nationality, the victims are only protected by their national laws.[100]

79. The purpose of Geneva Convention IV in providing for universal jurisdiction only in relation to the grave breaches provisions was to avoid interference by domestic courts of other States in situations which concern only the relationship between a State and its own nationals. The ICRC Commentary (GC IV), referred to by the appellants, thus stated that Geneva Convention IV is "faithful to a recognised principle of international law: it does not interfere in a State's relations with its own nationals".[101] The Commentary did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal national link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law. It may be added that the government of Bosnia and Herzegovina itself did not oppose the prosecution of Bosnian nationals for acts of violence against other Bosnians based upon the grave breaches regime.[102]

80. It is noteworthy that, although the appellants emphasised that the "nationality" referred to in Geneva Convention IV is to be understood as referring to the legal citizenship under domestic law, they accepted at the hearing that in the former Yugoslavia "nationality", in everyday conversation, refers to ethnicity.[103]

81. The Appeals Chamber agrees with the Prosecution that depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were

---

[99] Appeal Transcript, pp 397-398.
[100] Appeal Transcript p 415.
[101] ICRC Commentary (GC IV), p 46.
[102] *See* Tribunal's Second Annual Report, para 132; Third Annual Report, para 167 and Fourth Annual Report, para 183.
[103] Appeal Transcript, pp 545-546.

placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions. A more purposive and realistic approach is particularly apposite in circumstances of the dissolution of Yugoslavia, and in the emerging State of Bosnia and Herzegovina where various parties were engaged in fighting, and the government was opposed to a partition based on ethnicity, which would have resulted in movements of population, and where, ultimately, the issue at stake was the final shape of the State and of the new emerging entities.

82. In *Tadi}*, the Appeals Chamber, relying on a teleological approach, concluded that formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds:

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance.[104]

83. As found in previous Appeals Chamber jurisprudence, Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of "the substance of relations"[105] and not based on the legal characterisation under domestic legislation. In today's ethnic conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadi}* Appeal Judgement that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable".[106]

84. Applying the principle enunciated in *Aleksovski*, the Appeals Chamber sees no cogent reasons in the interests of justice to depart from the *Tadi}* Appeal Judgement. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.

---

[104] *Tadi}* Appeal Judgement, para 166.

85. It is therefore necessary to consider the findings of the Trial Chamber to ascertain whether it applied these principles correctly.

2. Did the Trial Chamber Apply the Correct Legal Principles?

86. As in the section relating to the nature of the conflict, the Appeals Chamber first notes that the *Tadi}* Appeal Judgement, which set forth the law applicable to the determination of protected person status, had not been issued at the time of the issue of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although having not, from a formal viewpoint, applied the reasoning of the Appeals Chamber in the *Tadi}* Appeal Judgement, based its conclusions on legal reasoning consistent with it.

87. The issue before the Trial Chamber was whether the Bosnian Serb victims in the hands of Bosnian Muslims and Bosnian Croats could be regarded as protected persons, *i.e.*, as having a different nationality from that of their captors.

88. The appellants argue that the Bosnian Serb victims detained in the ^elebi}i camp were clearly nationals of Bosnia and Herzegovina, and cannot be considered as FRY nationals. Thus, the victims could not be considered as "protected persons". The Prosecution on the other hand contends that the test applied by the Trial Chamber was consistent with the *Tadi}* Appeal Judgement.

89. It is first necessary to address a particular argument before turning to an examination of the Trial Chamber's findings. Delali} submits, contrary to the Prosecution's assertions, the *Tadi}* Appeal Judgement does not govern the protected persons issue in this case, because the facts of the two cases are dramatically different.[107] The Appeals Chamber in *Aleksovski* observed that the principle that the Appeals Chamber will follow its previous decisions "only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision".[108]

90. In *Tadi}* and *Aleksovski* the perpetrators were regarded as acting on behalf of an external party, the FRY and Croatia respectively, and the Bosnian Muslim victims were considered as

---

[105] *Tadi}* Appeal Judgement, para 168.
[106] *Tadi}* Appeal Judgement, para 169.
[107] Delali}'s Reply, p 4.
[108] *Aleksovski* Appeal Judgement, para 110.

protected persons by virtue of the fact that they did not have the nationality of the party in whose hands they found themselves. By contrast, in this case, where the accused are Bosnian Muslim or Bosnian Croat, no finding was made that they were acting on behalf of a foreign State, whereas the Bosnian Serb victims could be regarded as having links with the party (the Bosnian Serb armed forces) acting on behalf of a foreign State (the FRY). However, although the factual circumstances of these cases are different, the legal principle which is applicable to the facts is identical. The Appeals Chamber therefore finds the appellant's argument unconvincing.

91. The Trial Chamber found that the Bosnian Serb victims could be regarded "as having been in the hands of a party to the conflict of which they were not nationals, being Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina".[109] The Trial Chamber essentially relied on a broad and purposive approach to reach its conclusion, rejecting the proposition that a determination of the nationality of the victims should be based on the domestic laws on citizenship.

92. The Trial Chamber first emphasised the role played by international law in relation to nationality,[110] holding that "the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[111] It then nevertheless found that '[a]n analysis of the relevant laws on nationality in Bosnia and Herzegovina in 1992 does not, however, reveal a clear picture. At that time, as we have discussed, the State was struggling to achieve its independence and all the previous structures of the SFRY were dissolving. In addition, an international armed conflict was tearing Bosnia and Herzegovina apart and the very issue which was being fought over concerned the desire of certain groups within its population to separate themselves from that State and join with another".[112] The Trial Chamber also noted that "the Bosnian Serbs, in their purported constitution of the SRBH, proclaimed that citizens of the Serb Republic were citizens of Yugoslavia".[113]

93. The Trial Chamber also declined to rely upon the argument presented by the Prosecution's expert Professor Economides that there is an emerging doctrine in international law of the right to the nationality of one's own choosing. Finding that the principle of a right of

[109] Trial Judgement, para 274.
[110] Trial Judgement, para 248.
[111] Trial Judgement, para 258 (footnote omitted).
[112] Trial Judgement, para 251.
[113] Trial Judgement, para 253.

option was not a settled rule of international law, the Trial Chamber held that this principle could not be, of itself, determinative in viewing the Bosnian Serbs to be non-nationals of Bosnia and Herzegovina.[114]

94. The Trial Chamber discussed the nationality link in the light of the *Nottebohm* case and concluded:

> Assuming that Bosnia and Herzegovina had granted its nationality to the Bosnian Serbs, Croats and Muslims in 1992, there may be an insufficient link between the Bosnian Serbs and that State for them to be considered Bosnian nationals by this Trial Chamber in the adjudication of the present case. The granting of nationality occurred within the context of the dissolution of a State and a consequent armed conflict. Furthermore, the Bosnian Serbs had clearly expressed their wish not to be nationals of Bosnia and Herzegovina by proclaiming a constitution rendering them part of Yugoslavia and engaging in this armed conflict in order to achieve that aim. Such finding would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose. It would also be in the spirit of that law by rendering it as widely applicable as possible.[115]

95. In the light of its finding on the international character of the conflict, the Trial Chamber held that it is "possible to regard the Bosnian Serbs as acting on behalf of the FRY in its continuing armed conflict against the authorities of Bosnia and Herzegovina".[116] The Bosnian Serb victims could thus be considered as having a different nationality from that of their captors.

96. That the Trial Chamber relied upon a broad and purposive, and ultimately realistic, approach[117] is indicated by the following references which concluded its reasoning:

> [T]his Trial Chamber wishes to emphasise the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would indeed be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.[118]

97. The Appeals Chamber finds that the legal reasoning adopted by the Trial Chamber is consistent with the *Tadi}* reasoning. The Trial Chamber rejected an approach based upon formal national bonds in favour of an approach which accords due emphasis to the object and

---

[114] Trial Judgement, para 256.
[115] Trial Judgement, para 259.
[116] Trial Judgement, para 262.
[117] The Trial Chamber characterised its approach as "broad and principled" (para 275).

purpose of the Geneva Conventions.[119] At the same time, the Trial Chamber took into consideration the realities of the circumstances of the conflict in Bosnia and Herzegovina, holding that "(t)he law must be applied to the reality of the situation".[120] Although in some respects the legal reasoning of the Trial Chamber may appear to be broader than the reasoning adopted by the Appeals Chamber, this Appeals Chamber is satisfied that the conclusions reached fall within the scope of the *Tadi}* reasoning. As submitted by the Prosecution,[121] the Trial Chamber correctly sought to establish whether the victims could be regarded as belonging to the opposing side of the conflict.

98. The Appeals Chamber particularly agrees with the Trial Chamber's finding that the Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they "were arrested and detained mainly on the basis of their Serb identity" and "they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State".[122]

99. The Trial Chamber's holding that its finding "would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose"[123] also follows closely the Appeals Chamber's position that the legal test to ascertain the nationality of the victims is applicable within the limited context of humanitarian law, and for the specific purposes of the application of Geneva Convention IV in cases before the Tribunal. Land`o submitted in his brief that the Trial Chamber's finding suggests that a person can have one nationality for the purposes of national law, and another for purposes of international law, which, in his opinion, is contrary to international law. He also contended that the Trial Chamber's holding involuntarily deprives all Bosnian Serbs of their nationality. The argument that the Trial Chamber's findings have the consequence of regulating the nationality of the victims in the national sphere is unmeritorious. It should be made clear that the conclusions reached by international judges in the performance of their duties do not have the effect of regulating the nationality of these persons *vis à vis* the State within the national sphere. Nor do they purport to pronounce on the internal validity of the laws of Bosnia and Herzegovina. The Appeals Chamber agrees with the Prosecution that the Trial Chamber did not act unreasonably

---

[118] Trial Judgement, para 263.
[119] *See* for instance: "In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken", Trial Judgement, para 266.
[120] Trial Judgement, para 264.
[121] Prosecution Response, p 36.
[122] Trial Judgement, para 265.
[123] Trial Judgement, para 259.

in not giving weight to the evidence led by the Defence concerning the nationality of the particular victims under domestic law.

100. The appellants submit arguments based upon the "effective link" test derived from the ICJ case *Nottebohm*.[124] In their view, the following indicia should be taken into consideration when assessing the nationality link of the victims with the FRY: place of birth, of education, of marriage, of vote, and habitual residence; the latter being, they submit, the most important criterion.

101. The *Nottebohm* case was concerned with ascertaining the effects of the national link for the purposes of the exercise of diplomatic protection, whereas in the instant case, the Appeals Chamber is faced with the task of determining whether the victims could be considered as having the nationality of a foreign State involved in the conflict, for the purposes of their protection under humanitarian law. It is thus irrelevant to demonstrate, as argued by the appellants, that the victims and their families had their habitual residence in Bosnia and Herzegovina, or that they exercised their activities there. Rather, the issue at hand, in a situation of internationalised armed conflict, is whether the victims can be regarded as not sharing the same nationality as their captors, for the purposes of the Geneva Conventions, even if arguably they were of the same nationality from a domestic legal point of view.

102. Although the Trial Chamber referred to the *Nottebohm* "effective link" test in the course of its legal reasoning, its conclusion as to the nationality of the victims for the purposes of the Geneva Conventions did not depend on that test. The Trial Chamber emphasised that "operating on the international plane, the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[125] Further, the Trial Chamber when assessing the nationality requirement clearly referred to the specific circumstances of the case and to the specific purposes of the application of humanitarian law.

103. Delali} further submitted that the Trial Chamber altered international law in relying upon the "secessionist activities" of the Bosnian Serbs to reach its conclusion, as the right to self-determination is not recognised in international law.[126]

---

[124] Delali} Brief, p 55. Deli} Brief, pp 36-39. Landžo Brief, pp 62-64.
[125] Trial Judgement, para 258.
[126] Delali} in his Brief made reference to the proclamation of Serbian autonomous regions and the establishment of the Republika Sprska in 1992, pp 52-54.

104. It is irrelevant to determine whether the activities with which the Bosnian Serbs were associated were in conformity with the right to self-determination or not. As previously stated, the question at issue is not whether this activity was lawful or whether it is in compliance with the right to self-determination. Rather, the issue relevant to humanitarian law is whether the civilians detained in the ^elebi}i camp were protected persons in accordance with Geneva Convention IV.

105. Deli} also submits that the Trial Chamber's finding that the Bosnian Serb victims were not Bosnian nationals is at odds with its factual conclusions that Bosnian Serbs were Bosnian citizens for the purpose of determining the existence of an international armed conflict.[127] This argument has no merit. Contrary to the Appellant's contention, the findings of the Trial Chamber are not contradictory. In finding that the conflict which took place in Bosnia and Herzegovina was of an international character, the Trial Chamber merely concluded that a foreign State was involved and was supporting one of the parties in a conflict that was *prima facie* internal. This finding did not purport to make a determination as to the nationality of the party engaged in fighting with the support of the foreign State.

3. Conclusion

106. The Appeals Chamber finds that the legal reasoning applied by the Trial Chamber is consistent with the applicable legal principles identified in the *Tadi}* Appeal Judgement. For the purposes of the application of Article 2 of the Statute to the present case, the Bosnian Serb victims detained in the ^elebi}i camp must be regarded as having been in the hands of a party to the conflict, Bosnia and Herzegovina, of which they were not nationals. The appellants' grounds of appeal therefore fail.

[127] Delic Brief, pp 48-49.

C. Whether Bosnia and Herzegovina was a Party to the Geneva Conventions at the Time of the Events Alleged in the Indictment

107. Delic challenges the Trial Chamber's findings of guilt based on Article 2 of the Statute, which vests the Tribunal with the jurisdiction to prosecute grave breaches of the 1949 Geneva Conventions. Delić contends that because Bosnia and Herzegovina did not "accede" to the Geneva Conventions until 31 December 1992, *i.e.*, after the events alleged in the Indictment, his acts committed before that date cannot be prosecuted under the treaty regime of grave breaches.[128] Delic also argues that the Geneva Conventions do not constitute customary law. Therefore, in his opinion, the application of the Geneva Conventions to acts which occurred before the date of Bosnia and Herzegovina's "accession" to them would violate the principle of legality or *nullem crimen sine lege*.[129] All counts based on Article 2 of the Statute in the Indictment should, he argues, thus be dismissed.

108. The Prosecution contends that regardless of whether or not Bosnia and Herzegovina was bound by the Geneva Conventions *qua* treaty obligations at the relevant time, the grave breaches provisions of the Geneva Conventions reflected customary international law at all material times.[130] Further, Bosnia and Herzegovina was bound by the Geneva Conventions as a result of their instrument of succession deposited on 31 December 1992, which took effect on the date on which Bosnia and Herzegovina became independent, 6 March 1992.[131]

109. The Appeals Chamber first takes note of the "declaration of succession" deposited by Bosnia and Herzegovina on 31 December 1992 with the Swiss Federal Council in its capacity as depositary of the 1949 Geneva Conventions.

110. Bosnia and Herzegovina's declaration of succession may be regarded as a "notification of succession" which is now defined by the 1978 Vienna Convention on Succession of States in Respect of Treaties as "any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty".[132] Thus, in the case of the

---

[128] Delić's Issue 3 as set out in the Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, reads: Whether Delić can be convicted of grave breaches of the Geneva Conventions of 12 August 1949 in that at the time of the acts alleged in the indictment the Republic of Bosnia and Herzegovina was not a party to the Geneva Conventions of 12 August 1949.

[129] Delić Brief, pp 19-21. Appeal Transcript, pp 338-345.

[130] Prosecution Response, pp 37-40.

[131] Appeal Transcript pp 367–370.

[132] 17 ILM 1488. The Vienna Convention on Succession of States in Respect of Treaties was adopted on 22 August 1978 and entered into force on 6 November 1996. Bosnia and Herzegovina succeeded as a party to the

replacement of a State by several others, "a newly independent State which makes a notification of succession [...] shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.[133] The date of 6 March 1992 is generally accepted as the official date of Bosnia and Herzegovina's independence (when it became a sovereign State) and it may be considered that it became an official party to the Geneva Conventions from this date.[134] Indeed, the Swiss Federal Council subsequently notified the State parties to the Geneva Conventions that Bosnia and Herzegovina "became a party to the Conventions [...] at the date of its independence, i.e. on 6 March 1992".[135] In this regard, the argument put forward by the appellants appears to confuse the concepts of "accession" and "succession".

111. Although Article 23(2) of the Convention also provides that pending notification of succession, the operation of the treaty in question shall be considered "suspended" between the new State and other parties to the treaty, the Appeals Chamber finds that in the case of this type of treaty, this provision is not applicable. This is because, for the following reasons, the Appeals Chamber confirms that the provisions applicable are binding on a State from creation. The Appeals Chamber is of the view that irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of convention entails automatic succession, *i.e.*, without the need for any formal confirmation of adherence by the successor State. It may be now considered in international law that there is automatic State succession to multilateral humanitarian treaties in the broad sense, *i.e.*, treaties of universal character which express fundamental human rights.[136] It is noteworthy that Bosnia and Herzegovina itself recognised this principle before the ICJ.[137]

Convention on 23 July 1993. Although the Convention was not in force at the time relevant to the issue at hand, the provisions of relevance to the issue before the Appeals Chamber codify rules of customary international law, as has been recognised by State. *See, e.g.*, Declaration of Tanganyika, 1961, and the subsequent declarations made by new States since then (United Nations Legislative Series, ST/LEG/SER.B/14 p 177). The Appeals Chamber notes that the practice of international organisations (UN, ILO, ICRC) and States shows that there was a customary norm on succession *de jure* of States to general treaties, which applies automatically to human rights treaties.

[133] Article 23(1) of the Vienna Convention.

[134] Opinion 11, dated 16 July 1993, of the Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Commission) concludes that following the official promulgation of the result of the referendum on independence on 6 March 1992, "6 March 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia".

[135] Swiss Federal Department of Foreign Affairs, Notification to the Governments of the State parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, 17 February 1993.

[136] In relation to international human rights instruments, *see* UN Human Rights Commission resolutions 1993/23, 1994/16 and 1995/18; E/CN4/1995/80 p 4; Human Rights Committee General Comment 26(61) CCPR/C/21/Rev.1/Add.8/Rev.1. *See* also in relation to Bosnia and Herzegovina's succession to the ICCPR, Decision adopted by the Human Rights Committee on 7 October 1992 and discussion thereto, in Official

112. It is indisputable that the Geneva Conventions fall within this category of universal multilateral treaties which reflect rules accepted and recognised by the international community as a whole. The Geneva Conventions enjoy nearly universal participation.[138]

113. In light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, and of the customary nature of their provisions,[139] the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these fundamental humanitarian conventions. In this regard, reference should be made to the Secretary-General's Report submitted at the time of the establishment of the Tribunal, which specifically lists the Geneva Conventions among the international humanitarian instruments which are "beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[140] The Appeals Chamber finds further support for this position in the *Tadic* Jurisdiction Decision.[141]

114. For these reasons the Appeals Chamber finds that there was no gap in the protection afforded by the Geneva Conventions, as they, and the obligations arising therefrom, were in force for Bosnia and Herzegovina at the time of the acts alleged in the Indictment.

115. The Appeals Chamber dismisses this ground of appeal.

Records of the Human Rights Committee 1992/93, Vol 1, p 15. *See* also Separate Opinion of Judge Weeramantry, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports 1996.

[137] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports 1996, the ICJ noted that Bosnia and Herzegovina "contended that the Genocide Convention falls within the category of instruments for the protection of human rights, and that consequently, the rule of 'automatic succession' necessarily applies", para 21.

[138] As of Sept 2000, 189 States are parties to the Geneva Conventions. Only two United Nations members are not party to them (Marshall and Nauru).

[139] Article 158, para 4, of Geneva Convention IV provides that the denunciation of the Convention "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience". Further, Article 43 of the 1969 Vienna Convention on the Law of Treaties entitled "Obligations imposed by international law independently of a treaty" provides: "The invalidity, termination, or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation [...] shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

[140] Secretary-General's Report, para 34.

[141] *Tadic* Jurisdiction Decision, paras 79-85.

III. GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE

116. Delali},[142] Muci}[143] and Deli}[144] challenge the Trial Chamber's findings that (1) offences within common Article 3 of the Geneva Conventions of 1949 are encompassed within Article 3 of the Statute; (2) common Article 3 imposes individual criminal responsibility; and (3) that common Article 3 is applicable to international armed conflicts. The appellants argue that the Appeals Chamber should not follow its previous conclusions in the *Tadi}* Jurisdiction Decision, which, it is submitted, was wrongly decided. That Decision determined that violations of common Article 3 were subjected to the Tribunal's jurisdiction under Article 3 of its Statute, and that, as a matter of customary law, common Article 3 was applicable to both internal and international conflicts and entailed individual criminal responsibility. The Prosecution submits that the appellants' grounds should be rejected because they are not consistent with the *Tadi}* Jurisdiction Decision, which the Appeals Chamber should follow. The Prosecution contends that the grounds raised by the appellants for reopening the Appeals Chamber's previous reasoning are neither founded nor sufficient.

117. As noted by the parties, the issues raised in this appeal were previously addressed by the Appeals Chamber in the *Tadi}* Jurisdiction Decision. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow its *Tadi}* jurisprudence on the issues, unless there exist cogent reasons in the interests of justice to depart from it.

118. The grounds presented by the appellants raise three different issues in relation to common Article 3 of the Geneva Conventions: (1) whether common Article 3 falls within the

---

[142] Delali}'s Grounds of Contention as set out in his Brief read: "Whether the Security Council intended to incorporate common article 3 into Article 3 of the Statute" and "Whether Common Article 3 is customary international law in respect of its application to natural persons". At the hearing, Delali}'s counsel presented the arguments in relation to these grounds on behalf of all other appellants.

[143] Muci}'s Ground 6 reads: Whether at the time of the acts alleged in the indictment customary international law provided for individual criminal responsibility for violations of Common Article 3 of the Geneva Conventions (Appellant Zdravko Muci}'s Final Designation of his Grounds of Appeal, 31 May 2000, p 2). Muci} adopts the arguments of Delali}.

[144] Deli}'s Grounds read: "Issue Number Five: Whether, at the time of the acts alleged in the indictment, customary international law provided for individual criminal responsibility for violations of Common Article 3"; "Issue Number Six: Whether the Security Council vested the Tribunal with jurisdiction to impose individual criminal sanctions for violations of common Article 3"; "Issue Number Seven: Whether Common Article 3 constitutes customary international law in international armed conflicts to the extent that it imposes criminal sanctions on individuals who violate its terms" (Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, pp 2-3).

scope of Article 3 of the Tribunal's Statute; (2) whether common Article 3 is applicable to international armed conflicts; (3) whether common Article 3 imposes individual criminal responsibility. After reviewing the *Tadi}* Jurisdiction Decision in respect of each of these issues to determine whether there exist cogent reasons to depart from it, the Appeals Chamber will turn to an analysis of the Trial Judgement to ascertain whether it applied the correct legal principles in disposing of the issues before it.

119. As a preliminary issue, the Appeals Chamber will consider one of the appellants' submissions concerning the status of the *Tadi}* Jurisdiction Decision, which is relevant to the discussion of all three issues.

120. In their grounds of appeal, the appellants invite the Appeals Chamber to reverse the position it took in the *Tadi}* Jurisdiction Decision concerning the applicability of common Article 3 of the Geneva Conventions under Article 3 of the Statute, and thus to revisit the issues raised. Delali} *inter alia* submits that the Appeals Chamber did not conduct a rigorous analysis at the time (suggesting also that there is a difference in nature between interlocutory appeals and post-judgement appeals) and that many of the issues raised now were not briefed or considered in the *Tadi}* Jurisdiction Decision.[145] In the appellants' view, the Decision was rendered *per incuriam*.[146] Such a reason affecting a judgement was envisaged in the *Aleksovski* Appeal Judgement as providing a basis for departing from an earlier decision.[147]

121. As to the contention that the arguments which the appellants make now were not before the Appeals Chamber in *Tadi}*, the Prosecution submits that it is not the case that they were not considered in the *Tadi}* Jurisdiction Decision: the essence of most of the arguments now submitted by the appellants was addressed and decided by the Appeals Chamber in that Decision. In relation to the argument that the *Tadi}* Jurisdiction Decision was not based on a rigorous analysis, the Prosecution submits that that Decision contains detailed reasoning and that issues decided in an interlocutory appeal should not be regarded as having any lesser status than a decision of the Appeals Chamber given after the Trial Chamber's judgement. Further, the Decision was not given *per incuriam*, as the Appeals Chamber focused specifically on this

[145] Delali} Brief, p 6. Delali} does not point to any specific issue.
[146] Appeal Transcript p 320. "There is no indication that that issue was properly and fully briefed for that court [...]. It was really only decided in an interlocutory fashion to guide the Trial Chamber in *Tadi}* through the *Tadi}* trial" (Appeal Transcript pp 321-322).
[147] *Aleksovki* Appeal Judgement, para 108 (footnote omitted).

issue, the arguments were extensive and many authorities were referred to.[148] In the Prosecution's submission, there are therefore no reasons to depart from it.

122. This Appeals Chamber is of the view that there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal. The purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality.[149] There is therefore no basis in the interlocutory status of the *Tadic* Jurisdiction Decision to consider it as having been made *per incuriam*.

A. Whether Common Article 3 of the Geneva Conventions Falls Within the Scope of Article 3 of the Statute

1. What is the Applicable Law?

123. Article 3 of the Statute entitled "Violations of the Laws or Customs of War" reads:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and science, historic monuments and works of art and science;
>
> (e) plunder of public or private property.

124. Common Article 3 of the Geneva Conventions provides in relevant parts that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without

[148] Appeal Transcript pp 323-24.
[149] It is noted that the Appeals Chamber in *Aleksovski* did not draw any distinction between the authoritative nature of its interlocutory and final decisions.

> any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> (2) The wounded and the sick shall be collected and cared for.

125. In relation to the scope of Article 3 of the Statute, the Appeals Chamber in the *Tadi}* Jurisdiction Decision held that Article 3 "is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5".[150] It went on:

> Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.[151]

126. The conclusion of the Appeals Chamber was based on a careful analysis of the Secretary-General's Report. The Appeals Chamber *inter alia* emphasised that the Secretary-General acknowledged that the Hague Regulations, annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, which served as a basis for Article 3 of the Statute, "have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in the hostilities (prisoners of war), but also the conduct of hostilities".[152] The Appeals Chamber noted that, although the Secretary-General's Report subsequently indicated "that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions", Article 3 contains the phrase "shall include but not be limited to".[153] The Appeals Chamber concluded: "Considering this list in the general context of the Secretary-General's discussion of

[150] *Tadi}* Jurisdiction Decision, para 89.
[151] *Ibid*, para 91 (underlining in original).
[152] *Ibid*, para 87.
[153] *Ibid.*

the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law."[154]

127. In support of its conclusion, the Appeals Chamber also relied on statements made by States in the Security Council at the time of the adoption of the Statute of the Tribunal, which "can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law".[155] The Appeals Chamber also relied on a teleological approach in its analysis of the provisions of the Statute. Reference was also made to the context and purpose of the Statute as a whole, and in particular to the fact that the Tribunal was established to prosecute "serious violations of international humanitarian law".[156] It continued: "Thus, if correctly interpreted, Article 3 fully realises the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed".[157] The Appeals Chamber concluded that Article 3 is intended to incorporate violations of both Hague (conduct of war) and Geneva (protection of victims) law[158] provided that certain conditions, *inter alia* relating to the customary status of the rule, are met.[159]

128. The Appeals Chamber then went on to specify four requirements that must be met in order for a violation of international humanitarian law to be subject to Article 3 of the Statute.[160] The Appeals Chamber then considered the question of which such violations, when committed in internal conflicts, met these requirements. It discussed in depth the existence of customary international humanitarian rules applicable to internal conflicts, and found that State practice had developed since the 1930s, to the effect that customary rules exist applicable to non-international conflicts. These rules include common Article 3 but also go beyond it to include rules relating to the methods of warfare.[161]

129. The Appeals Chamber will now turn to the arguments of the appellants which discuss the *Tadi}* Jurisdiction Decision conclusions in order to determine whether there exist cogent reasons in the interests of justice to depart from them.

---

[154] *Ibid.*
[155] *Ibid*, para 88.
[156] *Ibid*, para 90.
[157] *Ibid*, para 92.
[158] *Ibid*, para 89.
[159] *Ibid*, para 94.
[160] *Ibid.*
[161] *Tadi}* Jurisdiction Decision, paras 119-125.

130. In support of their submission that violations of common Article 3 are not within the jurisdiction of the Tribunal, the appellants argue that in adopting Article 3 of the Statute, the Security Council never intended to permit prosecutions under this Article for violations of common Article 3,[162] and, had the Security Council intended to include common Article 3 within the ambit of Article 3, it would have expressly included it in Article 2 of the Statute, which deals with the law related to the protection of victims. In their opinion, an analysis of Article 3 of the Statute shows that it is limited to Hague law. A related argument presented by the appellants is that Article 3 can only be expanded to include offences which are comparable and lesser offences than those already listed, and not to include offences of much greater magnitude and of a completely different character. In support of their argument, the appellants also rely on a comparison of the ICTY and ICTR Statutes, as Article 4 of the ICTR Statute *explicitly* includes common Article 3.[163] The appellants further argue that the Security Council viewed the conflict taking place in the former Yugoslavia as international, and accordingly provided for the prosecution of serious violations of humanitarian law in the context of an international conflict only.[164] The Prosecution submits that the Appeals Chamber should follow its previous conclusion in the *Tadi}* Jurisdiction Decision.

131. As to the appellants' argument based on the intention of the Security Council, the Appeals Chamber is of the view that the Secretary-General's Report and the statements made by State representatives in the Security Council at the time of the adoption of the Statute, as analysed in *Tadi}*, clearly support a conclusion that the list of offences listed in Article 3 was meant to cover violations of *all* of the laws or customs of war, understood broadly, in addition to those mentioned in the Article by way of example. Recourse to interpretative statements made by States at the time of the adoption of a resolution may be appropriately made by an international court when ascertaining the meaning of the text adopted, as they constitute an important part of the legislative history of the Statute.[165] These statements may shed light on some aspects of the drafting and adoption of the Statute as well as on its object and purpose, when no State contradicts that interpretation, as noted in *Tadi}*.[166] This is consistent with the accepted rules of treaty interpretation.[167]

---

[162] Appeal Transcript p 319.
[163] Appeal Transcript p 320.
[164] *See* Delali} Brief, pp 8-20.
[165] *See* for instance *Ngeze and Nahimana* v *Prosecutor*, ICTR Appeals Chamber, 5 Sept 2000, Joint Separate Opinion, Judge Vohrah and Judge Nieto-Navia, paras 12-17.
[166] *Tadi}* Jurisdiction Decision, para 75.
[167] Article 32 of the Vienna Convention on the Law of Treaties provides that the preparatory work of a treaty may be used as a supplementary means of interpretation to interpret the provisions of a treaty.

132. The Appeals Chamber is similarly unconvinced by the appellants' submission that it is illogical to incorporate violations of common Article 3 which are "Geneva law" rules, within Article 3 which covers "Hague law" rules. The Appeals Chamber in *Tadi}* discussed the evolution of the meaning of the expression "war crimes". It found that war crimes have come to be understood as covering both Geneva and Hague law, and that violations of the laws or customs of war cover both types of rules. The traditional law of warfare concerning the protection of persons (both taking part and not taking part in hostilities) and property is now more correctly termed "international humanitarian law" and has a broader scope, including, for example, the Geneva Conventions.[168] The ICRC Commentary (GC IV) indeed stated that "the Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called war crimes".[169] Further, Additional Protocol I contains rules of both Geneva and Hague origin.[170]

133. Recent confirmation that a strict separation between Hague and Geneva law in contemporary international humanitarian law based on the "type" of rules is no longer warranted may be found in Article 8 of the ICC Statute. This Article covers "War crimes" generally, namely grave breaches and "other serious violations of the laws and customs of war applicable in international armed conflict"; violations of common Article 3 in non-international armed conflicts; and "other serious violations of the laws and customs of war applicable in non-international armed conflict". The Appeals Chamber thus confirms the view expressed in the *Tadi}* Appeal Judgement that the expression "laws and customs of war" has evolved to encompass violations of Geneva law at the time the alleged offences were committed, and that consequently, Article 3 of the Statute may be interpreted as intending the incorporation of Geneva law rules. It follows that the appellants' argument that violations of common Article 3 cannot be included in Article 3 as they are of a different fails.

134. Turning next to the appellants' argument that common Article 3 would more logically be incorporated in Article 2 of the Statute, the Appeals Chamber observes that the Geneva Conventions themselves make a distinction between the grave breaches and other violations of

---

[168] *Tadi}* Jurisdiction Decision, para 87.

[169] ICRC Commentary (GC IV), p 583.

[170] The draft Statute of an International Criminal Court prepared by the ILC also followed this approach in its Article 20 entitled "Crimes within the jurisdiction of the Court", which listed among the offences subject to the jurisdiction of the Court "serious violations of the laws and customs of war applicable in armed conflicts", including both Geneva and Hague law. ILC Report 1994, p 70. *See* also the ILC Draft Code against the Peace and Security of Mankind adopted in 1996. The Commission stated in its Report that the expressions "war crimes", "violations of laws and customs of war" and "violations of the rules of humanitarian law applicable in armed conflicts" are used in the report interchangeably. ILC Report 1996, p 113. Further, Article 20 entitled "War crimes" included violations of Hague law, as well as Geneva law under a common heading.

their provisions. The offences enumerated in common Article 3 may be considered as falling into the category of other serious violations of the Geneva Conventions, and are thus included within the general clause of Article 3. There is thus no apparent inconsistency in not including them in the scope of Article 2 of the Statute. This approach based on a distinction between the grave breaches of the Geneva Conventions and other serious violations of the Conventions, has also later been followed in the ICC Statute.[171]

135. As will be discussed below, the appellants' argument that the Security Council viewed the conflict as international, even if correct, would not be determinative of the issue, as the prohibitions listed under common Article 3 are also applicable to international conflicts. It is, however, appropriate to note here that the Appeals Chamber does not share the view of the appellants that the Security Council and the Secretary-General determined that the conflict in the former Yugoslavia at the time of the creation of the Tribunal was international. In the Appeals Chamber's view, the Secretary-General's Report does not take a position as to whether the various conflicts within the former Yugoslavia were international in character for purposes of the applicable law as of a particular date. The Statute was worded neutrally. Article 1 of the Statute entitled "Competence of the International Tribunal" vests the Tribunal with the power to prosecute "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", making no reference to the nature of the conflict.[172] This supports the interpretation that the Security Council in adopting the Statute was of the view that the question of the nature of the conflict should be judicially determined by the Tribunal itself, the issue involving factual and legal questions.

136. The Appeals Chamber thus finds no cogent reasons in the interests of justice to depart from its previous jurisprudence concerning the question of whether common Article 3 of the Geneva Conventions is included in the scope of Article 3 of the Statute.

2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision?

137. The Trial Chamber generally relied on the *Tadi}* Jurisdiction Decision as it found "no reason to depart" from it.[173] That the Trial Chamber accepted that common Article 3 is incorporated in Article 3 of the Statute appears clearly from the following findings. The Trial Chamber referred to paragraphs 87 and 91 of the *Tadi}* Jurisdiction Decision to describe the

[171] ICC Statute, Article 8.

[172] Article 8 of the Statute sets out, in relation to the temporal jurisdiction of the Tribunal, the neutral date of 1 January 1991. Article 5 of the Statute, which, in relation to crimes against humanity, vests the Tribunal with the power to prosecute them in internal as well as international conflicts.

"division of labour between Articles 2 and 3 of the Statute".[174] The Trial Chamber went on to hold that "this Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal."[175]

138. In respect of the customary status of common Article 3, the Trial Chamber found:

> While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law. As discussed at length by the Appeals Chamber, a corpus of law concerning the regulation of hostilities and protection of victims in internal armed conflicts is now widely recognised.[176]

139. The Appeals Chamber therefore finds that the Trial Chamber correctly adopted the Appeals Chamber's statement of the law in disposing of this issue.

B. Whether Common Article 3 is Applicable to International Armed Conflicts

1. What is the Applicable Law?

140. In the course of its discussion of the existence of customary rules of international humanitarian law governing internal armed conflicts, the Appeals Chamber in the *Tadi}* Jurisdiction Decision observed a tendency towards the blurring of the distinction between interstate and civil wars as far as human beings are concerned.[177] It then found that some treaty rules, and common Article 3 in particular, which constitutes a mandatory minimum code applicable to internal conflicts, had gradually become part of customary law. In support of its position that violations of common Article 3 are applicable regardless of the nature of the conflict, the Appeals Chamber referred to the ICJ holding in *Nicaragua* that the rules set out in common Article 3 reflect "elementary considerations of humanity" applicable under customary international law to any conflict.[178] The ICJ in *Nicaragua* discussed the customary status of common Article 3 to the Geneva Conventions and held:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt

---

[173] Trial Judgement, para 280.
[174] Trial Judgement, para 297.
[175] Trial Judgement, para 299.
[176] Trial Judgement, para 301 (footnote omitted).
[177] *Tadi}* Jurisdiction Decision, para 97.
[178] *Nicaragua*, para 218.

> that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215).[179]

Thus, relying on *Nicaragua*, the Appeals Chamber concluded:

> Therefore at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.[180]

141. The Appeals Chamber also considered that the procedural mechanism, provided for in common Article 3,[181] inviting parties to internal conflicts to agree to abide by the rest of the Conventions, "reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict."[182] The Appeals Chamber also found that General Assembly resolutions corroborated the existence of certain rules of war concerning the protection of civilians and property applicable in both internal and international armed conflicts.[183]

142. Referring to the *Tadi}* Jurisdiction Decision, which the Trial Chamber followed, Delali} argues that the Appeals Chamber failed to properly consider the status of common Article 3, and in particular failed to analyse state practice and *opinio juris*, in support of its conclusion that it was, as a matter of customary international law, applicable to international armed conflicts. Further, in his opinion, the findings of the ICJ on the customary status of common Article 3 and its applicability to both internal and international conflicts are *dicta*.[184] The Prosecution is of the view that, as stated by the ICJ in *Nicaragua*, it is because common Article 3 gives

---

[179] *Nicaragua*, para 218. The ICJ considers that the Geneva Conventions in general are customary international law. Paragraph 219 reads in relevant parts: "Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for one or for the other category of conflict". In the *Corfu Channel* case, the ICJ regarded the provisions of the Hague Convention as a special application of a much more general principle of universal applicability. Its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ reiterated the principle that certain minimum rules are applicable regardless of the nature of the conflict: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgement of 9 April 1949 in the *Corfu Channel* case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law". *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), para 79.

[180] *Tadi}* Jurisdiction Decision, para 102.

[181] Common Article 3 provides: "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".

[182] *Tadi}* Jurisdiction Decision, para 103. In this context, the Appeals Chamber specifically referred to the 1967 conflict in Yemen.

[183] *Tadi}* Jurisdiction Decision, paras 110-112 referring to resolutions 2444 (1968) and 2675 (1970).

[184] Delali} also submits that the ICJ findings are not based on state practice and *opinio juris*; Delali} Brief, pp 32-34.

expression to elementary considerations of humanity, which are applicable irrespective of the nature of the conflict, that common Article 3 is applicable to international conflicts.[185]

143. It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles.[186] These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts.[187] In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[188] These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.

144. It is these very principles that the ICJ considered as giving expression to fundamental standards of humanity applicable in *all* circumstances.

145. That these standards were considered as reflecting the principles applicable to the Conventions in their entirety and as constituting substantially similar core norms applicable to both types of conflict is clearly supported by the ICRC Commentary (GC IV):

> This minimum requirement in the case of non-international conflict, is *a fortiori* applicable in international armed conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.[189]

146. This is entirely consistent with the logic and spirit of the Geneva Conventions; it is a "logical application of its fundamental principle".[190] Specifically, in relation to the substantive

---

[185] Appeal Transcript, pp 350-51.

[186] The rules of common Article 3 setting out standards of basic humanitarian protection were originally intended to serve as a general statement of the object of the Geneva Conventions as a whole. The ICRC Commentary (GC IV) provides that the wording of common Article 3 is largely based on general ideas contained in various draft preambles which were eventually omitted, pp 26-34.

[187] This interpretation is supported by the Preamble of Additional Protocol II which provides that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". This statement is founded on the Martens clause, which was set out in the preamble of the 1899 and 1907 Hague Conventions.

[188] ICRC Commentary (GC IV), p 44.

[189] ICRC Commentary (GC IV), p 14.

[190] ICRC Commentary (GC IV), p 26.

rules set out in subparagraphs (1) (a)-(d) of common Article 3, the ICRC Commentary continues:

> The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say.[191]

147. Common Article 3 may thus be considered as the "minimum yardstick"[192] of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It should be noted that the rules applicable to international conflicts are not limited to the minimum rules set out in common Article 3, as international conflicts are governed by more detailed rules. The rules contained in common Article 3 are considered as applicable to international conflicts because they constitute the core of the rules applicable to such conflicts. There can be no doubt that the acts enumerated in *inter alia* subparagraphs (a), violence to life, and (c), outrages upon personal dignity, are heinous acts "which the world public opinion finds particularly revolting".[193] These acts are also prohibited in the grave breaches provisions of Geneva Convention IV, such as Article 147. Article 75 of Additional Protocol I, applicable to international conflicts, also provides a minimum of protection to any person unable to claim a particular status. Its paragraph 75(2) is directly inspired by the text of common Article 3.

148. This interpretation is further confirmed by a consideration of other branches of international law, and more particularly of human rights law.

149. Both human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity. The ICRC Commentary on the Additional Protocols refers to their common ground in the following terms: "This irreducible core of human rights, also known as 'non-derogable rights' corresponds to the lowest level of protection which can be claimed by anyone at anytime [...]".[194] The universal and regional human rights instruments[195] and the Geneva Conventions share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted. The object of the

[191] ICRC Commentary (GC IV), p 14.
[192] *Nicaragua*, para 218.
[193] ICRC Commentary (GC IV), p 38.
[194] ICRC Commentary on the Additional Protocols, p 1340.
[195] The Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; European Convention on Human Rights; and Inter American Convention on Human Rights.

fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[196]

150. It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions.

2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision?

151. The Trial Chamber found:

> While common Article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflicts. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflicts. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3.[197]

152. The Trial Chamber therefore clearly followed the Appeals Chamber jurisprudence.

C. Whether Common Article 3 Imposes Individual Criminal Responsibility

1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadi}* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at

---

[196] The UN Human Rights Commission is currently conducting a study to identify certain minimum humanitarian standards applicable at all times, which draw from both bodies of law. *See* UN documents E/C.N. 4/1998/87, E/C.N. 4/1999/92, E/C.N. 4/2000/94, and E/C.N. 4/2000/145.

[197] Trial Judgement, para 314.

[198] *Tadi}* Jurisdiction Decision, para 128.

Nuremberg[199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflict of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[200]

154. In the Appeals Chamber's opinion, this conclusion was also supported by "many elements of international practice (which) show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts".[201] Specific reference was made to prosecutions before Nigerian courts,[202] national military manuals,[203] national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence),[204] and resolutions adopted unanimously by the Security Council.[205]

155. The Appeals Chamber found further support for its conclusion in the law of the former Yugoslavia as it stood at the time of the offences alleged in the Indictment:

> Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[206]

156. Reliance was also placed by the Appeals Chamber on the agreement reached under the auspices of the ICRC on 22 May 1992, in order to conclude that the breaches of international law occurring within the context of the conflict, regarded as internal by the agreement, could be criminally sanctioned.[207]

157. The appellants contend that the evidence presented in the *Tadi}* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall

---

199 The Appeals Chamber further referred to the IMT's holding that crimes against international law are committed by individuals. *Tadi}* Jurisdiction Decision, para 128.
200 *Ibid*, para 129.
201 *Ibid*, para 130.
202 *Ibid*, at para 130, referring to paras 106 and 125.
203 *Ibid*, para 131.
204 *Ibid*, para 132.
205 *Ibid*, para 133.
206 *Ibid*, para 135.
207 *Ibid*, para 136.
208 Delali} Brief, pp 20-40.

within the scheme providing for individual criminal responsibility.[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

158. In addition, the appellants argue that solid evidence exists which demonstrates that common Article 3 is *not* a rule of customary law which imposes liability on natural persons.[211] Particular emphasis is placed on the ICTR Statute and the Secretary-General's Report which states that common Article 3 was criminalised for the first time in the ICTR Statute.[212]

159. The Prosecution argues that the *Tadi}* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law.[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate.[215]

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadi}* found that as a matter of customary law, breaches of international humanitarian law

---

[209] The appellants emphasise that violations of common Article 3 were thus not subjected to the universal jurisdiction provisions, Delalic Brief, p 28.
[210] Deli} Brief, p 80.
[211] The appellants rely on the ICRC practice; *Nicaragua*; the conclusions of the UN Expert Commission; the ILC draft codes; comments made in the Security Council; the ICC Statute. In relation to *Nicaragua*, Delali} submits that the finding that common Article 3 constitute customary international law is *dicta* and therefore not an authoritative holding. It is also argued that the ICC Statute constitutes evidence that common Article 3 does not reflect customary law: Delalic Brief, pp 32-40.
[212] The report stated that Article 4 "for the first time criminalizes common article 3 of the four Geneva Conventions". Report of the Secretary-General pursuant to Paragraph 5 of Security Council resolution 955 (1994), S/1995/134, 13 February 1995, para 12.
[213] Appeal Transcript pp 351-352.
[214] Appeal Transcript pp 355-356.
[215] Appeal Transcript p 352.

committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

161. Following the appellants' argument, two different regimes of criminal responsibility would exist based on the different legal characterisation of an armed conflict. As a consequence, the same horrendous conduct committed in an internal conflict could not be punished. The Appeals Chamber finds that the arguments put forward by the appellants do not withstand scrutiny.

162. As concluded by the Appeals Chamber in *Tadi}*, the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT indeed followed a similar approach, as recalled in the *Tadi}* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.[216] The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[217]

163. The appellants argue that the exclusion of common Article 3 from the Geneva Conventions grave breaches system, which provides for universal jurisdiction, has the necessary consequence that common Article 3 attracts no individual criminal responsibility. This is misconceived. In the Appeals Chamber's view, the appellants' argument fails to make a distinction between two separate issues, the issue of criminalisation on the one hand, and the issue of jurisdiction on the other. Criminalisation may be defined as the act of outlawing or making illegal certain behaviour.[218] Jurisdiction relates more to the judicial authority to prosecute those criminal acts. These two concepts do not necessarily always correspond. The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949, as they were clearly intended to be illegal within the international legal order. The language of common Article 3 clearly prohibits fundamental offences such as murder and torture. However, no jurisdictional or enforcement mechanism was provided for in the Geneva Conventions at the time.

---

[216] *Tadi}* Jurisdiction Decision, para 128. The IMT prosecuted violations of Hague Convention IV and Geneva Convention of 1929 even though they did not provide for the punishment of their breaches.
[217] As referred to in para 128 of *Tadi}* Jurisdiction Decision.
[218] Black's Law Dictionary, 6th ed (1990).

164. This interpretation is supported by the provisions of the Geneva Conventions themselves, which impose on State parties the duty "to respect and ensure respect for the present Conventions in all circumstances".[219] Common Article 1 thus imposes upon State parties, upon ratification, an obligation to implement the provisions of the Geneva Conventions in their domestic legislation. This obligation clearly covers the Conventions in their entirety and this obligation thus includes common Article 3. The ICJ in the *Nicaragua* case found that common Article 1 also applies to internal conflicts.[220]

165. In addition, the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides:

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

166. The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention".[221] It then concluded:

> This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.[222]

167. This, in the Appeals Chamber's view, clearly demonstrates that, as these provisions do not provide for exceptions, the Geneva Conventions envisaged that violations of common Article 3 could entail individual criminal responsibility under domestic law, which is accepted by the appellants. The absence of such legislation providing for the repression of such violations would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions.

168. As referred to by the Appeals Chamber in the *Tadi}* Jurisdiction Decision, States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common

---

[219] Article 1 common to the Geneva Conventions ("Common Article 1").
[220] *Nicaragua*, para 220.
[221] ICRC Commentary (GC IV), p 594.
[222] *Ibid.*

Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

169. The Appeals Chamber is also not convinced by the appellants' submission that sanctions for violations of common Article 3 are intended to be enforced at the national level only. In this regard, the Appeals Chambers refers to its previous conclusion on the customary nature of common Article 3 and its incorporation in Article 3 of the Statute.

170. The argument that the ICTR Statute, which is concerned with an internal conflict, made violations of common Article 3 subject to prosecution at the international level, in the Appeals Chamber's opinion, reinforces this interpretation. The Secretary-General's statement that violations of common Article 3 of the Geneva Conventions were criminalised for the first time, meant that provisions for international jurisdiction over such violations were *expressly* made for the first time. This is so because the Security Council when it established the ICTR was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR. In the Appeals Chamber's view, in establishing this Tribunal, the Security Council simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility.

171. The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level. This is especially true in relation to prosecution conducted by an international tribunal created by the UN Security Council, in a situation where it specifically called for the prosecution of persons responsible for violations of humanitarian law in an armed conflict regarded as constituting a threat to international peace and security pursuant to Chapter VII of the UN Charter.

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the

---

[223] *See* for instance the United States War Crimes Act 1996 extended by the Expanded War Crimes Act of 1997 to include violations of common Article 3.

[224] *See* for instance in Switzerland, *Jugement en la cause Fulgence Niyonteze*, Tribunal de division 2, 3 septembre 1999, and Tribunal militaire d'appel 1, 26 mai 2000.

conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement, which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[226] It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."

174. The Appeals Chamber is unable to find any cogent reasons in the interests of justice to depart from the conclusions on this issue in the *Tadi}* Jurisdiction Decision.

2. Did the Trial Chamber Apply the Correct Legal Principles?

175. The Appeals Chamber notes that the appellants raised before the Trial Chamber the same arguments now raised in this appeal. The Trial Chamber held:

> Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadi} Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings. In its Decision, the Appeals Chamber examines various national laws as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts. From these sources, the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common Article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.[227]

176. It then concluded:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[228]

---

[225] The Appeals Chamber also notes that in human rights law the violation of rights which have reached the level of *jus cogens*, such as torture, may constitute international crimes.
[226] *Aleksovski* Appeal Judgement, para 126.
[227] Trial Judgement, para 307.
[228] Trial Judgement, para 308.

177. In support of this conclusion, which fully accords with the position taken by the Appeals Chamber, the Trial Chamber went on to refer to the ILC Draft Code of Crimes against the Peace and Security of Mankind and the ICC Statute.[229] The Trial Chamber was careful to emphasise that although "these instruments were all drawn up after the acts alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common Article 3 are not incompatible with the attribution of individual criminal responsibility".[230]

178. In relation to the ICTR Statute and the Secretary-General's statement in his ICTR report that common Article 3 was criminalised for the first time, the Trial Chamber held: "the United Nations cannot 'criminalise' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the Statute of the ICTR".[231] This statement is fully consistent with the Appeals Chamber's finding that the lack of explicit reference to common Article 3 in the Tribunal's Statute does not warrant a conclusion that violations of common Article 3 may not attract individual criminal responsibility.

179. The Trial Chamber's holding in respect of the principle of legality is also consonant with the Appeals Chamber's position. The Trial Chamber made reference to Article 15 of the ICCPR,[232] and to the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina,[233] before concluding:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[234]

180. The Appeals Chamber fully agrees with this statement and finds that the Trial Chamber applied the correct legal principles in disposing of the issues before it.

181. It follows that the appellants' grounds of appeal fail.

---

[229] Trial Judgement, para 309.
[230] *Ibid.*
[231] *Ibid*, para 310.
[232] *Ibid*, para 311.

IV. GROUNDS OF APPEAL CONCERNING COMMAND RESPONSIBILITY

182. In the present appeal, Muci} and the Prosecution have filed grounds of appeal which relate to the principles of command responsibility. Article 7(3) of the Statute, "Individual criminal responsibility", provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

A. The Ninth Ground of Appeal of Muci}

183. The ninth ground of Muci}'s appeal alleges both a legal and factual error on the part of the Trial Chamber in finding that Muci} had, at the time when the crimes concerned in this case were being committed, the *de facto* authority of a commander in the ^elebi}i camp.[235] Most of the arguments presented by Muci} are concerned with the Trial Chamber's factual findings.[236] The Prosecution argues that Muci}'s ground be denied.

184. The Appeals Chamber understands that the remedy desired by the appellant in this ground of appeal is an acquittal of those convictions based on his command responsibility.[237]

185. The Appeals Chamber will first consider the issue of whether a superior may be held liable for the acts of subordinates on the basis of *de facto* authority, before turning to the arguments relating to alleged errors of fact.

---

[233] *Ibid*, para 312.
[234] *Ibid*, para 313.
[235] Muci}'s ground 9 reads: "Whether the Trial Chamber made the proper legal and factual determinations in convicting Mr Muci} of command responsibility pursuant to Article 7(3)", Appellant Zdravko Muci}'s Final Designation of his Grounds of Appeal, 31 May 2000, at p 2. This document serves to clarify the previous documents setting out Muci}'s grounds.
[236] While the appellant made some submissions in his Brief on matters of law, it is difficult to identify the precise errors that are alleged to have been committed by the Trial Chamber. Matters were not further clarified at the hearing. Counsel for the appellant however asked the Appeals Chamber to consider the issue of superior responsibility arising out of a *de facto* position of authority, Appeal Transcript, pp 253-254.
[237] Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999, Registry p 1800. Muci} submits that the convictions entered by the Trial Chamber pursuant to Article 7(3) of the Statute are "nullified" as a result of its reasoning.

1. *De Facto* Authority as a Basis for a Finding of Superior Responsibility in International Law

186. In his brief, Muci} appeared to contest the issue of whether a *de facto* status is sufficient for the purpose of ascribing criminal responsibility under Article 7(3) of the Statute. It is submitted that *de facto* status must be equivalent to *de jure* status in order for a superior to be held responsible for the acts of subordinates.[238] He submits that a person in a position of *de facto* authority must be shown to wield the same kind of control over subordinates as *de jure* superiors.[239] In the appellant's view, the approach taken by the Trial Chamber that the absence of formal legal authority, in relation to civilian and military structures, does not preclude a finding of superior responsibility, "comes too close to the concept of strict responsibility".[240] Further, Muci} interprets Article 28 of the ICC Statute as limiting the application of the doctrine of command responsibility to "commanders or those effectively acting as commanders".[241] He submits that "the law relating to *de jure/de facto* command responsibility is far from certain" and that the Appeals Chamber should address the issue.[242]

187. The Prosecution argues that Muci} has failed to adduce authorities to support his argument that the Trial Chamber erred in finding Muci} to be a *de facto* superior.[243] In its view, the finding of the *de facto* responsibility does not amount to a form of strict liability, and *de facto* authority does not have to possess certain features of *de jure* authority. It is submitted that Muci} has not identified any legal basis for alleging that the Trial Chamber has erred in holding that the doctrine of command responsibility applies to civilian superiors.

188. The Trial Chamber found:

> [...] a *position of command is indeed a necessary precondition* for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position *cannot be determined by reference to formal status alone.* Instead, the factor that determines liability for this type of criminal responsibility is the *actual possession, or non-possession, of powers of control over the actions of subordinates.* Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander.[244]

---

[238] Muci} Brief, Section 3, p 1.
[239] Muci} Brief, Section 3, p 7.
[240] Muci} Brief, Section 3, p 6.
[241] Muci} Brief, Section 3, p 18.
[242] Appeal Transcript, p 252. When replying to the Prosecution, Muci} did not object to the Prosecution's submissions, Appeal Transcript, p 302, that he did not take issue with the Trial Chamber's legal finding that a person can be found liable under Article 7(3) on the basis of *de facto* authority, Appeal Transcript, pp 316-317.
[243] Prosecution Response, section 10.
[244] Trial Judgement, para 370 (emphasis added).

189. It is necessary to consider first the notion of command or superior authority within the meaning of Article 7(3) of the Statute before examining the specific issue of *de facto* authority. Article 87(3) of Additional Protocol I to the 1949 Geneva Conventions provides:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons *under his control* are going to commit or have committed a breach of the Conventions or of his Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[245]

190. The *Blaski}* Judgement, referring to the Trial Judgement and to Additional Protocol I, construed control in terms of the material ability of a commander to punish:

> What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.[246]

191. In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.[247]

192. Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

193. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the

---

[245] (Emphasis added).
[246] *Blaški}* Judgement, para 302.
[247] *Aleksovski* Appeal Judgement, para 76.

superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

194. In relation to Muci}'s responsibility, the Trial Chamber held:

> [...] whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.[248]

195. The Trial Chamber, prior to making this statement in relation to the case of Muci}, had already considered the origin and meaning of *de facto* authority with reference to existing practice.[249] Based on an analysis of World War II jurisprudence, the Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[250] The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence. The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature.[251] In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that "it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control", the Trial Chamber properly considered the issue in finding the applicable law.[252]

196. "Command", a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[253] Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. The *Bla{ki}* Trial Chamber for instance endorsed the finding of the Trial

---

[248] Trial Judgement, para 736.
[249] Trial Judgement, paras 364-378.
[250] Trial Judgement, paras 356-363.
[251] By the end of 1992, 119 States had ratified Additional Protocol I, *International Review of the Red Cross* (1993), No. 293, at p 182.
[252] Trial Judgement, para 371.
[253] Trial Judgement, paras 355-363. *See* also Secretary-General's Report, paras 55-56.

Judgement to this effect.[254] The showing of effective control is required in cases involving both *de jure* and *de facto* superiors. This standard has more recently been reaffirmed in the ICC Statute, Article 28 of which reads in relevant parts:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court;
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces,
>
> [...]
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates [...][255]

197. In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.[256] This would equally apply in the context of criminal responsibility. In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility[257] and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met. Muci}'s argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts. The Appeals Chamber therefore agrees with the Trial Chamber's conclusion:

---

[254] *Bla{ki}* Judgement, paras 300-301 referring to *^elebi}i* Trial Judgement, para 378.

[255] *Tadi}* Appeal Judgement, para 223, which states that the text of the ICC Statute "may be taken to express the legal position *i.e., opinio juris*" of those States that adopted the Statute, at the time it was adopted. Muci}'s reliance on the ICC Statute in support of his arguments is thus not helpful in relation to the determination of the law as it stood at the time of the offences alleged in the Indictment.

[256] In relation to State responsibility see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 1971, p 16 at para 118.

[257] At the hearing, Muci} referred with approval to the *Aleksovski* Judgement's finding that '[A]nyone, including a civilian may be held responsible, pursuant to Article 7(3) of the Statute, if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations." Appeal Transcript, p 238, referring to para 70 of the *Aleksovski* Appeal Judgement, quoting para 103 of the *Aleksovski* Judgement.

> While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. *The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.* A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. *It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute.* While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, *great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.*
>
> Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, *it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.* With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[258]

198. As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.[259]

199. The remainder of Muci}'s ground of appeal concerns the sufficiency of the evidence regarding the existence of his *de facto* authority. This poses a question of fact, which the Appeals Chamber will now consider.

2. The Trial Chamber's Factual Findings

200. At the appeal hearing, Muci} argued that the Trial Chamber's reliance on the evidence cited in the Trial Judgement in support of the finding that he exercised superior authority was unreasonable. He made a number of arguments which were ultimately directed to his central contention that the evidence was insufficient to support a conclusion that he was a *de facto*

---

[258] Trial Judgement, paras 377-378 (emphasis added; footnote omitted). In relation to the case of Delali}, the Trial Chamber further held that a *de facto* position of authority may be sufficient for a finding of criminal responsibility, "provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control." Trial Judgement, para 646. The Appeals Chamber does not understand this as a reference to any need for a formal appointment.

[259] The Appeals Chamber thus agrees with the Prosecution that reliance on *de facto* control to establish superior responsibility does not amount to a form of strict liability.

commander for the entire period of time set forth in the Indictment.[260] His submissions particularly emphasised that he had no authority in the camp during the months of May, June, or July of 1992.[261]

201. At the hearing, the Prosecution submitted that it was open to a reasonable Trial Chamber to conclude from the evidence as a whole that Muci} was commander of the ^elebi}i camp throughout the period referred to in the Indictment.[262] It was argued that Muci} has not shown that the Trial Chamber has been unreasonable in its evaluation of evidence, and that it is a reasonable inference of the Trial Chamber that Muci} wielded a degree of control and authority in the ^elebi}i camp, drawn from the fact that he had the ability to assist detainees.[263]

3. Discussion

202. In respect of a factual error alleged on appeal, the *Tadi}* Appeal Judgement provides the test that:

> It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.[264]

203. In the appeal of *Furund`ija*, the Appeals Chamber declined to conduct an independent assessment of the evidence admitted at trial, as requested by the appellants, understood as a request for *de novo* review, and took the view that "[t]his Chamber does not operate as a second Trial Chamber."[265]

204. In paragraphs 737-767 of the Trial Judgement, a thorough analysis of evidence led the Trial Chamber to conclude that Muci} "had all the powers of a commander" in the camp.[266] The conclusion was also based on Muci}'s own admission that he had "necessary disciplinary powers".[267] Muci}, who disputes this conclusion on appeal, must persuade the Appeals Chamber that the conclusion is one which could not have reasonably been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.[268]

---

[260] Appeal Transcript, p 236.
[261] Appeal Transcript, pp 236-237. Counsel for the appellant referred to the testimony of a number of witnesses in support of his contention.
[262] Appeal Transcript, p 314.
[263] Prosecution Response, Section 10, pp 61-63.
[264] *Tadi}* Appeal Judgement, para 64. *See* also *Aleksovski* Appeal Judgement, para 63.
[265] *Furund`ija* Appeal Judgement, paras 38 and 40.
[266] Trial Judgement, para 767.
[267] *Ibid.*
[268] *See* also paras 434 and 435 *infra*.

205. The Appeals Chamber notes that Muci} argued at trial to the effect that, in the absence of any document formally appointing him to the position of commander or warden of the camp, it was not shown what authority he had over the camp personnel.[269] On appeal, he repeats this argument,[270] and reiterates some of his objections made at trial in respect of the Prosecution evidence which was accepted by the Trial Chamber as showing that he had *de facto* authority in the camp in the period alleged in the Indictment.[271]

206. Having concluded that "the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility" provided that the *de facto* superior exercises actual powers of control,[272] the Trial Chamber considered the argument of Muci} that he had no "formal authority".[273] It looked at the following factors to establish that Muci} had *de facto* authority: Muci}'s acknowledgement of his having authority over the ^elebi}i camp since 27 July 1992,[274] the submission in the defence closing brief that Muci} used his "limited" authority to prevent crimes and to order that the detainees not be mistreated and that the offenders tried to conceal offences from him,[275] the defence statement that when Muci} was at the camp, there was "far greater" discipline than when he was absent,[276] the evidence that co-defendant Deli} told the detainees that Muci} was commander,[277] the evidence that he arranged for the transfer of detainees,[278] his classifying of detainees for the purpose of continued detention or release,[279] his control of guards,[280] and the evidence that he had the authority to release prisoners.[281] At trial, the Trial Chamber accepted this body of evidence. The Appeals Chamber considers that it has not been shown that the Trial Chamber erred in accepting the evidence which led to the finding that Muci} was commander of the camp and as such exercised command responsibility.

207. Muci} argues that the Trial Chamber failed to explain on what date he became commander of the camp. The Trial Chamber found:

---

269 Trial Judgement, para 731.
270 Appeal Transcript, pp 239-241.
271 Appeal Transcript pp 242-249.
272 Trial Judgement, para 736.
273 *Ibid*, para 741.
274 *Ibid*, para 737.
275 *Ibid*, para 740.
276 *Ibid*, para 743.
277 *Ibid*, para 746.
278 *Ibid*, para 747.
279 *Ibid*, para 748.
280 *Ibid*, paras 765-66.
281 *Ibid*, para 764.

> The Defence is not disputing that there is a considerable body of evidence [...] that Zdravko Muci} was the acknowledged commander of the prison-camp. Instead, the Defence submits that the Prosecution has to provide evidence which proves beyond a reasonable doubt the dates during which Muci} is alleged to have exercised authority in the ^elebi}i prison-camp [...]. The Trial Chamber agrees that the Prosecution has the burden of proving that Muci} was the commander of the ^elebi}i prison-camp and that the standard of proof in this respect is beyond reasonable doubt. However, the issue of the actual date on which Muci} became a commander is not a necessary element in the discharge of this burden of proof. Instead, the issue is whether he was, during the relevant period as set forth in the Indictment, the commander of the prison-camp.[282]

208. The Appeals Chamber can see no reason why the Trial Chamber's conclusion that it was unnecessary to make a finding as to the exact date of his appointment – as opposed to his status during the relevant period – was unreasonable.

209. Muci} claims that he had no authority of whatever nature during the months of May, June and July of 1992. The Indictment defined the relevant period in which Muci} was commander of the camp to be "from approximately May 1992 to November 1992". The offences of subordinates upon which the relevant charges against Muci} were based took place during that period. The Appeals Chamber notes that the Trial Judgement considered the objection of Muci} to the evidence which was adduced to show that he was present in the camp in May 1992.[283] The objection was made through the presentation of defence evidence, which was rejected by the Trial Chamber as being inconclusive.[284] On this point, the Appeals Chamber observes that Muci} did not challenge the testimony of certain witnesses which was adduced to show that Muci} was not only present in the camp but in a position of authority in the months of May, June and July of 1992. Reference is made to the evidence given by Witness D, who was a member of the Military Investigative Commission in the camp and worked closely with Muci} in the classification of the detainees.[285] The Trial Chamber was "completely satisfied" with this evidence.[286] The witness testified that Muci} was present at the meeting of the Military Investigative Commission held in early June 1992 to discuss the classification and continued detention or release of the detainees.[287] It is also noteworthy that, in relation to a finding in the case of Deli}, it was found that the Military Investigative Commission only conducted interviews with detainees after informing Muci}, or Deli} when the former was absent, and that only Muci} and Deli} had access to the files of the Commission.[288] Further, Muci} conceded in his interview with the Prosecution that he went to the camp as early as 20

---

[282] *Ibid*, para 745.
[283] *Ibid*, para 754.
[284] *Ibid*, para 754.
[285] *Ibid*, para 748.
[286] *Ibid*, para 762.
[287] *Ibid*, para 748.
[288] *Ibid*, para 807.

May 1992.[289] Moreover, Grozdana]e}ez, a former detainee at the camp, was interrogated by Muci} in late May or early June 1992.[290] The Appeals Chamber is satisfied that the evidence relied upon by the Trial Chamber constitutes adequate support for its findings.

210. The Appeals Chamber is satisfied that it was open to the Trial Chamber to find that from "before the end of May 1992" Muci} was exercising *de facto* authority over the camp and its personnel.[291]

211. In addition, Muci} submitted:[292]

(i) The Trial Chamber failed to consider the causal implications of the acquittal of the co-defendant Delali} from whom the Prosecution alleged Muci} obtained his necessary authority; and

(ii) The Trial Chamber gave wrongful and/or undue weight to the acts of benefice [*sic*] attributed to Muci} at, *inter alia*, paragraph 1247 of the Trial Judgement, to found command responsibility, instead of treating them as acts of compassion coupled with the strength of personal character which constitute some other species of authority.[293]

212. The first argument appears to be based on an assumption that Muci}'s authority rested in some formal way on that of Delali}. This argument has no merit. It is clear that the Trial Chamber found that, regardless of the way Muci} was appointed, he in fact exercised *de facto* authority, irrespective of Delali}'s role in relation to the camp.

213. The second point lacks merit in that the acts related to in paragraph 1247 of the Trial Judgement were considered by the Trial Chamber for the purpose of sentencing, rather than conviction; and that acts beneficial to detainees done by Muci} referred to by the Trial Chamber may reasonably be regarded as strengthening its view that Muci} was in a position of authority to effect "greater discipline" in the camp than when he was absent.[294] Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which Muci} exercised and thus of his authority.

---

[289] *Ibid*, para 737.
[290] *Ibid*, para 747.
[291] *Ibid*, para 761.
[292] Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999, Registry page 1799. This document serves to clarify section 3 of the Muci} Brief.
[293] Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999, Registry page 1799.
[294] Trial Judgement, para 743.

4. Conclusion

214. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal and upholds the finding of the Trial Chamber that Muci} was the *de facto* commander of the ^elebi}i camp during the relevant period indicated in the Indictment.

B. The Prosecution Grounds of Appeal

215. The Prosecution has filed three grounds of appeal relating to command responsibility.[295]

1. Mental Element – "Knew or had Reason to Know"

216. The Prosecution's first ground of appeal is that the Trial Chamber has erred in law by its interpretation of the standard of "knew or had reason to know" as laid down in Article 7(3) of the Statute.[296]

217. Delali} argues that the Trial Chamber's interpretation of "had reason to know" is *obiter dicta* and does not affect the finding concerning Delali} that he never had a superior-subordinate relationship with Deli}, Muci}, and Land`o.[297] He submits that the Trial Chamber did not determine the matter of the mental element of command responsibility in terms of customary law. The ground should therefore not be considered. He argues that if the Appeals Chamber proceeds to deal with this ground, Delali} will agree with the interpretation given by the Trial Chamber in this regard.[298]

218. Acknowledging Delali}'s submission, the Prosecution asks the Appeals Chamber to deal with the mental element as a matter of general significance to the Tribunal's jurisprudence.[299] The Trial Chamber, it contends, determined the matter in terms of the customary law applicable at the time of the offences.[300] The Prosecution does not argue for a mental standard based on strict liability.[301]

---

[295] Ground one: "The Trial Chamber erred in paragraphs 379-393 when it defined the mental element 'knew or had reasons to know' for the purposes of Superior Responsibility";
Ground two: "The Trial Chamber's finding that Zejnil Delali} did not exercise superior responsibility";
Ground five: "The Trial Chamber erred when it decided in paragraphs 776–810 that Hazim Deli} was not a 'superior' in the ^elebi}i Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute".
[296] Prosecution Brief, para 2.7.
[297] Delali} Response, p 155. Appeal Transcript, p 257.
[298] Delali} Response, p 156.
[299] Prosecution Reply, para 2.3.
[300] *Ibid*, para 2.5.
[301] *Ibid*, para 2.6.

219. Delić agrees with the Prosecution's position that Articles 86 and 87 of Additional Protocol I reflect customary law as established through the post Second World War cases. A commander has a duty to be informed, but not every failure in this duty gives rise to command responsibility.[302]

220. The issues raised by this ground of appeal of the Prosecution include:

(i) whether in international law, the duty of a superior to control his subordinates includes a duty to be apprised of their action, i.e. a duty to know of their action and whether neglect of such duty will always result in criminal liability;

(ii) whether the standard of "had reason to know" means either the commander had information indicating that subordinates were about to commit or had committed offences or he did not have this information due to dereliction of his duty; and

(iii) whether international law acknowledges any distinction between military and civil leaders in relation to the duty to be informed.

221. The Appeals Chamber takes note of the fact that this ground of appeal is raised by the Prosecution for its general importance to the "jurisprudence of the Tribunal".[303] Considering that this ground concerns an important element of command responsibility, that the Prosecution alleges an error on the part of the Trial Chamber in respect of a finding as to the applicable law,[304] that the parties have made extensive submissions on it, and that it is indeed an issue of general importance to the proceedings before the Tribunal,[305] the Appeals Chamber will consider it by reference to Article 7(3) of the Statute and customary law at the time of the offences alleged in the Indictment.[306]

(i) The Mental Element Articulated by the Statute

222. Article 7(3) of the Statute provides that a superior may incur criminal responsibility for criminal acts of subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so" but fails to prevent such acts or punish those subordinates.

223. The Trial Chamber held that a superior:

---

[302] Delić Response, para 212.
[303] Prosecution Reply, para 2.3; Appeal Transcript pp 147-148.
[304] Trial Judgement, para 393.
[305] *See Tadić* Appeal Judgement, paras 247 and 281.
[306] Secretary-General's Report, para 34.

> [...] may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[307]

224. The Prosecution position is essentially that the reference to "had reason to know" in Article 7(3) of the Statute, refers to two possible situations. First, a superior had information which put him on notice or which suggested to him that subordinates were about to commit or had committed crimes. Secondly, a superior lacked such information as a result of a serious dereliction of his duty to obtain the information within his reasonable access.[308] As acknowledged by the Prosecution, only the second situation is not encompassed by the Trial Chamber's findings.[309] Delali} argues to the effect that the Trial Chamber was correct in its statement of the law in this regard, and that the second situation envisaged by the Prosecution was in effect an argument based on strict liability.[310] Deli} agrees with the Prosecution's assessment of customary law that "the commander has an international duty to be informed", but argues that the Statute was designed by the UN Security Council in such a way that the jurisdiction of the Tribunal was limited to cases where the commander had actual knowledge or such knowledge that it gave him reason to know of subordinate offences, which was a rule inconsistent with customary law laid down in the military trials conducted after the Second World War.[311]

225. The literal meaning of Article 7(3) is not difficult to ascertain. A commander may be held criminally liable in respect of the acts of his subordinates in violation of Articles 2 to 5 of the Statute. Both the subordinates and the commander are individually responsible in relation to the impugned acts. The commander would be tried for failure to act in respect of the offences of his subordinates in the perpetration of which he did not directly participate.

226. Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to

---

[307] Trial Judgement, para 383.
[308] Prosecution Brief, para 2.7; Appeal Transcript p 121.
[309] Appeal Transcript, p 121.
[310] Delali} Response, p 157.
[311] Deli} Response, para 215.

know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.

227. As the Tribunal is charged with the application of customary law,[312] the Appeals Chamber will briefly consider the case-law in relation to whether there is a duty in customary law to know of all subordinate activity, breach of which will give rise to criminal responsibility in the context of command or superior responsibility.

(ii) Duty to Know In Customary Law

228. In the *Yamashita* case, the United States Military Commission found that:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility [...]. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[313]

The Military Commission concluded that proof of widespread offences, and secondly of the failure of the commander to act in spite of the offences, may give rise to liability. The second factor suggests that the commander needs to discover and control. But it is the first factor that is of primary importance, in that it gives the commander a reason or a basis to discover the scope of the offences. In the *Yamashita* case, the fact stood out that the atrocities took place between 9 October 1944 to 3 September 1945, during which General Yamashita was the commander-in-chief of the 14th Army Group including the Military Police.[314] This length of time begs the question as to how the commander and his staff could be ignorant of large-scale atrocities spreading over this long period. The statement of the commission implied that it had

[312] Secretary–General's Report, para 34.
[313] Law Reports of Trials of War Criminals, Vol IV, p 35.
[314] *Ibid*, p 19.

found that the circumstances demonstrated that he had enough notice of the atrocities to require him to proceed to investigate further and control the offences. The fact that widespread offences were committed over a long period of time should have put him on notice that crimes were being or had been committed by his subordinates.

229. On the same case, the United Nations War Crimes Commission commented:

> [...] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused *knew* of their perpetration, or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his troops.[315]

This last sentence deserves attention. However, having considered several cases decided by other military tribunals, it went on to qualify the above statement:

> Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded *means of knowledge* as being the same as knowledge itself.[316]

In summary, it pointedly stated that "the law on this point awaits further elucidation and consolidation".[317] Contrary to the Trial Chamber's conclusion, other cases discussed in the Judgement do not show a consistent trend in the decisions that emerged out of the military trials conducted after the Second World War.[318] The citation from the Judgement in the case of *United States v Wilhelm List*[319] ("*Hostage case*") indicates that List failed to acquire "supplementary reports to apprise him of all the pertinent facts".[320] The tribunal in the case found that if a commander of occupied territory "fails to require and obtain *complete* information" he is guilty of a dereliction of his duty.[321] List was found to be charged with notice of the relevant crimes because of reports which had been made to him.[322] Therefore, List had in his possession information that should have prompted him to investigate further the situation under his command. The Trial Chamber also quoted from the *Pohl* case.[323] The phrase quoted is also meant to state a different point than that suggested by the Trial Chamber. In that case, the accused Mummenthey pleaded ignorance of fact in respect of certain aspects of the running

---

[315] *Ibid*, p 94.
[316] *Ibid*, p 94.
[317] *Ibid*, p 95.
[318] The Trial Chamber held that "the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates." Trial Judgement, para 388.
[319] *United States v Wilhelm List et al*, Vol XI, TWC, 1230.
[320] *Ibid*, p 1271, cited in Trial Judgement, para 389.
[321] *Ibid* (emphasis added).
[322] *United States v Wilhelm List et al*, Vol XI, TWC, at pp 1271-1272.
[323] Trial Judgement, para 389.

of his business which employed concentration camp prisoners.[324] Having refuted this plea by invoking evidence showing that the accused knew fully of those aspects, the tribunal stated:

> Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.[325]

That statement, when read in the context of that part of the judgement, means that the accused was under a duty arising from his position as an SS officer and business manager in charge of a war-time enterprise to know what was happening in his business, including the conditions of the labour force who worked in that business. Any suggestion that the tribunal used that statement to express that the accused had a duty under international law to know would be *obiter* in light of the finding that he had knowledge. In the *Roechling* case, which was also referred to by the Trial Chamber, the court concluded that Roechling had a "duty to keep himself informed about the treatment of the deportees."[326] However, it also noted that "Roechling [...] had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoner's uniform on those occasions".[327] This was information which would put him on notice. It is to be noted that the courts which referred to the existence of a "duty to know" at the same time found that the accused were put on notice of subordinates' acts.

230. Further, the Field Manual of the US Department of Army 1956 (No. 27-10, Law of Land Warfare) provides:

> The commander is...responsible, if he had actual knowledge, or *should have had knowledge, through reports received by him or through other means*, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.[328]

The italicised clause is clear that the commander should be presumed to have had knowledge if he had reports or other means of communication; in other words, he *had already information* as contained in reports or through other means, which put him on notice. On the basis of this analysis, the Appeals Chamber must conclude, in the same way as did the United Nations War Crimes Commission,[329] that the then customary law did not impose in the criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates' crimes.

---

[324] *United States v Oswald Pohl et al.*, TWC, Vol. V, p 1055.
[325] *Ibid.*
[326] TWC, Vol XIV, Appendix B, p 1136.
[327] TWC, Vol XIV, Appendix B, p 1136-37.
[328] Emphasis added.
[329] Law Reports of Trials of War Criminals, Vol IV, p 94.

231. The anticipated elucidation and consolidation of the law on the question as to whether there was a duty under customary law for the commander to obtain the necessary information came with Additional Protocol I. Article 86(2) of the protocol provides:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or *had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[330]

232. The phrase, "had reason to know", is not as clear in meaning as that of "had information enabling them to conclude", although it may be taken as effectively having a similar meaning. The latter standard is more explicit, and its rationale is plain: failure to conclude, or conduct additional inquiry, in spite of alarming information constitutes knowledge of subordinate offences. Failure to act when required to act with such knowledge is the basis for attributing liability in this category of case.

233. The phrase "had information", as used in Article 86(2) of Additional Protocol I, presents little difficulty for interpretation. It means that, at the critical time, the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate. As observed by the Trial Chamber, the apparent discrepancy between the French version, which reads "*des informations leur permettant de conclure*" (literally: information enabling them to conclude), and the English version of Article 86(2) does not undermine this interpretation.[331] This is a reference to information, which, if at hand, would oblige the commander to obtain *more* information (i.e. conduct further inquiry), and he therefore "had reason to know".

234. As noted by the Trial Chamber, the formulation of the principle of superior responsibility in the ILC Draft Code is very similar to that in Article 7(3) of the Statute.[332] Further, as the ILC comments on the draft articles drew from existing practice, they deserve close attention.[333] The ILC comments on the *mens rea* for command responsibility run as follows:

> Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or

---

[330] Emphasis added.

[331] Trial Judgement, para 392. The two commentaries on Additional Protocol I appear to agree that the French text, which is broader, should be preferred. *See* Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, Michael Bothe, Karl Joseph Partsch, Waldemar A Solf, (Martinus Nijhoff: The Hague 1982), pp 525-526; ICRC Commentary para 3545.

[332] Trial Judgement, para 342.

[333] ILC Report, pp 34 ff.

> had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime...In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime.[334]

The ILC further explains that "[t]he phrase 'had reason to know' is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude' which is used in the Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion."[335]

235. The consistency in the language used by Article 86(2) of Additional Protocol I, and the ILC Report and the attendant commentary, is evidence of a consensus as to the standard of the *mens rea* of command responsibility. If "had reason to know" is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of "should have known" as upheld by certain cases decided after the Second World War.[336]

236. After surveying customary law and especially the drafting history of Article 86 of Additional Protocol I,[337] the Trial Chamber concluded that:

> An interpretation of the terms of this provision [Article 86 of Additional Protocol I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point.[338]

---

[334] *Ibid*, pp 37-38 (emphasis added).

[335] *Ibid*, p 38. Article 28(a) of the ICC Statute provides for the responsibility of a military commander or a person effectively acting as a military commander. To establish the responsibility, proof is required that the commander or person "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes".

[336] Trial Judgement, para 389, where the trial of Admiral Toyoda was cited. Also, the *Tokyo Trial* Judgement, International Military Tribunal for the Far East (29 April 1946-12 November 1948), Vol.1, p 30, cited in the Prosecution Brief, para 2.9.

[337] The Trial Chamber, in particular, correctly observed to the effect that an overly broad "should have known" standard was rejected at the conference which adopted Additional Protocol I. Trial Judgement, para 391.

[338] *Ibid*, para 393.

237. The Prosecution contends that the Trial Chamber relied improperly upon reference to the object and purpose of Additional Protocol I.[339] The ordinary meaning of the language of Article 86(2) regarding the knowledge element of command responsibility is clear. Though adding little to the interpretation of the language of the provision, the context of the provision as provided by Additional Protocol I simply confirms an interpretation based on the natural meaning of its provisions. Article 87 requires parties to a conflict to impose certain duties on commanders, including the duty in Article 87(3) to "initiate disciplinary or penal action" against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the commander "is aware" that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only.

238. Contrary to the Prosecution's submission, the Trial Chamber did not hold that a superior needs to have information on subordinate offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility. A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know". The ICRC Commentary (Additional Protocol I) refers to "reports addressed to (the superior), [...] the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I.[340] As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.

239. Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an

[339] *See* Prosecution argument in Prosecution Brief, paras 2.15-2.19. Reference is made to Article 31 of the Vienna Convention on the Law of Treaties of 1969.
[340] ICRC Commentary (Additional Protocol I), para 3545.

assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber,[341] as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability.

(iii) Civilian Superiors

240. The Prosecution submits that civilian superiors are under the same duty to know as military commanders.[342] If, as found by the Appeals Chamber, there is no such "duty" to know in customary law as far as military commanders are concerned, this submission lacks the necessary premise. Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law. As the Trial Chamber made a factual determination that Delali} was not in a position of superior authority over the ^elebi}i camp in any capacity, there is no need for the Appeals Chamber to resolve this question.

(iv) Conclusion

241. For the foregoing reasons, this ground of appeal is dismissed. The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard "had reason to know", that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[343] This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.

2. Whether Delali} Exercised Superior Responsibility

242. The Prosecution's second ground of appeal alleges an error of law in the Trial Chamber's interpretation of the nature of the superior-subordinate relationship which must be established to prove liability under Article 7(3) of the Statute. The Prosecution contends that the Trial Chamber wrongly "held that the doctrine of superior responsibility requires the

[341] Trial Judgement, para 383.
[342] Prosecution Brief, para 2.11.

perpetrator to be part of a subordinate unit in a direct chain of command under the superior."[344] This legal error, it is said, led to the erroneous finding that Delali} did not exercise superior responsibility over the ^elebi}i camp and thus was not responsible for the offences of the camp staff.[345]

243. The Prosecution argues that, contrary to the finding of the Trial Chamber, the doctrine of command responsibility does not require the existence of a direct chain of command under the superior, and that other forms of *de jure* and *de facto* control, including forms of influence, may suffice for ascribing liability under the doctrine.[346] The criterion for superior responsibility is actual control, which entails the ability to prevent violations, rather than direct subordination.[347] Delali} was in a special position in that the facts found by the Trial Chamber established that he "act[ed] on behalf of the War Presidency, he act[ed] on behalf of the supreme command in Sarajevo, he act[ed] on behalf of the investigating commission with respect to prisoners, he issued orders with respect to the functioning of the ^elebi}i prison".[348] It concludes that, as the Trial Chamber found him to have knowledge of the ill-treatment in the camp,[349] and yet failed to prevent or punish the violations,[350] the Appeals Chamber may substitute verdicts of guilty on those counts under which command responsibility was charged.[351]

244. The Prosecution submits that, if the Appeals Chamber applies the correct test to all of the facts found by the Trial Chamber, the *only* conclusion it could reach is that Delalic was a superior and was guilty of the crimes charged, which would permit it to reverse the verdict of acquittal.[352] If the Appeals Chamber finds that the facts found by the Trial Chamber do not permit it to reach that conclusion, it should remit the case to a newly constituted Trial Chamber to determine the relevant counts.[353]

---

[343] Trial Judgement, para 393.
[344] Prosecution Brief, para 3.6.
[345] *Ibid*, para 3.6.
[346] *Ibid*, paras 3.17, 3.22.
[347] *Ibid*, para 3.27.
[348] Appeal Transcript, p 163; Prosecution Brief, para 3.36.
[349] Prosecution Brief, para 3.60.
[350] *Ibid*, para 3.66.
[351] Counts 13, 14, 33-35, 38, 39, 44, 45, 46, 47 and 48. *Ibid*, para 3.79.
[352] Appeal Transcript, p 165; *See* also Appeal Transcript at pp 156-158, noting the decisions in the *Tadic* Appeal Judgement and *Aleksovski* Appeal Judgement dealing with the Appeals Chambers powers to intervene on factual matters.
[353] Appeal Transcript, p 166.

245. In the alternative, the Prosecution requests leave to be granted to present additional evidence which had been "wrongly excluded by the Trial Chamber", being evidence that it sought to call in rebuttal.[354] The documentary evidence which had not been admitted was annexed to the Prosecution Brief. The submission in relation to admission of wrongfully excluded evidence as expressed in the Prosecution Brief initially suggested that this course was proposed as an alternative *remedy* which would fall for consideration only should the Appeals Chamber accept the argument that the Trial Chamber made an error of law in its statement of the nature of the superior-subordinate relationship.[355] However, it was also stated that the Prosecution alleges that the Trial Chamber's exclusion of the evidence constituted a distinct error of law, and in subsequent written and oral submissions it was made apparent that, although not expressed as a separate ground of appeal, the submissions as to erroneous exclusion of evidence constitute an independent basis for challenging the Trial Chamber's finding that Delalic was not a superior.[356] As Delalic in fact answered this Prosecution argument, no prejudice will result if the Appeals Chamber deals with this alternative submission as an independent allegation of error of law.

246. Delali} contends that in any event the evidence of the position of Delali} in relation to the ^elebi}i camp demonstrates that he had no superior authority there,[357] and that the Prosecution's theory of "influence responsibility" is not supported by customary law.[358] He argues that a revision of the judgement by the Appeals Chamber can only concern errors of law, and that, where there is a mix of factual and legal errors, the appropriate remedy is that a new trial be ordered.[359] Delali} submits that the Trial Chamber was correct in refusing the to allow the proposed Prosecution witnesses to testify as rebuttal witnesses and in rejecting the Prosecution motion to re-open the proceedings.[360]

---

[354] Prosecution Brief, para 3.80.

[355] *Ibid*, para 3.80: "In the alternative, should the Appeals Chamber determine that the facts as found by the Trial Chamber are not of themselves sufficient to support a reversal of the acquittals of Delalic, the Prosecution submits that it should be granted leave by the Appeals Chamber to present additional evidence that was wrongly excluded by the Trial Chamber." Cf para 3.84: "[...] the Prosecution now seeks an appellate remedy against these decisions of the Trial Chamber [not to admit the evidence]".

[356] Prosecution Reply, para 3.16; para 3.23; Appeal Transcript p 16: "The issue is an issue of error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of fresh or rebuttal evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred" and at p 171, where the Prosecution agreed that their submission was '[...] that there was an error of law, the documents which are attached to the submissions will demonstrate that it was an error of law which caused harm to the Prosecution's case, and therefore, you want a new trial."

[357] Appeal Transcript, pp 30-97.

[358] Delali} Response, pp 119, 122.

[359] Delali} Response, pp 9-10.

[360] Delali} Response, p 129.

247. The Prosecution's argument relating to the Trial Chamber's findings as to the nature of the superior-subordinate relationship is considered first before turning to the second argument relating to the exclusion of evidence which was sought to be admitted as rebuttal or fresh evidence.

(i) The Superior-Subordinate Relationship in the Doctrine of Command Responsibility

248. The Prosecution interprets the Trial Chamber to have held that, in cases involving command or superior responsibility, the perpetrator must be "part of a subordinate unit in a direct chain of command under the superior" for the superior to be held responsible.[361] The Prosecution submissions do not refer to any specific express statement of the Trial Chamber to this effect but appear to consider that this was the overall effect of the Trial Chamber's findings. The Prosecution first refers to, and apparently accepts, the finding of the Trial Chamber that:

> [...] in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences [...] such authority can have a *de facto* or *de jure* character.[362]

249. The Prosecution then refers to certain subsequent conclusions of the Trial Chamber which it apparently regards as supporting its interpretation that the Trial Chamber held that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a direct chain of command under the superior. First, the Prosecution refers to the Trial Chamber's statement that, in the case of the exercise of *de facto* authority, it must be

> [...] accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means that the perpetrator of the underlying offence must be the subordinate of the person of higher rank *and under his direct or indirect control*.[363]

The section of the judgement cited and relied upon in the Prosecution Brief, however, omits the italicised portion of the passage. This qualification expressly conveys the Trial Chamber's view that the relationship of subordination required by the doctrine of command responsibility may be direct *or indirect*.

250. The Trial Chamber also referred to the ICRC Commentary (Additional Protocols), where it is stated that the superior-subordinate relationship should be seen "in terms of a

---

[361] Prosecution Brief, para 3.6.
[362] Trial Judgement, para 378, cited in Prosecution Brief at para 3.2.
[363] Trial Judgement, para 646, cited in Prosecution Brief at para 3.3.

hierarchy encompassing the concept of control".[364] Noting that Article 87 of Additional Protocol I establishes that the duty of a military commander to prevent violations of the Geneva Conventions extends not only to his subordinates but also to "other persons under his control", the Trial Chamber stated that:

> This type of superior-subordinate relationship is described in the Commentary to the Additional Protocols by reference to the concept of "indirect subordination", in contrast to the link of "direct subordination" which is said to relate the tactical commander to his troops.[365]

251. Two points are clear from the Trial Chamber's consideration of the issue. First, the Trial Chamber found that a *de facto* position of authority suffices for the purpose of ascribing command responsibility. Secondly, it found that the superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner, with the result that the superior-subordinate relationship itself may be both direct and indirect. Neither these findings, nor anything else expressed within the Trial Judgement, demonstrates that the Trial Chamber considered that, for the necessary superior-subordinate relationship to exist, the perpetrator must be in a *direct* chain of command under the superior.

252. Examining the actual findings of the Trial Chamber on the issue, it is therefore far from apparent that it found that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a *direct* chain of command under the superior; nor is such a result a necessary implication of its findings. This seems to have been implicitly recognised by the Prosecution in its oral submissions on this ground of appeal at the hearing.[366] The Appeals Chamber regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established.

253. However, the argument of the Prosecution goes further than challenging the perceived requirement of *direct* subordination. The key focus of the Prosecution argument appears to be the Trial Chamber's rejection of the Prosecution theory that persons who can exert "substantial influence" over a perpetrator who is not necessarily a subordinate may, by virtue of that influence, be held responsible under the principles of command responsibility.[367] The

---

[364] Trial Judgement, para 354, quoting from the ICRC Commentary (Additional Protocols), para 3544.
[365] Trial Judgement, para 371.
[366] The Prosecution submitted that the Trial Chamber "*appeared* to focus on the necessity of a chain of command. It *appeared to focus* on the necessity of that there has to be a command structure..." and referred to "...the Trial Chamber's reliance on the need for a chain of command, and specifically some – *what appears to be* some direct link or direct chain of command ...", Appeal Transcript, pp 152 and 153.
[367] *See* Trial Judgement, para 648.

Prosecution does not argue that *anyone* of influence may be held responsible in the context of superior responsibility, but that a superior encompasses someone who "may exercise a substantial degree of influence over the perpetrator or over the entity to which the perpetrator belongs."[368]

254. The Trial Chamber understood the Prosecution at trial to be seeking "to extend the concept of the exercise of superior authority to persons over whom the accused can exert substantial influence in a given situation, who are clearly not subordinates",[369] which is essentially the approach taken by the Prosecution on appeal. The Trial Chamber also rejected the idea, which it apparently regarded as being implicit in the Prosecution view, that a superior-subordinate relationship could exist in the absence of a subordinate:

> The view of the Prosecution that a person may, in the absence of a subordinate unit through which authority is exercised, incur responsibility for the exercise of a superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility.[370]

The Trial Chamber thus unambiguously required that the perpetrator be subordinated to the superior. While it referred to hierarchy and chain of command, it was clear that it took a wide view of these concepts:

> The requirement of the existence of a "superior-subordinate relationship" which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined. It is the Trial Chamber's conclusion ... that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so.[371]

The Trial Chamber's references to concepts of subordination, hierarchy and chains of command must be read in this context, which makes it apparent that they need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied.

---

[368] Appeal Transcript, pp 116-118.
[369] Trial Judgement, para 648.
[370] Trial Judgement, para 647, cited in the Prosecution Brief at para 3.4.
[371] Trial Judgement, para 354.

255. It is clear that the Trial Chamber drew a considerable measure of assistance from the ICRC Commentary (Additional Protocols) on Article 86 of Additional Protocol I (which refers to the circumstances in which a superior will be responsible for breaches of the Conventions or the Protocol committed by his subordinate) in finding that actual control of the subordinate is a necessary requirement of the superior-subordinate relationship.[372] The Commentary on Article 86 of Additional Protocol I states that:

> [...] we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, *being his subordinate, is under his control*. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1 [of Article 86]. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[373]

The point which the commentary emphasises is the concept of control, which results in a relationship of superior and subordinate.

256. The Appeals Chamber agrees that this supports the Trial Chamber's interpretation of the law on this point. The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[374]

257. In considering the Prosecution submissions relating to "substantial influence", it can be noted that they are not easily reconcilable with other Prosecution submissions in relation to command responsibility. The Prosecution expressly endorses the requirement that the superior have effective *control* over the perpetrator,[375] but then espouses, apparently as a matter of general application, a theory that in fact "substantial influence" alone may suffice, in that "where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so

---

[372] Trial Judgement, paras 354, 371 and 647, referring to para 3544 of the ICRC Commentary (Additional Protocols). Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

[373] ICRC Commentary (Additional Protocols), para 3544.

[374] It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).

may result in criminal liability."[376] This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, it is unclear that in its natural sense the concept of "substantial *influence*" entails any necessary notion of control at all. Indeed, certain of the Prosecution submissions at the appeal hearing suggest that the substantial influence standard it proposes is not intended to pose any different standard than that of control in the sense of the ability to prevent or punish:

> But we would submit that if there is the substantial influence, which we concede is something which has got to be determined essentially on a case-by-case basis, if this superior does have *the material ability to prevent or punish*, he or she should be within the confines of this doctrine of command responsibility as set forth in Article 7(3).[377]

The Appeals Chamber will consider whether substantial influence has ever been recognised as a foundation of superior responsibility in customary law.

258. The Prosecution relied at trial and on appeal on the *Hostage case* in support of its position that the perpetrators of the crimes for which the superior is to be held responsible need not be subordinates, and that substantial influence is a sufficient degree of control.[378] The Appeals Chamber concurs with the view of the Trial Chamber that the *Hostage case* is based on a distinction in international law between the duties of a commander for occupied territory and commanders in general. That case was concerned with a commander in occupied territory. The authority of such a commander is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally. Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, provides:

> Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43 provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public

---

[375] Prosecution Brief para 3.7; Appeal Transcript p 115.
[376] Prosecution Brief, para 3.15 (emphasis added).
[377] Appeal Transcript, p 119.
[378] The *Hostage case*, TWC, Vol. XI, p 1260.

> order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This clearly does not apply to commanders in general. It was not then alleged, nor could it now be, that Delali} was a commander in occupied territory, and the Trial Chamber found expressly that he was not.[379]

259. The Prosecution emphasises however that it did not rely on the *Hostage case* alone.[380] At trial, and on appeal, the Prosecution relied on the judgement in the *Muto* case before the International Military Tribunal for the Far East.[381] The Appeals Chamber regards the *Muto* case as providing limited assistance for the present purpose. Considering Muto's liability as Chief-of-Staff to General Yamashita, the Tokyo Tribunal found him to be in a position "to influence policy", and for this reason he was held responsible for atrocities by Japanese troops in the Philippines. It is difficult to ascertain from the judgement in that case whether his conviction on Count 55 for his failure to take adequate steps to ensure the observance of the laws of war reflected his participation in the making of that policy or was linked to his conviction on Count 54 which alleged that he "ordered, authorized and permitted" the commission of conventional war crimes.[382] It is possible that the conviction on Count 54 led to that on Count 55.

260. On the other hand, the Military Tribunal V in *United States v Wilhelm von Leeb et al,* states clearly that:

> In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitively upon his commander.[383]

This suggests that a Chief-of-Staff would be found guilty only if he were involved in the execution of criminal policies by writing them into orders that were subsequently signed and issued by the commanding officer. In that case, he could be *directly* liable for aiding and abetting or another form of participation in the offences that resulted from the orders drafted by him. The Appeals Chamber therefore confines itself to stating that the case-law relied on by the

---

[379] Trial Judgement, para 649.
[380] Prosecution Brief, para 3.20.
[381] Trial Judgement, paras 368-369; Appeal Transcript, p 117, Tokyo War Crimes Trial, The International Military Tribunal for the Far East, Judgement, Official Transcript reprinted in R John Pritchard and Sonia Magbanna Zaide (eds.) The Toyko War Crimes Trial, Vol. 20 (1981).
[382] J Pritchard et al (eds), *The Tokyo War Crimes Trial* (Garland Publishing Inc, New York and London, 1981) (complete transcripts), vol 20 (Judgement and Annexes), pp 49,772.
[383] *United States v Wilhelm von Leeb et al*, TWC, Vol. XI, pp 513-514, quoted in the Trial Judgement, para 367.

Prosecution was not uniform on this point. No force of precedent can be ascribed to a proposition that is interpreted differently by equally competent courts.

261. The Prosecution also relies on the *Hirota* and *Roechling* cases.[384] In the *Hirota* case, the Tokyo Tribunal found that Hirota, the Japanese Foreign Minister at the time of the atrocities committed by Japanese forces during the Rape of Nanking, "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[385] The Trial Chamber found this to be "language indicating powers of persuasion rather than formal authority to order action to be taken".[386]

262. In the *Roechling* case,[387] a number of civilian industrialists were found guilty in respect of the ill-treatment of deportees employed in forced labour, not on the basis that they ordered the treatment but because they "permitted it; and indeed supported it, and in addition, for not having done their utmost to put an end to the abuses".[388] The Trial Chamber referred specifically to the findings in relation to von Gemmingen-Hornberg, who was the president of the Directorate and works manager of the Roechling steel plants. The tribunal at first instance had found that "the high position which he occupied in the corporation, as well as the fact that he was Herman Roechling's son-in-law, gave him certainly sufficient authority to obtain an alleviation in the treatment of these workers", and that this constituted "cause under the circumstances" to find him guilty of inhuman treatment of the workers. The reference to "sufficient authority" was interpreted by the Trial Chamber as indicating "powers of persuasion rather than formal authority", partly because of the tribunal's reference to the fact that the accused was Roechling's son-in-law,[389] and it is upon this interpretation that the Prosecution appears to rely.[390]

263. The Appeals Chamber does not interpret the reference to "sufficient authority" as entailing an acceptance of powers of persuasion or influence alone as being a sufficient basis on

---

[384] Appeal Transcript, p 117; Prosecution Brief, para 3.16.
[385] *The Tokyo Judgment*, The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, Vol I, (ed B V A Röling and C F Rüter, 1977, APA University Press, Amsterdam) pp 447-448.
[386] Trial Judgement, para 376.
[387] *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Directors of the Roechling Enterprises*, XIV Trials of War Criminals Before the Nuremberg Military Tribunals, p 1061("*Roechling* case") at pp 1092-3.
[388] *Roechling* case, judgement on appeal at p 1136.
[389] Trial Judgement, para 376.
[390] The Prosecution does not cite the relevant parts of the judgement on which it relies but refers to the Trial Chamber's references to the case. Prosecution Brief para 3.17. *See* also Appeal Transcript at p 117. The Trial Chamber was, as is apparent from the reference in footnote 404 of the Trial Judgement, referring to the accused von Gemmingen-Hornberg.

which to found command responsibility. The *Roechling* judgement on appeal does not refer to the fact that the accused was Roechling's son-in-law, but it emphasises his senior position as president of the Directorate and his position as works manager, "that is, as the works representative in negotiations with the authorities specially competent to deal with matters relating to labor. His sphere of competence also included contact with the Gestapo in regard to the works police".[391] The judgements suggest that he was found to have powers of control over the conditions of the workers which, although not involving any formal ability to give orders to the works police, exceeded mere powers of persuasion or influence. Thus the Appeals Chamber considers the Trial Chamber's initial characterisation of the case as being "best construed as an example of the imposition of superior responsibility on the basis of *de facto* powers of control possessed by civilian industrial leaders" as being the more accurate one.[392]

264. The Appeals Chamber also considers that the *Pohl* case does not support the proposition of the Prosecution that the substantial influence alone of a superior may suffice for the purpose of command responsibility.[393] The person in question, Karl Mummenthey, an SS officer and a business manager, not only possessed "military power of command" but, more importantly in this case, "control" over the industries where mistreatment of concentration camp labourers occurred.[394] This is apparent even from the passage of the judgement cited by the Prosecution in its Appeal Brief:[395]

> Mummenthey was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, *wielded military power of command*. If excesses occurred in the industries *under his control* he was in a position not only to know about them, but to do something.[396]

265. In the context of relevant jurisprudence on the question, it should also be noted that the Prosecution also relies on the fact that a Trial Chamber of the International Criminal Tribunal for Rwanda, in *Prosecutor v Kayishema and Ruzindana*,[397] relied on these World War II authorities, and on the references to them in the judgement of the Trial Chamber in *Celebici*, to

---

[391] *Roechling* Case, judgement on appeal, p 1136; *See* also p 1140. The Superior Military Government Court also referred specifically to the fact that the chief of the works police (Werkschutz) was an SS officer called Rassner who was appointed by the accused von Gemmingen-Hornberg: p 1135.
[392] Trial Judgement, para 376.
[393] *United States v Oswald Pohl et al*, TWC, Vol.V, p 958. Relied on in the Prosecution Brief at 3.14 and 3.20.
[394] *Ibid*, pp 1052-1053.
[395] Prosecution Brief, para 3.14, citing the *Pohl* case as referred to in the Trial Judgement, para 374.
[396] *United States v Oswald Pohl et al*, Vol V, TWC, p 958 (emphasis added).
[397] *Prosecution* v *Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999.

find that powers of influence are sufficient to impose superior responsibility.[398] The ICTR Trial Chamber stated:

> [...] having examined the *Hostage* and *High Command* cases the Chamber in *Celebici* concluded that they authoritatively asserted the principle that, "powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility." This Trial Chamber concurs.[399]

No weight can be afforded to this statement of the ICTR Trial Chamber, as it is based on a misstatement of what the Trial Chamber in *Celebici* actually held. The quoted statement was *not* a conclusion of the Trial Chamber, nor its interpretation of the *Hostage* and *High Command* cases, but the ICTR Trial Chamber's interpretation of the decision of the Tokyo Tribunal in the *Muto* case.[400] The Trial Chamber in *Celebici* ultimately regarded any "influence" principle which may have been established by *Muto* case as being outweighed by other authorities which suggested that a position of command in the sense of effective control was necessary.

266. The Appeals Chamber considers, therefore, that customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.

267. The Appeals Chamber therefore finds that the Trial Chamber has applied the correct legal test in the case of Delali}. There is, therefore, no basis for any further application of that test to the Trial Chamber's findings, whether by the Appeals Chamber or by a reconstituted Trial Chamber.[401]

268. The Prosecution's argument dealt with here is limited to the submission that it was the Trial Chamber's alleged error of law in the legal test which led it to an erroneous conclusion that Delalic did not exercise superior authority. There was no independent allegation in the

---

[398] Prosecution Brief, para 3.18.
[399] *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999, para 220.
[400] Trial Judgement, para 375.
[401] Prosecution Brief, para 3.33; Appeal Transcript pp 158 and 166.

Prosecution Brief that the Trial Chamber made errors of fact in its factual findings which should be overturned by the Appeals Chamber, although certain submissions at the hearing of the appeal suggest that the Prosecution submits that, even under the standard of effective control (which was in fact applied by the Trial Chamber), the Trial Chamber should have found Delalic to have exercised superior authority.[402] However, nothing raised by the Prosecution would support a finding by the Appeals Chamber that the Trial Chamber's findings, and its ultimate conclusion from those facts that Delalic did not exercise the requisite degree of control, was so unreasonable that no reasonable tribunal of fact could have reached them.[403]

(ii) Whether the Trial Chamber erred in excluding rebuttal or fresh evidence

269. As discussed above, the Prosecution submitted "in the alternative" that the Appeals Chamber should grant leave to the Prosecution to present "additional" evidence that was wrongly excluded by the Trial Chamber.[404] The nature of the "alternative" was described as follows:

> The issue is an issue of an error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of rebuttal or fresh evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred.[405]

270. As noted above, the Appeals Chamber deals with this argument as an independent allegation of an error of law on behalf of the Trial Chamber.

271. At the request of the Trial Chamber during the case of the last of the accused to present his defence, the Prosecution filed a notification of witnesses proposed to testify in rebuttal. It proposed to call four witnesses, one relating to the case against Landžo and the others relating to the case against Delalic, one of whom was a Prosecution investigator being called essentially to tender a number of documents "not previously available to the prosecution".[406] Oral submissions on the proposal were heard by the Trial Chamber on 24 July 1998,[407] and the Trial Chamber ruled that, with the exception of the witness relating to the case against Landžo, the proposed evidence was not rebuttal evidence, but fresh evidence, and that the Prosecution had

---

[402] Appeal Transcript, p 164: after referring to various facts found by the Trial Chamber, it was submitted that: "As a result of this specific position and someone who is granted authority by the higher command, it is the Prosecution's position that those facts demonstrate he had *control*."

[403] *Tadic* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63; *Furundžija* Appeal Judgement, para 37 and *infra* paras 434-436.

[404] Prosecution Brief, para 3.80.

[405] Appeal Transcript, p 168.

[406] Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 22 July 1998, ("Notification"), 5th unnumbered page.

[407] Trial Transcript, pp 14934-14974.

not put forward anything which would support an application to admit fresh evidence.[408] This decision was reflected in a written Order which noted that "rebuttal evidence is limited to matters that arise directly and specifically out of defence evidence".[409]

272. The evidence which was not admitted by the Trial Chamber related to Delic, Mucic and Delalic, but the Prosecution submission that the exclusion constituted an error invalidating the decision is limited in application to the effect of this evidence on its case against Delalic. Its overall purpose was to show that Delali} had the requisite degree of control over the ^elebi}i camp. The three proposed witnesses, and the documents they sought to adduce, were as follows:

(i) Rajko Đordic, Sr, to testify as to his release from the ^elebi}i camp pursuant to a release form signed by Delalic and dated 3 July 1992. It was proposed that the witness produce and authenticate the document. This was intended to rebut the evidence of defence witnesses that Delalic was authorised to sign release documents only in exceptional circumstances when the members of the Investigative Commission were not present in ^elebi}i.

(ii) Stephen Chambers, an investigator of the Office of the Prosecutor, to present "documentary evidence not previously available to the Prosecutor" which had been seized from the State Commission for the Search for the Missing in Sarajevo and from the home and work premises of an official of the State Commission for Gathering Facts on War Crimes in Konjic. This was said to rebut the testimony of witnesses that Delalic, as commander of Tactical Group 1, had no authority over the ^elebi}i camp.[410]

(iii) Professor Andrea Stegnar, a handwriting expert, to give expert testimony in relation to a number of the recently obtained documents alleged to bear the signature of the accused. This was not argued to have any independent rebuttal basis.[411]

---

[408] Trial Transcript, pp 14943, 14972, 14975.
[409] Order on the Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 30 July 1998, p 2.
[410] Notification, 4th and 5th unnumbered pages. It was put by the Prosecution on appeal that one item of documentary evidence would also more specifically rebut defence evidence as to the reliability of Prosecution Exhibit 214, a document signed by the President of the Konjic State Commission for the Exchange of War Prisoners which was described as "indicat[ing] that the overseeing and guarding of the prisoners had been taken over by the Tactical Group", as the new document in question was an authenticated copy of the document. *See* Prosecution Brief, para 3.81(2)(c) and fn 160.
[411] Notification, 6th unnumbered page. There were originally two categories of documents in relation to which the Prosecution sought Professor Stegnar's testimony. The Prosecution only appeals against the decision not to admit one of these categories (the new documents). Prosecution Brief, para 3.81(4) and fn 162.

273. The Trial Chamber characterised the nature of rebuttal evidence as "evidence to refute a particular piece of evidence which has been adduced by the defence", with the result that it is "limited to matters that arise directly and specifically out of defence evidence."[412] This standard is essentially consistent with that used previously and subsequently by other Trial Chambers.[413] The Appeals Chamber agrees that this standard – that rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated – is correct. It is in this context that the Appeals Chamber understands the Trial Chamber's statement, made later in its Decision on Request to Reopen, that "evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso*, and which remedies a defect in the case of the Prosecution, is generally not admissible."[414] Although the Appeals Chamber would not itself use that particular terminology, it sees, contrary to the Prosecution submission,[415] no error in that statement when read in context.

274. The Trial Chamber's particular reasons for rejecting the evidence as rebuttal evidence, as expressed in the oral hearing on 24 July, were, in relation to category (i), that the other evidence heard by the Trial Chamber was that Delalic had signed such documents only on behalf of the Investigating Commission and not in his own capacity. As the relevant release document also was acknowledged to state that Delalic was signing "for" the Commission,[416] the Trial Chamber queried how it could be considered to rebut what had already been put in evidence.[417] The Trial Chamber appeared to assess the document as having such low probative value in relation to the fundamental matter that the Prosecution was trying to prove – namely, Delalic's authority to release prisoners in his own capacity – that it could not be considered to

---

[412] Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, ("Decision on Request to Reopen"), para 23.

[413] *Prosecutor v Tadic*, Case No IT-94-1, Trial Transcript, 29 May 1998: p 3676, Judge McDonald refusing the admission in rebuttal of those parts of testimony which were "evidence that [the Prosecutor] could have adduced during [her] case in chief. Our concern is that this not be a practice of offering additional evidence that you would have an opportunity to offer on the case in chief." *Prosecutor v Furundžija*, Case No IT-95-17/2, Confidential Decision on Prosecutor's Motion in Respect of Rebuttal Witness and Witness Protection Issued Pertaining to Disclosure and Testimony by the Witness, 19 June 1998. The right of rebuttal is "to be used to challenge Defence evidence that could not have reasonably been foreseen, and that it would be a misuse of this right to permit it to be used to adduce evidence that should properly have been proved as part of the Prosecution case against an accused". (Nothing referred to here from that decision is confidential material). In *Prosecutor v Kordic*, Case No IT-95-14/2, Transcript 18 Oct 2000. The Trial Chamber endorsed the practice of the Trial Chambers in *^elebi}i* and *Furundžija* of limiting rebuttal evidence strictly to matters arising in the defence case which were not already covered in the Prosecution case. It described the relevant standard to be the "only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted." *See* p 26647.

[414] Decision on Request to Reopen, para 23.

[415] Prosecution Brief, para 3.104.

[416] Trial Transcript, p 14936.

[417] Trial Transcript, p 14938.

rebut the defence evidence identified by the Prosecution. This assessment was reasonably open to the Trial Chamber.

275. In relation to category (ii), the Trial Chamber rejected the characterisation of the evidence as rebuttal evidence on the basis that it was better characterised as fresh evidence. While it may have been desirable for the Trial Chamber to state more specifically its view as to why the evidence did not refute a particular matters arising directly and specifically out of defence evidence, the Appeals Chamber agrees that it was open to regard the evidence as not being evidence in rebuttal. It is first noteworthy that the Prosecution, in applying to adduce the evidence, described it first as "fresh evidence, not previously available to the prosecution"[418] and gave only a fairly cursory description of how in its view the evidence rebutted defence evidence. It said that the evidence would rebut the evidence of witnesses "who all stated that Zejnil Delalic as Commander of Tactical Group 1 had no *de facto* authority, or any other authority whatsoever" over the ^elebi}i camp.[419] Thus the evidence was intended to establish that Delalic did in fact exercise such authority. As such, it went to a matter which was a fundamental part of the case the Prosecution was required to prove in relation to its counts under Article 7(3). Such evidence should be brought as part of the Prosecution case in chief and not in rebuttal. As the Trial Chamber correctly observed, where the evidence which "is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it", it is inappropriate to admit it in rebuttal, and the Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it." [420]

276. Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies. This is essentially what the Trial Chamber found. There is therefore no merit in the Prosecution's submission that the evidence should have been admitted as "the reason for not adducing it during the Prosecution's case [was] not due to the failure to foresee

[418] Notification, para A, 4th unnumbered page.
[419] *Ibid.*
[420] Decision on Request to Reopen, para 23.

the issues that may arise during the Defence case." [421] The issue as to whether the evidence should have been admitted as fresh evidence is considered below.

277. The admission of the testimony of the handwriting expert referred to in category (iii) essentially relied on the admission of the category (ii) evidence, so it need not be further considered.

278. Following the Trial Chamber's rejection of the evidence as rebuttal evidence, the Prosecution filed an alternative request to re-open the Prosecution case.[422] The Trial Chamber rejected this alternative orally,[423] issuing its written reasons on 19 August 1998.[424] The Prosecution filed applications under Rule 73 for leave to appeal the Order of 30 July and the Decision of 4 August, on 6 August and 17 August, respectively. A Bench of the Appeals Chamber denied leave to appeal in respect of both applications on the basis that it saw no issue that would cause such prejudice to the case of the Prosecution as could not be cured by the final disposal of the trial including post-judgement appeal, or which assumed general importance to the proceedings of the Tribunal or in international law generally, these being the two tests established by Rule 73(B) regarding the granting or withholding of leave to appeal.[425]

279. In its Decision on Request to Reopen the Trial Chamber, after considering the basis on which evidence could be admitted as rebuttal evidence, acknowledged the possibility that the Prosecution "may further be granted leave to re-open its case in order to present new evidence not previously available to it." It stated:

> Such fresh evidence is properly defined not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time. The burden of establishing that the evidence sought to be adduced is of this character rests squarely on the Prosecution.[426]

280. The Trial Chamber also identified the factors which it considered relevant to the exercise of its discretion to admit the fresh evidence. These were described as:

> (i) the "advanced stage of the trial"; i.e., the later in the trial that the application is made, the less likely the evidence will be admitted;

---

[421] Prosecution Brief, para 3.94.
[422] Prosecution Brief, para 3.83.
[423] Trial Transcript, 4 Aug 1998, pp 15518-15520.
[424] Decision on Request to Reopen.
[425] Decision on Prosecutor's Applications for Leave to Appeal the Order of 30 July 1998 and Decision of 4 August 1998 of Trial Chamber II *Quater*, Case No. IT-96-21-AR73.6 and AR73.7, 29 Aug 1998.
[426] Decision on Request to Reopen, para 26.

(ii) the delay likely to be caused by a re-opening of the Prosecution case, and the suitability of an adjournment in the overall context of the trial; and

(iii) the probative value of the evidence to be presented.[427]

281. Taking these considerations into account the Trial Chamber assessed both the evidence and the Prosecution's explanation for its late application to adduce it and concluded that the Prosecution had not discharged its burden of proving that the evidence could not have been found earlier with the exercise of reasonable diligence.[428] In addition, it found that the admission of the evidence would result in the undue protraction of the trial for up to three months, as the testimony of further witnesses to authenticate the relevant documents could be required as well as the evidence of any witnesses that the defence should be permitted to bring in response.[429] Finally, the Trial Chamber assessed the evidence to be of minimal probative value, consisting of "circumstantial evidence of doubtful validity", with the result that its exclusion would not cause the Prosecution injustice.[430] It concluded generally that "the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application."[431]

282. The Prosecution does not challenge the Trial Chamber's definition of fresh evidence as evidence which was not in the possession of the party at the time and which by the exercise of all reasonable diligence could not have been obtained by the relevant party at the conclusion of its case. Nor does it challenge the "general principle of admissibility" used by the Trial Chamber.[432]

283. The Appeals Chamber agrees that the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89 (D) of the Rules, to exclude evidence where its probative value is

[427] Decision on Request to Reopen, para 27.
[428] Decision on Request to Reopen, para 29-30.
[429] Decision on Request to Reopen, para 36.
[430] Decision on Request to Reopen, para 34.
[431] Decision on Request to Reopen, para 37.
[432] Prosecution Brief, para 3.98.

substantially outweighed by the need to ensure a fair trial. Although this second aspect of the question of admissibility was less clearly stated by the Trial Chamber, the Appeals Chamber, for the reasons discussed below, considers that it applied the correct principles in this respect.

284. The Prosecution contends that although the Trial Chamber was correct in requiring proof of the exercise of reasonable diligence, it should have found that it had exercised such diligence.[433] The Trial Chamber took the view, having considered the reasons put forward by the Prosecution, that the Prosecution had not discharged its burden of demonstrating that even with reasonable diligence the proposed evidence could not have been previously obtained and presented as part of its case in chief. It implicitly expressed its opinion that the Prosecution had not pursued the relevant evidence vigorously until after the close of the Defence case.[434] The Prosecution submits that this finding was "factually incorrect" and represented "a misapprehension of the facts in relation to the efforts of the Prosecution to obtain this evidence", but does not more than reiterate the description of the efforts to obtain the evidence which it had already provided to the Trial Chamber.[435] It does not identify how, in its view, the Trial Chamber's conclusion on the facts were so unreasonable that no reasonable Trial Chamber could have reached it. It is not suggested that the Trial Chamber did not consider the Prosecution's explanation. No such suggestion could be made in light of the obvious demonstrations both in the hearing of the oral submissions on the issue[436] and the Decision on the Request to Reopen[437] that the Trial Chamber did consider the explanations the Prosecution was putting to it. In the Appeals Chamber's view, even making considerable allowances to the Prosecution in relation to the "complexities involved in obtaining the evidence",[438] it is apparent that there were failures to pursue diligently the investigations for which no adequate attempt to provide an explanation was made.

285. Two examples demonstrate this problem. A number of the documents which were sought to be admitted had been seized in June 1998 from the office and home of Jasminka Džumhur, a former official of the State Commission for Exchange in Konjic and the Army of Bosnia and Herzegovina 4th Corps Military Investigative Commission.[439] The material provided by the Prosecution in its Request to Reopen to explain its prior effort to obtain documents and information from Ms Džumhur includes the statement that:

---

[433] Prosecution Brief, paras 3.110-3.113.
[434] Decision on Request to Reopen, para 29.
[435] Prosecution Brief, para 3.111.
[436] Trial Transcript, 24 July 1998, pp 14946-14949; 14968-14971.
[437] Decision on Request to Reopen, para 28.
[438] Prosecution Brief, para 3.109.
[439] Request to Reopen, para 28.

> Between late 1996 and early 1997, the Prosecution contacted Jasminka Džumhur three times. She consistently refused to provide a statement, but on one occasion, *briefly showed an investigator an untranslated document concerning the transfer of duties in Celebici prison in November 1996*, signed by Zdravko Mucic and Zejnil Delalic. *She said she had other documents, but none of the documents were provided to the Prosecution.*[440]

With this knowledge, obtained in November 1996, that Ms Džumhur held documents which they considered would be relevant to their case, the next step apparently taken by the Prosecution was four to five months later in mid-April 1997, when it made a formal request for assistance to the Government of Bosnia and Herzegovina.[441] The Prosecution received a response on 23 July 1997, following a reminder in June 1997. On the material provided by the Prosecution, it was almost five months later that it took the next step of issuing a second request to the Government of Bosnia and Herzegovina, which received a relatively rapid response in early January, by providing certain documents.[442] Given that the trial had opened in March 1997, it was open to the Trial Chamber to regard the lapse of these periods of time between the taking of active steps to pursue the documents during after the trial had actually commenced as an indication that reasonable diligence was not being exercised.

286. Secondly, in a case such as the present where the evidence is sought to be presented not only after the close of the case of the Prosecution but long after the close of the case of the relevant accused, it was necessary for the Prosecution to establish that the evidence could not have been obtained, even if after the close of its case, at an earlier stage in the trial. The application to have the new evidence admitted was made many months after the Prosecution gained actual knowledge of the location at which the relevant documents were likely to be held. The information provided by the Prosecution, in its "Alternative Request to Reopen the Prosecution's Case", indicated that the Prosecution gained possession of certain documents from the State Commission for the Search for the Missing on 27 March 1998, which indicated that the relevant documents were in the possession of Jasminka Džumhur. It was not until 5 May 1998 that the Prosecution took any further step in trying to obtain the documents, when it "informed the authorities that various requests concerning the contacting of officials and former officials of Konjic Municipality, including Jasminka Džumhur remained outstanding". An application for a search warrant was made to a Judge of the Tribunal on 10 June 1998, after Delalic's defence case had closed. Even making allowances for the complexities of such investigations, allowing a period of over five weeks to elapse between becoming aware of the location of the documents and taking any further active step to obtain them, in light of the

[440] Request to Reopen, para 27.
[441] Request to Reopen, para 28
[442] Request to Reopen, para 29-31.

advanced state of the defence case, cannot be considered to be the exercise of reasonable diligence. If the Prosecution was in fact taking steps to obtain the information at that time, it did not disclose them to the Trial Chamber and cannot now complain at the assessment that it did not exercise "reasonable diligence" in obtaining and presenting the evidence earlier. Given that the burden of proving that reasonable diligence was exercised in obtaining the evidence lies on the Prosecution, it was open to the Trial Chamber to decide on the information provided to it by the Prosecution that it has not discharged that burden.

287. The Prosecution further submits that the Trial Chamber erred in the exercise of its discretion in certain of the matters it took into account. As the Trial Chamber's finding that reasonable diligence had not been exercised was a sufficient basis on which to dispose of the application, it is not strictly necessary to determine this issue, but as the Trial Chamber expressed its views on this aspect of the application, the Appeals Chamber will consider it here. The Prosecution argues that relevant and probative evidence is only excluded when its admission is substantially outweighed by the need to ensure a fair trial, and cites the provisions of certain national systems in support of this. In relation to these provisions which the Prosecution has selectively drawn from only three national jurisdictions, it can be observed that even if they were to be accepted as a guide to the principles applicable to this issue in the Tribunal, two of them simply confer a discretion on the Trial Chamber *exceptionally* to admit new evidence. The provision cited from the Costa Rican Code of Criminal Procedure states that:

> *Exceptionally*, the court *may* order [...] that new evidence be introduced if, during the trial proceedings new facts or circumstances have arisen that *need to be established*.[443]

The provision relied on from the German Code provides for the admission of new evidence "if this is absolutely necessary".[444]

288. The Trial Chamber stated the principle as being that:

> While it is axiomatic that all evidence must fulfil the requirements of admissibility, for the Trial Chamber to grant the Prosecution permission to reopen its case, the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused. Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands

[443] Code of Criminal Procedure, Costa Rica, Article 355, unofficial Prosecution translation, Prosecution Brief, para 3.88.
[444] Code of Criminal Procedure (*Strafprozeßordnung*) Article 244(2), unofficial Prosecution translation, Prosecution Brief, para 3.88.

> that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.[445]

The Prosecution argues that the statement of the Trial Chamber that "the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused" incorrectly states the applicable principle, which is that stated in Rule 89(D), namely that the need to ensure a fair trial substantially outweighs the probative value of the evidence.[446] The reference by the Trial Chamber to the potential "prejudice caused to the accused" was not, in the view of the Appeals Chamber, the appropriate one in the context. However it is apparent from a reading of the rest of the Decision on Request to Reopen that the Trial Chamber, in referring to prejudice to the accused was turning its mind to matters which may affect the fairness of the accused's trial. This is apparent both from the reference, in the passage cited above, to the need to avoid "injustice to the accused" and the concluding statement in the decision:

> In our view, the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application.[447]

289. The Prosecution also argues that the Trial Chamber erred in its assessment of the probative value of the evidence. It contends that the Trial Chamber erred in finding that the evidence was inferential and equivocal.[448] The Prosecution relies on a statement by the Trial Chamber that the documents "cannot be probative".[449] Although this was perhaps unfortunate terminology, it is apparent from the Trial Chamber's decision that after considering the evidence it was of the view not that it could not be probative but that the documents "contain circumstantial evidence of doubtful validity".[450] This was an assessment not that the documents were incapable, as a matter of law, of having probative value, but that, having regard to their contents which did not disclose direct evidence of the matters in dispute but, at best, gave rise to "mere inferences",[451] the documents had a low probative value. This assessment, and more specifically the exercise of balancing the particular degree of probative value disclosed by the documents against the unfairness which would result if the evidence were admitted, is a matter for the Trial Chamber which will not be interfered with on appeal in the absence of convincing demonstration of error. No such demonstration has been made.

---

[445] Decision on Request to Reopen, para 27.
[446] Prosecution Brief, para 3.107.
[447] Decision on Request to Reopen, para 37.
[448] Prosecution Brief, para 3.120.
[449] Decision on Request to Reopen, para 32, referred to in Prosecution Brief at para 3.115, 3.121.
[450] Decision on Request to Reopen, para 32.
[451] *Ibid*, para 32.

290. The Prosecution also specifically challenged the Trial Chamber's conclusion that the trial had reached such a stage that the evidence should not be admitted.[452] The stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence. This consideration extends not only to Delalic as the accused against whom the evidence was sought to be admitted, but also the three co-accused whose trial would be equally delayed for reasons unrelated to themselves. The Appeals Chamber does not understand the Trial Chamber to have taken the stage of the trial into account in any sense other than its impact on the fairness of the trial of the accused, and, in the circumstances, the Appeals Chamber regards the Trial Chamber as having been fully justified in taking the very late stage of the trial into account. The Prosecution sought to have this evidence admitted not only after the close of its own case, but well after the close of the defence case of Delalic and only very shortly before the close of the case of the last accused. The Prosecution contends that "none of the accused objected to the potential presentation of the evidence of Mr Chambers."[453] This assertion is clearly incorrect. At the hearing of oral submissions on whether the evidence could be admitted as rebuttal or fresh evidence, counsel for Delalic stated:

> His Honour Karibi-Whyte has said what I was thinking and that is that we're in the second year of this trial, and, perhaps, the third or fourth year of investigations concerning these matters. And the Prosecution, despite what they say, despite what reasons they may offer, I think is a matter of law. *It's unfair at this point to produce documents in June, 1998.*[454]

The defence for Delalic also expressed its opposition to the presentation of the fresh evidence in its written response to the request to reopen.[455]

291. The Prosecution also argued that the Trial Chamber was wrong in its finding that the admission of the evidence would cause three months' delay:

> The Prosecutor calculated that the three remaining proposed witnesses would take, on direct examination, less than four hours. It is respectfully submitted that the Trial Chamber's estimation that this would likely postpone the trial for three months is not borne out, given that there were only three witnesses and approximately 22 documents, some only supporting documents for the search warrant.[456]

---

[452] Prosecution Brief, para 3.101.
[453] Prosecution Brief, para 3.126
[454] Trial Transcript, p 14971 (emphasis added).
[455] Response of the Defendant Delalic Opposing the Prosecution's Alternative Request to Open the Prosecution's Case, 31 July 1998, pp 1; 10, 11. At p 10 the response states: "the Trial Chamber should consider whether it is in the interests of justice to permit the Prosecution to adduce the evidence at this late stage and whether to allow it would breach the Defendant's right to a fair trial as set out in Articles 20 and 21 of the Statute."
[456] Prosecution Brief, para 3.127.

This submission is disingenuous. The time which the Trial Chamber needed to take into account in determining the effect on the accused was not limited to the time which it may take to examine the three witnesses. The Trial Chamber found that, given the nature of the documents, it was likely that the testimony of further witnesses would be required to authenticate the relevant documents. It would also be necessary to allow for the defence to call appropriate witnesses in response.[457] Further, as noted by the Trial Chamber, the Prosecution had stated in its Request to Reopen, after acknowledging that the defence may need to call witnesses:

> In addition, the Prosecution would seek leave to call witnesses to rebut the testimony of those brought by the Defence.[458]

292. In light of these considerations, it was open to the Trial Chamber – which, having presided over the trial which had already taken over eighteen months, was well-placed to assess the time required taking into account practical considerations such as temporary witness unavailability – to conclude that the likely delay would be up to three months. In light of this finding, it is apparent that the Trial Chamber considered that the admission of the evidence would create a sufficiently adverse effect on the fairness of the trial of all of the accused, that it outweighed the limited probative value of the evidence. As a secondary matter, it is also apparent that the Trial Chamber was concerned to fulfil its obligation under Article 20 of the Statute to ensure the trial was expeditious.[459] In light of these considerations, the decision not to exercise its discretion to grant the application was open to the Trial Chamber.

293. For the above reasons, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber committed any error in the exercise of its discretion. This aspect of this ground of appeal relating to the exclusion of evidence by the Trial Chamber is therefore also dismissed, and with it this ground of appeal in its entirety.

3. Delić's Acquittal under Article 7(3)

294. The Prosecution's fifth ground of appeal alleges that the Trial Chamber "erred when it decided ... that Hazim Delić was not a 'superior' in the Čelebići Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute."[460] The Prosecution submits that the Trial Chamber applied the wrong legal test when it held that "the perpetrator of the underlying offence must be the *subordinate* of the person of higher rank" and that "a

[457] Decision on Request to Reopen, para 36.
[458] Request to Reopen, para 70.
[459] Decision on Request to Reopen, para 37.

subordinate unit of the superior or commander is a *sine qua non* for superior responsibility."[461] The Prosecution also submits, apparently in the alternative, that, even if the test formulated by the Trial Chamber for determining who is a superior for the purposes of Article 7(3) was correct, it misapplied the test in this case.[462] The Prosecution refers to the Trial Chamber's findings, including its finding that Deli} was the "deputy commander" of the camp,[463] to say that he should have been found to be a superior. Because, it is said, the Trial Chamber's findings also establish that he was aware of the offences of subordinates,[464] and that he failed to prevent or punish them, the Appeals Chamber should find Deli} guilty under Article 7(3) on counts 13, 14, 33, 34, 38, 39, 44, 45, 46 and 47.[465]

295. In support of this ground, the Prosecution reiterates its theory that command responsibility entails a superior-subordinate relationship in which the superior effectively controls the subordinate, in the sense that the superior possesses the material ability to prevent or punish the offences and that "[s]uch control can be manifest in powers of influence which permit the superior to intervene".[466] It also argues that the Trial Chamber erred in requiring Deli} to be part of the chain of command, as the correct test is whether he has sufficient control, influence, or authority to prevent or punish.[467] If, as the Trial Chamber found, *de facto* control is sufficient in this context, it should assess in each case whether an accused has *de facto* powers or control to prevent or punish.[468]

296. Deli} responds that among the elements required for finding a person liable under the doctrine of command responsibility are the requirement of "a hierarchy in which superiors are authorized to control their subordinates to a degree that the superior is responsible for the actions of his subordinates" and that the superior must be "vested with authority to control his subordinates."[469] In the military, the chain of command is a hierarchy of commanders, with deputy commanders being outside this chain of command.[470]

---

[460] Prosecution Brief, para 6.1.
[461] *Ibid*, para 6.7.
[462] *Ibid*, para 6.16.
[463] *Ibid*, para 6.12.
[464] *Ibid*, para 6.18.
[465] *Ibid*, para 6.23.
[466] Prosecution Brief, para 6.10; Prosecution Reply, para 6.2.
[467] Prosecution Reply, para 6.5.
[468] *Ibid*, para 6.11.
[469] *Deli}* Response, para 239.
[470] *Ibid*, para 247.

297. Turning to the Trial Chamber's findings on the question of Delic's liability under Article 7(3), it clearly found that Delic held the position of "deputy commander" of the ^elebi}i camp.[471] However, it also found that this was "not dispositive of Deli}'s status" as the real issue before the Trial Chamber was:

> [w]hether the accused had the power to issue orders to subordinates and to prevent or punish the criminal acts of his subordinates, thus placing him within the chain of command. In order to do so the Trial Chamber must look to the actual authority of Hazim Delic as evidenced by his acts in the Celebici prison camp.[472]

298. The Chamber proceeded to consider evidence of the degree of actual authority wielded by Deli} in the camp, and concluded that:

> [...] this evidence is indicative of *a degree of influence* Hazim Deli} had in the ^elebi}i prison-camp on some occasions, in the criminal mistreatment of detainees. However, this influence could be attributable to the guards' fear of an intimidating and morally delinquent individual who was the instigator of and a participant in the mistreatment of detainees, and *is not, on the facts before the Trial Chamber, of itself indicative of the superior authority of. Deli} sufficient to attribute superior responsibility to him*.[473]

Having examined more evidence, it further found:

> This evidence indicates that Hazim Deli} was tasked with assisting Zradvko Muci} by organising and arranging for the daily activities in the ^elebi}i prison-camp. However, it cannot be said to indicate that he had actual command authority in the sense that he could issue orders and punish and prevent the criminal acts of subordinates.[474]

299. The Trial Chamber therefore concluded that, despite Delic's position of deputy commander of the camp, he did not exercise actual authority in the sense of having powers to prevent or punish and therefore was not a superior or commander of the perpetrators of the relevant offences in the sense required by Article 7(3).

300. The Appeals Chamber has already rejected, in its discussion of the Prosecution's second ground of appeal, the Prosecution argument that "substantial influence" is a sufficient measure of "control" for the imposition of liability under Article 7(3). It need only therefore confirm that the Trial Chamber's finding that Delic had powers of influence was not of itself a sufficient basis on which to find him a superior if it was not established beyond reasonable doubt by the evidence that he actually had the ability to exercise effective control over the relevant perpetrators.

---

[471] Trial Judgement, paras 739 and 1268.
[472] Trial Judgement, para 800.
[473] *Ibid*, para 806.
[474] *Ibid*, para 809 (emphasis added).

301. The remaining issue as to the applicable law raised by the Prosecution in relation to this ground which has not previously been considered is its contention that the Trial Chamber erred because it required Delić to be part of the chain of command and, more generally, it required the perpetrators of the underlying offences to be his "subordinates" before liability under Article 7(3) could be imposed.

302. It is beyond question that the Trial Chamber considered Article 7(3) to impose a requirement that there be a superior with a corresponding subordinate.[475] The Prosecution itself submits that one of the three requirements under Article 7(3) is that of a superior-subordinate relationship. There is therefore a certain difficulty in comprehending the Prosecution submission that the Trial Chamber erred in law in requiring the perpetrator of the underlying offence to be a subordinate of the person of higher rank.[476] The Trial Chamber clearly did understand the relationship of subordination to encompass indirect and informal relationships, as is apparent from its acceptance of the concepts of civilian superiors and *de* facto authority, to which the Appeals Chamber has referred in its discussion of the issue in relation to the Prosecution's second ground of appeal.

303. The Appeals Chamber understands the necessity to prove that the perpetrator was the "subordinate" of the accused, not to import a requirement of *direct* or *formal* subordination but to mean that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise "effective control" over the other at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.[477]

---

[475] Trial Judgement, paras 646-647.
[476] Prosecution Brief, para 6.7.
[477] In any event, concepts of accessory criminal liability such as aiding and abetting will potentially apply to persons of moral or personal authority who, by failing to act in such scenarios, have the effect in the

304. The Appeals Chamber acknowledges that the Trial Chamber's references to the absence of evidence that Delic "lay within" or was "part of" the chain of command[478] may, if taken in isolation, be open to the interpretation that the Trial Chamber believed Article 7(3) to require the accused to have a formal position in a formal hierarchy which directly links him to a subordinate who also holds a formal position within that hierarchy. Given that it has been accepted that the law relating to command responsibility recognises not only civilian superiors, who may not be in any such formal chain of command, and *de facto* authority, for which no formal appointment is required, the law does not allow for such an interpretation. However, when read in the context of the rest of the Trial Chamber's Judgement, the Appeals Chamber is satisfied that the Trial Chamber was *not* in fact imposing the requirement of such a formalised position in a formal chain of command, as opposed to requiring that there be proof that Delic was a superior in the sense of having the material ability to prevent or punish the acts of persons subordinate to him. This is apparent from, for example, the Trial Chamber's references to the sufficiency of *indirect* control (where it amounts to effective control)[479] and its acceptance of *de facto* authority,[480] to which reference has already been made by the Appeals Chamber in the context of the Prosecution's second ground of appeal.

305. However, the Prosecution has also submitted that, "even on the Trial Chamber's test for the superior-subordinate relationship, Delic should have been convicted as the Trial Chamber misapplied this test to its own findings of fact".[481] The Prosecution, based on its understanding that the Trial Chamber required proof that Delic was exercising authority within a formal chain of command, contends that the facts found by the Trial Chamber establish this. As indicated above, the Appeals Chamber considers that the Trial Chamber essentially applied the correct test – whether Delic exercised effective control in having the material ability to prevent or punish crimes committed by subordinates – and did not require him to have a formalised position in a direct chain of command over the subordinates. However, the Appeals Chamber will consider the Trial Chamber findings which are relied on by the Prosecution to determine whether those findings must have compelled a conclusion that either standard was satisfied. As this aspect of the appeal involves an allegation that the Trial Chamber erred in its findings of fact, the Prosecution must establish that the conclusion reached by the Trial Chamber (that

---

circumstances of encouraging the commission of offences. *See Furundžija* Trial Judgement at para 209; *Aleksovski* Judgement, para 62.

[478] Trial Judgement, paras 796 and 810.

[479] Trial Judgement, paras 371 and 646.

[480] Trial Judgement, para 378.

[481] Prosecution Brief para 6.16; Prosecution Reply, para 6.13.

Delic did not exercise superior authority) was one which *no* reasonable tribunal of fact could have reached.[482] In order to succeed on its submission that the Appeals Chamber should substitute its own finding for that of the Trial Chamber – that is, that Delic did in fact exercise command responsibility and enter convictions accordingly – it is necessary for the Prosecution to establish that this finding is the *only reasonable* finding available on the evidence.[483] This standard was acknowledged by the Prosecution.[484]

306. The Prosecution first relies on the Trial Chamber's finding that Delic was deputy commander of the camp.[485] The Appeals Chamber accepts the Trial Chamber's view that this title or position is not dispositive of the issue and that it is necessary to look to whether there was evidence of *actual* authority or control exercised by Delic. For the same reason, the fact that the detainees regarded him as the deputy commander, and as a person with influence over the guards,[486] is not conclusive evidence of his *actual* authority.

307. The Prosecution identifies four other findings of the Trial Chamber which it says demonstrate such actual control.[487] The Appeals Chamber considers them in turn.

308. The Trial Chamber referred to testimony of four witnesses to the effect that the guards feared Delic and that he occasionally criticised them severely.[488] This evidence appeared to be accepted by the Trial Chamber, but it was interpreted by the Trial Chamber as showing a "degree of influence" which could be "attributable to the guards' fear of an intimidating and morally delinquent individual" rather than as unambiguous evidence of superior authority.[489] The Appeals Chamber considers that this interpretation of this piece of evidence was open to the Trial Chamber, who, it must be remembered, heard the witnesses and the totality of the evidence itself. There was certainly nothing submitted by the Prosecution which would demonstrate that this conclusion was so unreasonable that no reasonable tribunal of fact could have reached it.

309. The Prosecution also referred to evidence that Delic had ordered the beating of detainees on certain occasions.[490] As the Prosecution itself acknowledges, the Trial Chamber

---

[482] *See infra* paras 434-436.
[483] *Aleksovski* Appeal Judgement, para 74.
[484] Appeal Transcript, p 198.
[485] Prosecution Brief, paras 6.12-6.15.
[486] A matter also relied on by the Prosecution as evidence of authority: Prosecution Brief, para 6.11; Appeal Transcript, pp 193-194.
[487] Appeal Transcript at pp 193-194.
[488] Trial Judgement, para 803, referred to in Prosecution Brief at para 6.11(3) and Appeal Transcript at p 194.
[489] Trial Judgement, para 806.
[490] *Ibid*, paras 804 and 805.

did not find beyond reasonable doubt that Delic did in fact order guards to conduct the series of beatings which was the subject of the evidence referred to in paragraph 804 of the Trial Judgement. The Trial Chamber referred to the evidence of certain witnesses and concluded that the evidence "*suggests* that Mr Delic conducted a vindictive beating of the people from Bradina on one particular day and then told at least one other guard, Mr Landžo to continue this beating. However, it is *not proven* that the beatings that followed from that day or [*sic*] were 'ordered' by Mr Delic".[491] In relation to the second occasion referred to in paragraph 805 of the Judgement, the Trial Chamber only referred to the Prosecution allegation of Delic ordering a beating and stated:

> Witness F and Mirko Đordic testified to this incident and indicated that Delic "ordered" or was "commanding" the guards in this collective beating.

The Trial Chamber did not state whether it accepted this evidence, and it made *no* finding as to whether Delic actually ordered the beating or not. Despite the Prosecution's apparent suggestion that it is enough that "the Trial Chamber made no finding that this evidence was unreliable",[492] this is not a sufficient basis for the Appeals Chamber to take it as a finding by the Trial Chamber that the ordering of the beating was proved beyond reasonable doubt. The Appeals Chamber therefore cannot identify from the matters referred to by the Prosecution any unambiguous findings that it was proven beyond reasonable doubt that Delic ordered guards to mistreat detainees.

310. The Prosecution also refers to the finding that Delic "was tasked with assisting Zdravko Mucic by organising and arranging for the daily activities in the camp."[493] A finding as to such a responsibility for organising and arranging *activities* in the camp, while potentially demonstrating that Delic had some seniority within the camp, actually provides no information at all as to whether he had authority or effective control over the guards within the camp who were the perpetrators of the offences for which it is sought to make Delic responsible. The Appeals Chamber therefore agrees with the Trial Chamber that it was open to regard this evidence as inconclusive.

311. Finally, the Prosecution refers to evidence given by Delic's co-accused Landžo that he "carried out all of [Delic's] orders out of fear and also because I believed I had to carry [*sic*] execute them".[494] While the Trial Chamber certainly considered this evidence, it did not accept

---

[491] Emphasis added.
[492] Appeal Transcript, p 194.
[493] Trial Judgement, para 809.
[494] Appeal Transcript, p 194, referring to evidence cited at para 801 of Trial Judgement.

it, as it found that Landžo was not a credible witness and that his evidence could not be relied on unless supported by other evidence.[495] It did not identify any other evidence which it regarded as constituting such support.

312. There were therefore a number of problems with the relevance of the findings or the quality of the underlying evidence relied on by the Prosecution. The weakness of such evidence as the foundation of any finding *beyond reasonable doubt* that Delic exercised superior authority was recognised by the Trial Chamber, which concluded that all this evidence was "indicative of a degree of influence Hazim Deli} had in the ^elebi}i prison-camp on some occasions, in the criminal mistreatment of detainees", but that it "is not, on the facts before this Trial Chamber, of itself indicative of the superior authority of Deli} sufficient to attribute superior responsibility to him".[496] The Appeals Chamber does not see anything in this conclusion which suggests it is unreasonable, and certainly not that it is so unreasonable that no reasonable tribunal of fact could reach it.

313. Although this conclusion effectively disposes of this ground of appeal, it is necessary to make an observation in relation to one final issue. The Prosecution submitted that, should it be accepted that the Trial Chamber should have found that Delic did in fact exercise superior authority over the guards in the camp, it would then be possible to reverse his acquittals on the basis of the findings in the Trial Judgement. In particular, it submits that it is established that Delic knew or had reason to know on the following basis:

> It cannot seriously be disputed that Delic knew of the crimes being committed in the camp generally. The Trial Chamber said that "The crimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that *Mr Mucic* could not have known or heard about them." There is also no way that Delic could not have known about them, given that he was himself convicted for directly participating in them, and was involved in the operation of the camp on a daily basis.[497]

It must first be observed that, contrary to this submission, there was *no* finding that Delic directly participated in all of the crimes for which he is sought to be made responsible. Secondly, it cannot be accepted that a finding by the Trial Chamber that a co-accused who was commander of the camp must have known of the crimes committed in the camp can be taken, by some kind of imputation, as a finding beyond reasonable doubt that *Delic* knew or had reason to know of the crimes for which the Prosecution seeks to have convictions entered. The Trial Judgement contains no findings as to Delic's state of knowledge in relation to many of the

[495] Trial Judgement, para 802. This was acknowledged by the Prosecution: Appeal Transcript, p 194.
[496] *Ibid*, para 806.
[497] Prosecution Brief, para 6.18. (Emphasis added).

crimes for which the Prosecution seek a reversal of the acquittal. It is undisputed that command responsibility does not impose strict liability on a superior for the offences of subordinates. Thus, had the Appeals Chamber accepted that the only reasonable conclusion on the evidence was that Delic was a superior, the question of whether he knew or had reason to know of the relevant offences would have remained unresolved, and it would in theory have been necessary to remit the matter to a Trial Chamber for consideration.

314. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal.

V. UNLAWFUL CONFINEMENT OF CIVILIANS

A. Introduction

315. Count 48 of the Indictment charged Muci}, Deli} and Delali} with individual participation in, and superior responsibility for, the unlawful confinement of numerous civilians in the ^elebi}i camp. The offence of unlawful confinement of civilians is punishable under Article 2(g) of the Statute as a grave breach of the Geneva Conventions. Count 48 provided:

> Between May and October 1992, Zejnil DELALIC, Zdravko MUCIC, and Hazim DELIC participated in the unlawful confinement of numerous civilians at Celebici camp. Zejnil DELALIC, Zdravko MUCIC, and Hazim DELIC also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, Zejnil DELALIC, Zdravko MUCIC, and Hazim DELIC are responsible for:
>
> Count 48. A Grave Breach punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

316. The Trial Chamber found Muci} guilty of unlawful confinement of civilians as charged in count 48 under both Articles 7(1) and 7(3) of the Statute. It found Delali} and Deli} not guilty under this count. The Prosecution appeals against these acquittals. The Prosecution contends in its third ground of appeal that:

> The Trial Chamber erred when it decided in paragraphs 1124-1144 that Zejnil Delalic was not guilty of the unlawful confinement of civilians as charged in count 48 of the Indictment.[498]

The Prosecution's sixth ground of appeal is that:

> The Trial Chamber erred when it decided in paragraphs 1125-1144 that Hazim Delic was not guilty of the unlawful confinement of civilians as charged in count 48 of the Indictment.[499]

317. The Prosecution contends that the Trial Chamber applied the wrong legal principle to determine the responsibility of Delalic and Delic for the unlawful confinement of the civilians in the ^elebi}i camp. In the case of Delalic, the Prosecution contends that the Trial Chamber also failed to apply correctly the law relating to aiding and abetting.

318. Mucic appeals against his conviction. He contends in his twelfth ground of appeal that:

> The Trial Chamber erred in fact and law in finding that the detainees, or any of them, within the ^elebici camp were unlawfully detained [...][500]

---

[498] Prosecution Brief, p 68.
[499] Prosecution Brief, p 117.

Mucic also challenges the Trial Chamber's findings that he had the requisite *mens rea* for the offence and that any acts or omissions by him were sufficient to constitute the *actus reus* for the offence.[501]

319. These grounds of appeal, although dealing with different matters, touch on a number of issues which are common to each ground. It is convenient to discuss two of these common legal issues before turning to the specific issues raised discretely by each ground of appeal:

(i) the legal standard for determining what constitutes the *unlawful* confinement of civilians; and
(ii) whether the Trial Chamber was correct in its conclusion that some of the civilians in the Celebici camp were unlawfully detained.

(i) The unlawful confinement of civilians

320. The offence of unlawful confinement of a civilian, a grave breach of the Geneva Conventions which is recognised under Article 2(g) of the Statute of the Tribunal, is not further defined in the Statute. As found by the Trial Chamber, however, clear guidance can be found in the provisions of Geneva Convention IV. The Trial Chamber found that the confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV, which states:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
>
> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Thus the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of

---

[500] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucic Dated the 2nd July 1999, 26 July 1999, RP 1795. In the document Appellant Zdravko Mucic's Final Designation of his Grounds of Appeal, 31 May 2000, this ground of appeal was omitted but it was confirmed by counsel at the appeal hearing that this omission was unintentional and that the ground of appeal was being maintained. Appeal Transcript, p 459.

[501] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucic Dated the 2nd July 1999, 26 July 1999, RP 1795.

the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[502] That article provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

321. In its consideration of the law relating to the offence of unlawful confinement, the Trial Chamber also referred to Article 5 of Geneva Convention IV, which imposes certain restrictions on the protections which may be enjoyed by certain individuals under the Convention.[503] It provides, in relevant part:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> [...]
>
> In each case, such persons shall nevertheless be treated with humanity, and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.[504]

This provision reinforces the principle behind Article 42, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.

322. The Appeals Chamber agrees with the Trial Chamber that the exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42, and

---

[502] Trial Judgement, para 583.
[503] Trial Judgement, paras 566-567.
[504] Emphasis added.

where the provisions of Article 43 are complied with.[505] Thus the detention or confinement of civilians will be unlawful in the following two circumstances:

(i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *ie* they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and

(ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.

(ii) Was the confinement of the Celebici camp detainees unlawful?

323. As stated above, the Trial Chamber found that the persons detained in the Celebici camp were civilian protected persons for the purposes of Article 4 of Geneva Convention IV.[506] The Trial Chamber accepted evidence that indicated that a number of the civilians in the camp were in possession of weapons at the time of their capture, but refrained from making any finding as to whether the detaining power could legitimately have formed the view that the detention of this category of persons was necessary for the security of that power.[507] However, the Trial Chamber also found that the confinement of a significant number of civilians in the camp could not be justified by any means. Even taking into account the measure of discretion which should be afforded to the detaining power in assessing what may be detrimental to its own security, several of the detained civilians could not reasonably have been considered to pose any sufficiently serious danger as to warrant their detention.[508] The Trial Chamber specifically accepted the evidence of a number of witnesses who had testified that they had not participated in any military activity or even been politically active, including a 42-year old mother of two children.[509] It concluded that at least this category of people were detained in the camp although there existed no serious and legitimate reason to conclude that they seriously prejudiced the security of the detaining party, which indicated that the detention was a

[505] This does not preclude the existence of other circumstances which may render confinement of a civilian unlawful, but that question does not now arise for determination by the Appeals Chamber.
[506] *See* above, Chapter II, Section B.
[507] Trial Judgement, para 1131.
[508] Trial Judgement, para 1132.
[509] Trial Judgement, para 1133.

collective measure aimed at a specific group of persons, based mainly on their ethnic background.[510]

324. Mucic argues in relation to his ground of appeal,[511] and Delic and Delalic argue in response to the Prosecution's ground of appeal, that the Prosecution failed to prove beyond reasonable doubt that the persons confined in the Celebici camp were unlawfully detained. They reiterate their submission that the detainees were not in fact protected persons, a submission which the Appeals Chamber is rejecting in relation to the ground of appeal based on that argument.[512]

325. The Prosecution responds that the findings of the Trial Chamber that the victims were unlawfully detained must stand unless the accused show that those findings were unreasonable in the sense that no reasonable person could have reached them.[513]

326. Delali} contends that since "the Trial Chamber, in determining that they [the civilians] were protected persons, found that they were not loyal to [...] Bosnia and Herzegovina, then they are virtually *ipso facto* security risks to the Government in that they are supporting the rebel forces".[514] He explains the detention of persons who may not have borne arms on the basis that "if not engaged in actual fighting, then they are certainly in a position to provide food, clothing, shelter and information to those who are".[515]

327. In the Appeals Chamber's view, there is no necessary inconsistency between the Trial Chamber's finding that the Bosnian Serbs were regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict[516] and the finding that some of them could not reasonably be regarded as presenting a threat to the detaining power's security. To hold the contrary would suggest that, whenever the armed forces of a State are engaged in armed conflict, the *entire* civilian population of that State is necessarily a threat to security and therefore may be detained. It is perfectly clear from the provisions of Geneva Convention IV referred to above that there is no such blanket power to detain the entire civilian population of a

---

[510] Trial Judgement, para 1134.
[511] Most of the submissions of Mucic on this issue are drawn from the closing submissions made on behalf of Delalic at trial. *See* Motion to Amend by Substitution the Appeal Brief of Zdravko Mucic Filed on 2 July 1999, 15 July 1999, para 4: "The Appellant adopts as a substantive appeal against conviction on Count 48 the arguments and reasoning contained in the Final Written Submissions of Zejnil Delalic dated the 28th of August 1998 and set out at paragraph R, pages 337-343 inclusive of that document[...]."
[512] *Supra*, para 106.
[513] Prosecution Response, pp 50-51.
[514] Delali} Response, p 146.
[515] Delali} Response, p 146.
[516] Trial Judgement, para 265.

party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the State. This is reflected in the ICRC Commentary to Article 42 of Geneva Convention IV:

> [...] the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence.[517]

Thus the Appeals Chamber agrees with the conclusion reached by the Trial Chamber that "the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living, and is not, therefore, a valid reason for interning him."[518]

328. It was contended by Delić that detention in the present case was justified under international law because "[t]he government is clearly entitled to some reasonable time to determine which of the detainees is a danger to the State's security".[519] Although the Appeals Chamber accepts this proposition, it does not share the view apparently taken by Delic as to what is a "reasonable time" for this purpose. The reasonableness of this period is *not* a matter solely to be assessed by the detaining power. The Appeals Chamber recalls that Article 43 of Geneva Convention IV provides that the decision to take measures of detention against civilians must be "reconsidered *as soon as possible* by an appropriate court or administrative board."[520] Read in this light, the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the *minimum* time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a "definite suspicion" of the nature referred to in Article 5 of Geneva Convention IV. Although the Trial Chamber made no express finding upon this issue, the Appeals Chamber is satisfied that the only reasonable finding upon the evidence is that the civilians detained in the Celebici camp had been detained for longer than such a minimum time.

329. The Trial Chamber found that a Military Investigative Commission for the crimes allegedly committed by the persons confined in the Celebici camp was established,[521] but that this Commission did not meet the requirements of Article 43 of Geneva Convention IV as it did not have the necessary power to decide finally on the release of prisoners whose detention could

---

[517] ICRC Commentary (GC IV) p 258.
[518] Trial Judgement, para 1134.
[519] Delić Response, para 262, p 218.
[520] Emphasis added.
[521] *See infra* para 382.

not be considered as justified for any serious reason.[522] There is therefore nothing in the activities of the Commission which could justify the continued detention of detainees in respect of whom there was no reason to categorise as a security risk. Indeed, it appears to have recommended the release of several of the Celebici camp detainees, albeit without result.[523] Delic submits that "the government had the right to continue the confinement until it determined that the State's security would not be harmed by release of the detainees."[524] This submission, which carries the implication that civilian detainees may be considered a risk to security which makes their detention absolutely necessary until proved otherwise, completely reverses the onus of justifying detention of civilians. It is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view.

330. The Trial Chamber, as the trier of facts, is in the best position to assess and weigh the evidence before it, and the Appeals Chamber gives a margin of deference to a Trial Chamber's evaluation of the evidence and findings of facts.[525] Nothing put to the Appeals Chamber indicates that there is anything unreasonable in the relevant sense in the Trial Chamber's findings as to the unlawful nature of the confinement of a number of civilians in the Celebici camp. As observed in the ICRC Commentary, the measure of confinement of civilians is an "exceptionally severe" measure, and it is for that reason that the threshold for its imposition is high – it must, on the express terms of Article 42, be "absolutely necessary".[526] It was open to the Trial Chamber to accept the evidence of a number of witnesses that they had not borne arms, nor been active in political or any other activity which would give rise to a legitimate concern that they posed a security risk. The Appeals Chamber is also not satisfied that the Trial Chamber erred in its conclusion that, even if it were to accept that the initial confinement of the individuals detained in the Celebici prison-camp was lawful, the continuing confinement of these civilians was in violation of international humanitarian law, as the detainees were not granted the procedural rights required by article 43 of Geneva Convention IV.

---

[522] Trial Judgement, paras 1138-1140.
[523] Trial Judgement, paras 1137-1138.
[524] Delic Response, para 262, p 218.
[525] *See Aleksovski* Appeal Judgement, para 63.
[526] ICRC Commentary (GCIV) p 261: "the Convention describes internment and placing in assigned residence as exceptionally severe measures which may be applied only if they are absolutely necessary for the security of the State."

B. The Prosecution appeals

331. As stated above, the Prosecution claims that the Trial Chamber erred in acquitting Delalic of both direct responsibility under Article 7(1) and superior responsibility under Article 7(3) for the offence of unlawful confinement.

332. The Prosecution requests the Appeals Chamber to reverse the Trial Chamber's acquittal of Delali} and Muci} on count 48, and substitute a verdict of guilty for this count. Delali} and Deli} respond that their acquittals on this count were correct in law and should not be disturbed.

1. Article 7(3) Liability

333. The Prosecution argues as part of the third ground of appeal that the Trial Chamber erred in finding that it was not proved that Delali} had superior authority in connection with the unlawful confinement of civilians, and relies for support on its arguments submitted in relation to its second ground of appeal, without more.[527] In relation to the sixth ground of appeal, the Prosecution contends that the Trial Chamber erred in finding that Deli} did not have superior responsibility for the unlawful confinement of civilians.[528]

334. The Trial Chamber found that:

> Zejnil Delali} and Hazim Deli} have respectively been found not to have exercised superior authority over the ^elebi}i prison-camp. For this reason, the Trial Chamber finds that these two accused cannot be held criminally liable as superiors, pursuant to Article 7(3) of the Statute, for the unlawful confinement of civilians in the ^elebi}i prison-camp.[529]

The resolution of this aspect of these grounds therefore rests upon the resolution of the Prosecution's second and fifth grounds of appeal, which challenged the Trial Chamber's finding that Delalic and Delic did not exercise superior authority under Article 7(3) of the Statute. The Appeals Chamber has dismissed those grounds of appeal,[530] with the result that the Trial Chamber's determination that Delalic and Delic were not superiors for the purposes of Article 7(3) of the Statute remains. The present grounds of appeal therefore cannot succeed insofar as they relate to Delalic and Delic's liability for the unlawful confinement of civilians pursuant to Article 7(3) of the Statute.

---

[527] Prosecution Brief, para 4.5. The Second Ground of Appeal is that the Trial Chamber erred in finding that Delali} did not exercise superior responsibility.
[528] *Ibid*, para 7.19.
[529] Trial Judgement, para 1144.
[530] *Supra*, Chapter IV, Section B.

2. Article 7(1) Liability

335. The Prosecution contends that the Trial Chamber erred in law in the principles it applied in considering when an accused can be held responsible under Article 7 (1) for unlawful confinement of civilians.[531] The Prosecution argues that, had the Trial Chamber applied the correct legal principles in regard to Article 7(1) to the facts it had found, Delali} and Deli} would have been liable under Article 7(1) for aiding and abetting in the commission of the unlawful confinement of civilians. It is submitted that the Trial Chamber's findings demonstrate that Delali} and Deli} knew that civilians were unlawfully confined in the camp and consciously participated in their continued detention, and that this is sufficient to found their personal liability for the offence.[532]

336. As discussed above, the Trial Chamber found that civilians are unlawfully confined where they are detained in contravention of Articles 42 and 43 of Geneva Convention IV. In relation to the nature of the individual participation in the unlawful confinement which will render an individual personally liable for the offence of unlawful confinement of civilians under Article 2(g) of the Statute, the Trial Chamber, having found that Delali} and Deli} did not exercise superior responsibility over the camp, held:

> *Furthermore, on the basis of these findings, the Trial Chamber must conclude that the Prosecution has failed to demonstrate that Zejnil Delalic and Hazim Delic were in a position to affect the continued detention of civilians in the Celebici prison-camp.* In these circumstances, Zejnil Delalic and Hazim Delic cannot be deemed to have participated in this offence. Accordingly, the Trial Chamber finds that Zejnil Delalic and Hazim Delic are not guilty of the unlawful confinement of civilians, as charged in count 48 of the Indictment.[533]

337. On the basis of the italicised portion of the above passage, the Prosecution interprets the Trial Chamber as having applied a test which requires proof of the exercise of superior authority under Article 7(3) of the Statute before an individual could be held responsible under Article 7(1) of the Statute for the offence of unlawful confinement.[534] More generally, the Prosecution submits that the Trial Chamber erred in finding that, as a matter of law, an accused cannot be criminally liable under Article 7(1) for the unlawful confinement of civilians unless that person was "in a position to affect the continued detention of civilians".[535] The Prosecution observes

[531] Prosecution Brief, para 7.7.
[532] Prosecution Brief, paras 7.13 and 7.16.
[533] Trial Judgement, para 1144, (emphasis added).
[534] Prosecution Brief, para 4.10.
[535] Prosecution Brief, para 4.11.

that individual criminal liability extends to any person who committed an offence in the terms of Article 7(1).[536]

338. In relation to the contention that the Trial Chamber found that an accused can be liable under Article 7(1) for the offence of unlawful confinement only if it is proved that he exercises superior authority under Article 7(3), there is some question as to whether the Trial Chamber in fact made such a legal finding. The Trial Chamber's statement that, "on the basis of" its findings that Delalic and Delic could not be held criminally liable under Article 7(3) of the Statute, it "must conclude" that there had been a failure to prove that they had been in a position to affect the continued detention of the civilians in the camp could be interpreted as suggesting that the Trial Chamber believed that, as a *legal* matter, there could be no liability for unlawful confinement under Article 7(1) without superior responsibility under Article 7(3) being established. Such a legal interpretation is clearly incorrect, as it entwines two types of liability, liability under Article 7(1) and liability under Article 7(3). As emphasised by the Secretary-General's Report,[537] the two liabilities are different in nature. Liability under Article 7(1) applies to direct perpetrators of crimes and to accomplices. Article 7(3) applies to persons exercising command or superior responsibility. As has already been acknowledged by the Appeals Chamber in another context, these principles are quite separate and neither is dependent in law upon the other. In the *Aleksovski* Appeal Judgement, the Appeals Chamber rejected a Trial Chamber statement, made in relation to the offence of outrages of personal dignity consisting of the use of detainees for forced labour and as human shields, that the accused "cannot be held responsible under Article 7(1) in circumstances where he does not have direct authority over the main perpetrators of the crimes".[538] There is no reason to believe that, in the context of the offence of unlawful confinement, there would be any special requirement that a position of superior authority be proved before liability under Article 7(1) could be recognised.

339. However, the Appeals Chamber is not satisfied that this is what the Trial Chamber in fact held. The reference to its findings on the issue of superior authority when concluding that, "[i]n these circumstances, Zejnil Delalic and Hazim Delic cannot be deemed to have participated in this offence" suggests that the Trial Chamber was referring not to its *legal* conclusion that the two accused were not superiors for the purposes of Article 7(3), but to the previous *factual findings* that it had made in that context, which were also relevant to the issue

[536] Prosecution Brief, paras 7.8-7.9.
[537] Secretary-General's Report, paras 56-58.
[538] *Aleksovski* Appeal Judgement, para 170.

of their individual responsibility for the offence of unlawful confinement. Whether the Trial Chamber was unreasonable in relying on those findings to conclude that Delalic and Delic should be acquitted of the offence under Article 7(1) is a separate issue which is discussed below.

340. The Prosecution also challenges the Trial Chamber's apparent conclusion that, to be responsible for this offence under Article 7(1), the perpetrator must be "in a position to affect the continued detention" of the relevant civilians. Responsibility may be attributed if the accused falls within the terms of Article 7(1) of the Statute, which provides that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

341. It is submitted that an accused can be liable under Article 7(1) for committing the crime of unlawful confinement of civilians even if the accused was not the person who could determine which victim would be detained, and whether particular victims would be released.[539] The Prosecution proposes that, in order to establish criminal responsibility for *committing* the offence of unlawful confinement of civilians it is sufficient to prove (i) that civilians were unlawfully confined, (ii) knowledge that the civilians were being unlawfully confined and (iii) participation in the confinement of those persons.[540] The Prosecution submits that, in relation to guards in a prison, the third matter "will be satisfied by showing that the duties of the guard were in themselves in execution or administration of the illegal system."[541]

342. The Appeals Chamber is of the view that to establish that an individual has *committed* the offence of unlawful confinement, something more must be proved than mere knowing "participation" in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber's view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has *committed* a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release

---

[539] Prosecution Brief, para 7.9.
[540] Prosecution Brief, para 7.13.
[541] Prosecution Brief, para 7.13

detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist. In the case of prison guards who are employed or conscripted to supervise detainees, and have no role in the determination of who is detained or released, the Prosecution submits that the presence alone of the camp guards was the "most immediate obstacle to each detainee's liberty"[542] and that the guard's presence in the camp in that capacity alone would therefore constitute commission by them of the crime of unlawful confinement. This, however, poses the question of what such a guard is expected to do under such circumstances. The implication from the Prosecution submissions is that such a guard must release the prisoners. The Appeals Chamber, however, does not accept that a guard's omission to take unauthorised steps to release prisoners will suffice to constitute the commission of the crime of unlawful confinement. The Appeals Chamber also finds it difficult to accept that such a guard must cease to supervise those detained in the camp to avoid such liability, particularly in light of the fact that among the detainees there may be persons who are lawfully confined because they genuinely do pose a threat to the security of the State.

343. It is not necessary for present purposes for the Appeals Chamber to attempt an exhaustive definition of the circumstances which will establish that the offence is *committed*, but it suffices to observe that such liability is reserved for persons responsible in a more direct or complete sense for the civilian's unlawful detention. Lesser degrees of directness of participation obviously remain relevant to liability as an accomplice or a participant in a joint criminal enterprise, which concepts are best understood by reference first to what will establish primary liability for an offence.

344. In relation to accomplice liability, the Prosecution contends that, "[i]n the case of the crime of unlawful confinement of civilians under Article 2(g) of the Statute, a person who, for instance, *instigates* or *aids and abets* may not ever be in a position to affect the continued detention of the civilians concerned."[543] The Prosecution also observes that many of the crimes within the Tribunal's jurisdiction may in practice be committed jointly by a number of persons if they have the requisite *mens rea* and that the crime of unlawful confinement is a clear example of this as "it was the various camp guards and administrators, acting jointly, who collectively ran the camp and kept the victims confined within it."[544]

---

[542] Prosecution Brief, para 7.12.
[543] Prosecution Brief, para 7.8, (emphasis in the original).
[544] Prosecution Brief, para 7.11.

345. Although it did not explicitly discuss as a discrete legal matter the exact principles by which individuals will be held individually criminally responsible for the unlawful confinement of civilians, the Trial Chamber did, earlier in its Judgement, discuss the general principles relating to criminal responsibility under Article 7(1) of the Statute. It cited the following statement from the Trial Chamber in the *Tadi}* Judgement which the *Celebici* Trial Chamber considered to state accurately "the scope of individual criminal responsibility under Article 7(1)":[545]

> [...] the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

This statement, from its context in the *Tadic* Trial Judgement, although broadly expressed, appears to have been intended to refer to liability for aiding and abetting or all forms of accomplice liability rather than all forms of individual criminal responsibility under Article 7(1) including primary or direct responsibility.[546] In the case of primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must "directly and substantially affect the commission of the offence" is an unnecessary one. The Trial Chamber, in referring to the ability to "affect the continued detention" of the civilians, appears to have been providing a criterion to enable the identification of the person who could have a "direct and substantial effect" on the commission of unlawful confinement of civilians in the sense of the *Tadic* statement.

346. It may have been clearer had the Trial Chamber set out expressly its understanding of the relevant principles in relation to the establishment of primary or direct responsibility for the offence of unlawful confinement of civilians, in relation to which the general principles of accomplice liability set out earlier in its Judgement would also be applied. However, the Appeals Chamber does not consider that these submissions establish that the Trial Chamber erred in stating that an accused must be in a position to affect the continued detention of the civilians if this is understood, as the Appeals Chamber does, to mean that they must have participated in some significant way in the continued detention of the civilians, whether to a

---

[545] Trial Judgement para 329, citing *Tadi}* Trial Judgement, para 692.

[546] *See Tadic* Trial Judgement, at *e.g.*, para 688, where the opposition is drawn between culpability where the accused "intentionally commits" a crime or where he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime". (The underlining is in the original). The reference to "directly and substantially" is made only in relation to the latter category. *See* also the following paras 689-691 which appear to be concerned with aiding and abetting only.

degree which would establish primary responsibility, or to a degree necessary to establish liability as an accomplice or pursuant to a common plan. The particular submissions the Prosecution makes in support of its contention that Delalic and Delic should have been convicted under Article 7(1) for the offence are now considered.

(a) Delali}

347. The Prosecution alleges that Delalic should have been found guilty for aiding and abetting the offence of unlawful confinement. Delali} argues that the Indictment did not charge him with aiding and abetting in Count 48 and that, even if it were to be accepted that he was so charged, the evidence did not show beyond a reasonable doubt that he was guilty as an aider and abettor.[547]

348. The Prosecution responds that Delali} was charged with aiding and abetting in Count 48 of the Indictment by the use of the word "participation".[548] Delali} contends however that "when the Prosecutor intends to charge aiding and abetting it is done so specifically",[549] and he advances some examples of other indictments before the Tribunal that charge aiding and abetting for the offence of unlawful confinement.[550] Delali} refers to Articles 18(4) and 21(4)(a) of the Statute which require that the indictment contain "a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute" and that an accused must be informed of the nature and cause of the charge against him.[551]

349. The Appeals Chamber notes that the alleged offence of unlawful confinement is charged in count 48 of the Indictment[552] as follows:

> Between May and October 1992, Zejnil DELALIC, Zdravko MUCIC, and Hazim DELIC *participated in* the unlawful confinement of numerous civilians at Celebici camp. Zejnil DELALIC, Zrdavko MUCIC, and Hazim DELIC also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, Zejnil DELALIC, Zdravko MUCIC, and Hazim DELIC are responsible for:
>
> Count 48. A Grave Breach punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

---

[547] Delalic Response, p 149.
[548] Prosecution Reply paras 4.17-4.19.
[549] Delalic Response, p 148.
[550] *See* Counts 3 and 4 and paragraph 35 of the indictment filed against Radovan Karadzi} and Ratko Mladi} in July 1995 and *see* Count 22 and paragraph 44 of the amended indictment filed against Dario Kordi} in Sept 1998. Delali} Response, p 148.
[551] Delali} Response, pp 147-149.
[552] Indictment, para 36, (emphasis added).

Article 7 (1) does not contain the wording used in the Indictment of "participating", but the Prosecution contends that it is evident that a person can participate in a crime through any of the types of conduct referred to in that provision.

350. The Appeals Chamber notes that the language used in Count 48 could (and should) have been expressed with greater precision. Although the accused are clearly charged under both Article 7(1) and Article 7(3) of the Statute, no particular head of Article 7(1) is indicated. The Appeals Chamber has already referred to the difficulties which arise from the failure of the Prosecution to identify exactly the type of responsibility alleged against an accused, and has recommended that the Prosecution "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged".[553] However, it was also accepted in that case that the general reference to the terms of Article 7(1) was, in that context, an adequate basis on which to find that the accused had been charged with aiding and abetting.

351. In relation to use of the word "participate" to describe forms of responsibility, the Appeals Chamber notes that the Report of the Secretary-General mentions the word "participate" in the context of individual criminal responsibility:

> The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.[554]

It is clear that Article 7 (1) of the Statute encompasses various modes of participation, some more direct than other. The word "participation" here is a broad enough term to encompass all forms of responsibility which are included within Article 7(1) of the Statute. Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the "nature and cause of the charge against him".[555] There has been no suggestion that a complaint was made prior to the trial that Delalic did not know the case that he had to meet. It is too late to make the complaint now on appeal that the Indictment was inadequate to advise the accused that all such forms of responsibility were alleged. The use of the word "participate" is poor drafting, but it should have been understood here as including all forms of participation referred to in Article 7(1) given that superior responsibility was expressed to be an additional form of responsibility.

---

[553] *Aleksovski* Appeal Judgement para 171, fn 319. *See* also the *Furundžija* Judgement, para 189.
[554] Secretary-General's Report, para 54.
[555] Article 21(4)(a) of the Statute of the Tribunal.

352. The Trial Chamber therefore correctly interpreted Count 48 of the Indictment and the supporting paragraph as charging the three accused generally with participation in the unlawful confinement of civilians pursuant to Article 7(1) of the Statute, as well as with responsibility as superiors pursuant to Article 7(3) of the Statute.[556] The Trial Chamber had earlier defined aiding and abetting as:

> [including] all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence.[557]

The Prosecution does not challenge that definition. Subject to the observation that the acts of assistance, encouragement or support must have a substantial effect on the perpetration of the crime, the Appeals Chamber also accepts the statement as accurate.[558]

353. As noted above, in its conclusions in relation to the liability of Delalic and Delic under Article 7(1) for the offence of unlawful confinement, the Trial Chamber referred to its earlier findings made in the context of its consideration of their liability as superiors pursuant to Article 7(3) of the Statute. Although those findings were being made for the primary purpose of determining whether superior responsibility was being exercised, it is clear that they involved a broad consideration by the Trial Chamber of the nature of the involvement of the two accused in the affairs of the Celebici camp. The Prosecution indeed contends that the findings made by the Trial Chamber provided an adequate basis on which to determine Delalic's liability for aiding and abetting.

354. The Trial Chamber considered the evidence in relation to the placing of civilians in detention at the camp, but it made no finding that Delali} participated in their arrest or in placing them in detention in the camp.[559] The Prosecution advances no argument that the Trial Chamber erred in this respect.

355. However, the Prosecution argues that Delali} participated in the continued detention of civilians as an aider and abettor. The Trial Chamber found that there was "no evidence that the Celebici prison-camp came under Delalic's authority by virtue of his appointment as co-ordinator".[560] The Trial Chamber found that the primary responsibility of Delalic in his position

---

[556] Trial Judgement, para 1125.
[557] Trial Judgement, para 327.
[558] *Tadi}* Appeal Judgement, para 229.
[559] Trial Judgement, para 1131.
[560] Trial Judgement, para 669.

as co-ordinator was to provide logistical support for the various formations of the armed forces; that these consisted of, *inter alia*, supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up of electricity grids.[561] These findings as to the scope of Delalic's role obviously supported its later conclusion that he was not in a position to affect the continued detention of the civilians at the Celebici camp.

356. The Prosecution, however, refers to two specific matters which it says constituted aiding and abetting by Delalic: his role in "publicly justifying and defending the purpose and legality of the camp",[562] and his "participation in the classification and releasing of prisoners".[563]

357. The Prosecution contends that the evidence before the Trial Chamber showed that Delali} was involved in the release of Doctor Gruba~ and Witness P in July 1992,[564] and that he signed orders on 24 and 28 August 1992[565] for the classification of detainees and their release. However, the Trial Chamber explicitly found that:

> As co-ordinator, Zejnil Delalic had no authority to release prisoners.[566]

The Trial Chamber found that the orders referred to by the Prosecution were not signed in Delalic's capacity as "co-ordinator", as all documents were signed "for" the Head of the Investigating Body of the War Presidency.[567] He had no independent authority to do so.[568]

---

[561] Trial Judgement, para 664.
[562] Prosecution Brief, para 4.18.
[563] Prosecution Brief, para 4.21.
[564] Trial Judgement, para 684.
[565] Trial Judgement, para 692. *See* Prosecution Exhibits 99-7/10 and 99-7/11.
[566] Trial Judgement, para 684.
[567] Trial Judgement, para 684.
[568] Trial Judgement, para 685. It should be noted that, in the week prior to the hearing of the Appeal, the Prosecution filed a motion for the adjournment of the hearing of the appeal on the basis that it had recently received new documents from the archives of the Croatian government which related to the Celebici camp: Prosecution Motion for Adjournment of Oral Argument of Argument of Appeal or Alternatively for Adjournment of Oral Argument of Certain Grounds of Appeal, 31 May 2000. The Prosecution believed at that stage the there were "certain documents which appear to relate to the responsibilities of Zejnil Delalic as a commander in the region and his role in relation to the Celebici prison camp during the relevant time period" and sought time to have the documents translated and properly assessed. A brief description of certain of these documents was annexed to the motion and indicated that there may be documents which related in some way to Delalic's relationship with the Celebici camp. This motion for adjournment was refused on the basis that the material referred to in the motion did not adequately indicate that they were relevant to the allegations of errors of law in the relevant grounds of appeal, but the Appeals Chamber reserved the question of the use to which the material in the documents could be put to the hearing of the appeal. The Prosecution then made an oral motion at the hearing of the appeal that the appeal proceedings not be closed for a period of time after the hearing to enable the filing of written submissions in relation to the documents (*see* Appeal Transcript pp 79-82). This motion was supported by certain translated documents (Confidential Exhibits for Prosecution Oral Motion to File Supplementary Materials after the Conclusion of the Hearing of the Appeal, 5 June 2000), including a document which was described as being relevant to the capacity in which Delalic signed the orders for release referred to in the above text (Appeal Transcript pp 87-88). The Prosecution was given until the final day of the hearing of the appeal to determine whether it wished to bring an application for the use of the documents in

358. The Appeals Chamber considers that this conclusion has not been shown to be so unreasonable that no reasonable trier of fact could have reached it. The Trial Chamber interpreted those orders explicitly as not constituting evidence that he exercised superior responsibility in relation to the camp.[569] The Trial Chamber appears to have interpreted the orders as being, although indicative of some degree of involvement in the continuing detention or release of detainees, inadequate to establish a degree of participation that would be sufficient to constitute a substantial effect on the continuing detention which would be adequate for the purposes of aiding and abetting. The Appeals Chamber considers that this interpretation of the significance of the orders was open to the Trial Chamber.

359. The Prosecution's submission that the Trial Chamber erred in failing to find that Delali} aided and abetted the commission of the offence of unlawful confinement by publicly justifying and defending the purpose of the camp must be rejected for similar reasons.[570] The Trial Chamber referred to the evidence that Delalic had contacts with the ICRC, and that he had been interviewed by journalists in relation to the camp.[571] Even if it could be accepted that this reference alone constituted a finding by the Trial Chamber that these contacts and interviews occurred, it was open to the Trial Chamber to find that any supportive effect that this had in relation to the detention of civilians in the camp was inadequate to be characterised as having a substantial effect on the commission of the crime.

360. The Prosecution has not referred to any other evidence before the Trial Chamber which would indicate that a finding of guilt for Delalic on this count was the *only reasonable* conclusion to be drawn, a matter which must be established before an acquittal would be overturned on appeal.[572] The Prosecution's third ground of appeal must therefore be dismissed in its entirety.

(b) Deli}

361. The Prosecution submits that Delic should have been found guilty under Article 7(1), although its written or oral submissions again emphasise the concept of "participation" and do

---

some capacity but ultimately advised the Appeals Chamber that it would not do so (Appeal Transcript p 636). The Prosecution therefore closed its case without seeking to rely on those documents.

[569] Trial Judgement, para 685.

[570] Prosecution Brief, para 4.19. *See* also Trial Judgement, para 700.

[571] Trial Judgement, para 700.

[572] *Aleksovski* Appeal Judgement, para 172.

not clearly identify exactly what mode of participation it contends the Trial Chamber should have found had been established.

362. The Trial Chamber found no evidence which demonstrated beyond reasonable doubt that Deli} had any role in the creation of the camp, in the arrest and placing in detention of the civilians. Deli} argues that it has not been established that he exercised any role in the decision to detain or release prisoners.[573]

363. Although Deli} belonged to the military police of the joint command of the TO and HVO,[574] which the Trial Chamber found had been involved in the creation of the camp, there was no finding by the Trial Chamber that Deli} in his position had authority to detain or release civilians or even that as a practical matter he could affect who should be detained or released. The Prosecution does not refer to any evidence which would have established such a finding beyond reasonable doubt. The Trial Chamber did find that the evidence established that Delic was "tasked with assisting Zdravko Mucic by organising and arranging for the daily activities in the Celebici prison-camp."[575]

364. Although the Prosecution appears to contend that the evidence established Delic's primary responsibility for commission of the offence of unlawful confinement of civilians, it does not refer to any evidence which establishes more than that he was aware of the unlawfulness of the detention of at least some of the detainees, and that he, as a guard and deputy commander of the camp, thereby participated in the detention of the civilians held there.[576] The Prosecution makes the general submission that:

> Clearly, any detainee who had attempted to leave the Celebici camp would have been physically prevented from so doing, not by the person in command of the camp, but by one of the camp guards. The most immediate cause of each detainee's confinement, and the most immediate obstacle to each detainee's liberty, was thus the camp guards. Provided that he or she had the requisite *mens rea*, each camp guard who participated in the confinement of civilians in the camp, and prevented them from leaving it, will thus be criminally liable on the basis of Article 7(1) for the unlawful confinement of civilians, whether or not the particular guard, under the regime in force in the camp, had any responsibility for determining who would be detained and who would be released.[577]

Insofar as this may suggest that any prison guard who is aware that there are detainees within the camp who were detained without reasonable grounds to suspect that they were a security risk is, without more, responsible for the crime of unlawful confinement, the Appeals Chamber

[573] Deli} Response, para 267.
[574] *Ibid*, para 797.
[575] Trial Judgement, para 809.
[576] Prosecution Brief, para 7.16.
[577] Prosecution Brief, para 7.12.

does not accept this submission. As already indicated above, the Appeals Chamber has concluded that a greater degree of involvement in the confinement of an individual is required to establish primary responsibility, and that, even in relation to aiding and abetting, it must be established that the accused's assistance to the principal must have a substantial effect on the commission of the crime. What will satisfy these requirements will depend on the circumstances of the particular case, but the Appeals Chamber would not accept that the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians. The Prosecution has not referred to particular evidence which would place Delic's involvement in the confinement of the civilians at the Celebici camp at a level higher than the holding of the offices of guard and deputy-commander.

365. It appears from certain other submissions of the Prosecution that, although is does not put its case in this way, it in fact considers that the doctrine of common criminal purpose or joint criminal enterprise is the most apposite form of responsibility to apply to Delic.[578] However it does not identify any findings of the Trial Chamber on the evidence which would establish the necessary elements of criminal liability through participation in a joint criminal enterprise.

366. Although it may be accepted that the only reasonable finding on the evidence, particularly in relation to the nature of some of the detainees at the camp, including elderly persons,[579] must have been that Delic was aware that, in respect of at least some of the detainees, there existed no reasonable grounds to believe that they constituted a security risk, this is not the only matter which must be established in relation to an allegation of participation in a common criminal design. The existence of a common concerted plan, design or purpose between the various participants in the enterprise (including the accused) must also be proved.[580] It is also necessary to establish a specific *mens rea*, being a shared intent to further the planned crime, an intent to further the common concerted system of ill-treatment, or an intention to participate in and further the joint criminal enterprise, depending on the circumstances of the case.[581] The Prosecution has not pointed to any evidence before the Trial Chamber which would have made the conclusion that these elements had been proved beyond reasonable doubt the *only reasonable* conclusion on the evidence.

---

[578] Prosecution Brief, paras 7.11 and 7.13.
[579] *See infra* at para 385.
[580] *Tadic* Appeal Judgement, para 227.
[581] *Tadic* Appeal Judgement, para 228.

367. As to Delić's relationship to the work of the Military Investigative Commission in charge of granting procedural guarantees to detainees, the Trial Chamber concluded that the role of Delic was to assist Mucic by organising and arranging for detainees to be brought to interrogations.[582] The Trial Chamber made no finding that Delić had participated in the work of the Commission. It also made no finding that Delic himself had either responsibility for ensuring that the procedural review was conducted, or authority or power to release detainees, a power which should have been exercised when the appropriate reviews were not conducted.

368. The Appeals Chamber is satisfied that it was open to the Trial Chamber to assess the evidence before it as not proving beyond reasonable doubt that Delić's acts and omissions constituted any adequate form of "participation" in the offence of unlawful confinement for the purpose of ascribing criminal responsibility under Article 7(1).

369. The Appeals Chamber therefore finds that the Prosecution has not established that the Trial Chamber's conclusion that Delić was not guilty under Article 7 (1) for the offence of unlawful confinement was unreasonable.

C. Mucić's Appeal

370. Mucic, in support of this ground of appeal, adopted "as a substantive appeal against conviction on Count 48" the closing submissions made on behalf of Delalic at trial and made only a limited number of his own submissions on this ground.[583] The Prosecution submits that, as these "incorporated" arguments were filed before the Trial Chamber's Judgement was rendered, they should not be considered.

371. The task of the Appeals Chamber, as defined by Article 25 of the Statute, is to hear appeals from the decisions of Trial Chambers on the grounds of an error on a question of law invalidating the decision or of an error of fact which has occasioned a miscarriage of justice. An appellant must show how the Trial Chamber erred in law or in fact, and the Appeals Chamber expects their submissions to be directed to that end. The submissions "incorporated"

---

[582] Trial Judgement, para 807; the finding was made essentially on the evidence on Witness D (a member of the Commission) that the Commission would receive a list of detainees in the prison-camp from Mucic and that the Commission would write out a list of people to be "interviewed". Witness D testified that they would give the list of detainees to Mucic, and if he was not there to Delic, and that Delic (alone with Mucic) had access to Commission files.

[583] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucic Filed on 2 July 1999, 15 July 1999, para 4: "The Appellant adopts as a substantive appeal against conviction on Count 48 the arguments and reasoning contained in the Final Written Submissions of Zejnil Delalic dated the 28th of August 1998 and set out at paragraph R, pages 337-343 inclusive of that document [...]." These submissions will be referred to as the "Incorporated Submissions".

by Muci} provide no assistance on the aspects of his ground of appeal which allege an error of fact. However, to the extent that the submissions are relevant to the questions of law raised by Mucic's ground of appeal, the Appeals Chamber has considered them in addition to the submissions made by counsel for Mucic at the hearing of the appeal.

372. Muci} challenges his conviction for the offence of illegal detention or unlawful confinement first with the argument that the detainees of the camp were *lawfully* confined because of suspicion of inciting armed rebellion against the State of Bosnia and Herzegovina.[584] The Appeals Chamber has already considered the submission that the Trial Chamber erred in finding that at least some of the detainees were unlawfully confined, and has rejected it.[585]

373. Muci} then submits that it was not proved that he had the requisite *mens rea* because:

> Given that it is not remotely suggested that the Appellant has, or had, any expert or other knowledge of International Law, it would be a counsel of impossible perfection to conclude that in 1992 he could have known, or did know, that there was a possibility that the confinement of persons at Celebici could, or would be, construed as illegal under an interpretation of an admixture of the Geneva Conventions and Article 2(g) of the Statute of the Tribunal, a Statute not then in existence.[586]

374. The Prosecution notes that it is unclear whether Muci} contends that the knowledge of the law is an element of the crime or whether Muci} is raising a defence of error of law.[587] In either of those cases, the Prosecution argues that there is no general principle of criminal law that knowledge of the law is an element of the *mens rea* of a crime and that no defence of mistake of law is available under international humanitarian law. These submissions miss the real issue raised by Mucic's submission – that he could not have been expected to know that the detention of the Celebici detainees would become illegal at some future time. Mucic's submission has no merit because it is clear from the provisions cited above from Geneva Convention IV that the detention of those persons was illegal at the very time of their detention.

375. Mucic also argued that it was not his function as "prison administrator" to know whether the detention of the victims was unlawful.[588] At the hearing of the appeal, counsel for Mucic placed greater emphasis on the argument that Mucic did not in fact have the requisite *mens rea* for a conviction under Article 7(1) of the Statute, and that the Trial Chamber relied upon evidence which established only that he "had reason to know" as a basis for a positive finding that he did in fact have the requisite knowledge that the detainees were unlawfully

[584] *See* Incorporated Submissions at pp 339-342.
[585] *See* above, para 330.
[586] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucic Filed on 2 July 1999, p 2.
[587] Prosecution Response, paras 8.14-8.15.

detained.[589] The Prosecution argues that, because Muci} knew of the types of people detained in the camp and the circumstances of their arrest, he had the *mens rea* for the commission of the offence.[590]

376. The Trial Chamber found that Mucic, by virtue of his position of command, was the individual with primary responsibility for, and had the ability to affect, the continued detention of civilians in the camp.[591] Muci} submits in this regard that the determination of the legality of the detention is not a function or duty of prison administrators but rather of those who authorize arrests and the placing of arrestees into detention.[592] The Appeals Chamber accepts that it is not open simply to conclude that, because of a position of superior authority somewhere in relation to a prison camp, an accused is also *directly* responsible under Article 7(1) for the offence of unlawful confinement committed anywhere in that camp. The particular circumstances entailing liability under Article 7 (1) have to be specifically established before liability could be imposed. This depends on the particular organisation of duties within a camp, and it is a matter to be determined on the evidence.

377. The Trial Chamber found that some detainees were possibly legally detained *ab initio* but found that some other detainees were not.[593] The Trial Chamber made no finding that Muci} ordered, instigated, planned or otherwise aided and abetted the process of the arrest and placement of civilians in detention in the camp. However, as observed above, there is a second means by which the offence of unlawful confinement can be committed. The detention of detainees without granting the procedural guarantees required by Article 43 of Geneva Convention IV also constitutes the offence of unlawful confinement, whether the civilians were originally lawfully detained or not. It was this aspect of the offence that the Trial Chamber was relying on when it held:

> Specifically, Zdravko Mucic, in this position, [*ie* of superior authority over the camp] had the authority to release detainees. By omitting to ensure that a proper enquiry was undertaken into the status of the detainees, and that those civilians who could not lawfully be detained were immediately released, Zdravko Mucic participated in the unlawful confinement of civilians in the ^elebi}i prison-camp.[594]

---

[588] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucic Filed on 2 July 1999, p 2.
[589] Appeal Transcript, pp 468-470.
[590] Prosecution Response, para 8.20.
[591] Trial Judgement, para 1145.
[592] Motion to Amend by Substitution the Appeal Brief of Zdravko Muci} Filed on 2 July 1999, p 2.
[593] Trial Judgement, para 1131.
[594] This finding of the Trial Chamber is not challenged by Muci}. Muci} Response, p 5.

Thus the Trial Chamber appears to have found Mucic guilty on the basis of the denial of procedural guarantees under the second "category" of this offence, and the Appeals Chamber's consideration will be limited to his liability in that context. The Appeals Chamber first notes that, although Mucic contests whether it was his responsibility as camp commander to know whether the detainees were lawfully detained or not, he does not contest on appeal the Trial Chamber's finding that he had the authority to release prisoners. In any case, the Appeals Chamber notes that the Trial Chamber made reference to a variety of evidence in support of this finding.[595] The Appeals Chamber therefore proceeds on the basis that this finding was open to the Trial Chamber and that it is the relevant one.

378. As is evident from the earlier discussion of the law relating to unlawful confinement, the Appeals Chamber considers that a person in the position of Mucic commits the offence of unlawful confinement of civilians where he has the authority to release civilian detainees and fails to exercise that power, where

(i) he has no reasonable grounds to believe that the detainees do not pose a real risk to the security of the state;[596] or

(ii) he knows that they have not been afforded the requisite procedural guarantees (or is reckless as to whether those guarantees have been afforded or not).[597]

379. Where a person who has authority to release detainees knows that persons in continued detention have a right to review of their detention[598] and that they have not been afforded that right, he has a duty to release them. Therefore, failure by a person with such authority to exercise the power to release detainees, whom he knows have not been afforded the procedural rights to which they are entitled, commits the offence of unlawful confinement of civilians, even if he is not responsible himself for the failure to have their procedural rights respected.

---

[595] Trial Judgement, para 1145. The Trial Chamber found that from May until December 1992, individuals and groups were released from the ^elebi}i prison-camp at various times, some to continued detention at Musala, some for exchange, others under the auspices of the International Red Cross, which visited the camp on two occasions in the first half of August 1992 (Trial Judgement, para 157). It also found that there was evidence of the control by Mucic of the detainees who would leave or be transferred from the Celebici prison-camp to another detention facility: (Trial Judgement, para 764; *See* also Trial Transcript, p 1331 and Exhibit 75, signed by Muci}, a release document in respect of the detention of Branko Gotovac. There is also Exhibit 84, signed by Mucic for Mirko Kuljanin and Exhibit 91, signed by Mr. Mucic, which is the release document for Milojka Antic. Mucic also signed Exhibit 158, a release document for Witness B, and Exhibit 159, which is the release document for Zoran Ninkovic. Witness F testified that Muci} released detainees, sick and elderly people, late June, early July and on 8 October 1992: Trial Transcript, p 1331).

[596] This relates to the first "category" of the offence.

[597] This relates to the second "category".

[598] It is unnecessary that he is aware of the legal source of this right.

380. The Trial Chamber expressly found that the detainees were not afforded the necessary procedural guarantees. It also found that Mucic did in fact have the power to release detainees at the camp. The only remaining question raised by Muci}'s ground of appeal is therefore whether the Trial Chamber had found (although it did not refer to it explicitly) that Mucic had the relevant *mens rea, i.e.,*he knew that the detainees had a right to review of their detention but had not been afforded this review or was reckless as to whether they had been afforded it or not. It is not strictly necessary, in relation to an allegation that the offence of unlawful confinement has been committed through non-compliance with the obligation to afford procedural guarantees, to establish that there was also knowledge that the initial detention of the relevant detainees had been unlawful. This is because the obligation to afford procedural guarantees applies to all detainees whether initially lawfully detained or not. However, as is apparent from the discussion below, the Trial Chamber's findings also suggest that it had concluded that Mucic was also aware that no reasonable ground existed for the detention of at least some of the detainees.

381. The Trial Chamber concluded in relation to Mucic that "[b]y *omitting to ensure that a proper enquiry was undertaken into the status of the detainees* and that those civilians who could not lawfully be detained were immediately released, Zdravko Mucic participated in the unlawful confinement of civilians in the ^elebi}i prison-camp."[599] It is implicit in this finding that Mucic knew that a review of the detainees' detention was required but had not been conducted.[600] There are a number of findings of the Trial Chamber on the evidence before it which support this conclusion.

382. Relevant to Mucic's knowledge of the unlawful nature of the confinement of certain of the detainees (both because of absence of review of detention and, in some cases, of the absence of grounds for the initial detention) is his knowledge of the work of the Military Investigative Commission. As noted above, the Trial Chamber found that a Military Investigative Commission was established by the Konjic Joint Command following a decision by the War Presidency of Konjic to investigate crimes allegedly committed by the detainees prior to their

[599] Trial Judgement, para 1145 (emphasis added).
[600] This conclusion is not affected by the fact that Mucic could not ultimately be held responsible for failure to ensure such a review, or that (given that it was the detention practices of Mucic as person having authority over the camp, which were to be the subject of review) this responsibility appears to have lain with authorities outside the camp such as the Military Investigative Commission or the entities who were ultimately responsible for the creation of the camp.

arrival at the ^elebi}i camp,[601] and that the Commission did not have the power to finally decide on the release of wrongfully detained prisoners.[602]

383. The Trial Chamber found that the Commission consisted of five members, one of which was Witness D. The Trial Chamber referred to Witness D's testimony that he worked closely with Mucic in the classification of the detainees in the Celebici camp, and that Mucic had a complete list of the detainees which he brought out for members of the Commission.[603] It is apparent from the context of the Trial Chamber's reference that it accepted that evidence. Witness D also testified that Mucic was present early in June when members of the Commission met to discuss how they would go about their work of the classification of the detainees and consideration for their continued detention or release.[604] It is implicit in these findings as to Mucic's awareness of the work of the Commission, and even of its existence as an independent body with a review function over the camp, that Mucic must have known that such a review was legally required.

384. The Trial Chamber also found that the Commission had prepared a report in June 1992 detailing the "conditions in the prison-camp, including the mistreatment of detainees and the continued incarceration of persons who were peaceful civilians", and the fact that they were unable to correct them. The Trial Chamber cited from the report, which stated, *inter alia*:

> Detainees were maltreated and physically abused by certain guards from the moment they were brought in until the time their statement was taken i.e. until their interview was conducted. Under such circumstances, Commission members were unable to learn from a large number of detainees all the facts relevant for each detainee and the area from which he had been brought in and where he had been captured. [...] Commission members also interviewed persons arrested outside the combat zone; the Commission did not ascertain the reason for these arrests, but these detainees were subjected to the same treatment [...] Persons who had been arrested under such circumstances stayed in detention even after it had been established that they had been detained for no reason and received the same treatment as persons captured in the combat zone [...] Because self-appointed judges have appeared, any further investigation is pointless until these problems are solved.[605]

385. It is obvious from this report, which the Trial Chamber accepted, that there were persons in the camp in respect of whom no reasons existed to justify their detention and that the Commission was not able to perform the necessary review of the detention of the Celebici camp detainees. The Trial Chamber found that, after working for about one month at the prison-camp, the Commission was in fact disbanded at the instigation of its members as early as the end of

---

[601] Trial Judgement, para 1136.
[602] Trial Judgement, para 1137.
[603] Trial Judgement, para 748.
[604] Trial Transcript, pp 5175-5176, pp 5189-5190.
[605] Trial Judgement, para 1138.

June 1992.[606] Although the Trial Chamber made no finding that Mucic had read the Commission's report, in view of its findings that Mucic worked closely with the Commission, it is implicit in the findings taken as a whole that Mucic was aware of the matters that the Commission discussed in the report, including the fact that there were civilians there who had been detained without justification, and that the detainees generally had not had their detention properly reviewed. This knowledge can only have been reinforced by the presence in the camp, of which Mucic must have been aware, of detainees of a kind which would have appeared so unlikely to pose a security risk that it must have raised doubts as to whether any reasonable grounds had ever existed for their initial detention. This included elderly persons[607] and persons such as Grozdana Cecez, a 42 year old mother of two children.[608]

386. The Appeals Chamber finds that it was open to the Trial Chamber, from its primary findings (which have not been shown to be unreasonable), to conclude that Muci}, by not using his authority to release detainees whom he knew had not had their detention reviewed and had therefore not received the necessary procedural guarantees, committed the offence of unlawful confinement of civilians and was therefore guilty of the offence pursuant to Article 7(1) of the Statute.

387. The Appeals Chamber therefore dismisses this ground of appeal.

D. Conclusion

388. For the foregoing reasons, the Appeals Chamber dismisses the twelfth ground of appeal of Muci}, and the third and sixth grounds of appeal of the Prosecution.

---

[606] Trial Judgement, para 1136.
[607] Such as Scepo Gotovac, the man of about 70 years of age who was the victim of the wilful killing/murder charged in Counts 1 and 2 of the Indictment. *See* Trial Judgement, para 823.
[608] Trial Judgement, para 1133.

VI. MULTIPLE CONVICTIONS BASED ON THE SAME ACTS

389. The Trial Chamber found Mucic, Delic, and Landžo guilty both of grave breaches of the Geneva Conventions and of violations of the laws or customs of war based on the same acts. The counts containing convictions under both Articles 2 and 3 of the Statute are as follows:

Muci}: Counts 13 and 14; 33 and 34; 38 and 39; 44 and 45; 46 and 47.

Deli}: Counts 1 and 2; 3 and 4; 11 and 12; 18 and 19; 21 and 22; 42 and 43; 46 and 47.

Land'o: Counts 1 and 2; 5 and 6; 7 and 8; 11 and 12; 15 and 16; 24 and 25; 30 and 31; 36 and 37; 46 and 47.

390. Muci} and Deli} have appealed against the judgement of the Trial Chamber, stating in the Deli}/Muci} Supplementary Brief that these convictions violate the *Blockburger* standard, established by the U.S. Supreme Court in 1932. In *Blockburger v United States*, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact which the other does not."[609]

391. Although Land'o was also convicted under both Articles 2 and 3 based on the same acts, he did not lodge an appeal on this issue.

392. The crux of the appellants' arguments is as follows:

> Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes international individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions. Absent such proof, there can be no conviction under the Tribunal's jurisdiction to try allegations of grave breaches of the Geneva Conventions.
>
> Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.[610]

The appellants concede that Articles 2 and 3 differ. Beyond that, however, they provide very little analysis of this issue, merely concluding that the *Blockburger* standard is violated. Their argument appears to hinge on the fact that the requisite proof of protected person status under the grave breaches charge is lacking.

---

[609] *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("*Blockburger*").

[610] Appellants-Cross Appellees Hazim Deli}'s and Zdravko "Pavo" Muci}'s Motion for Leave to File Supplemental Brief and Supplemental Brief, 14 Feb 2000, p 13, (footnotes omitted).

393. In their 7 April 2000 Response to the Prosecutor's Supplementary Brief, the appellants restate that the *Blockburger* standard is the appropriate test for double jeopardy.[611] They further claim that under the reasoning of the *Kupreskic* Judgement and of *Ball v United States*, a 1985 U.S. Supreme Court case which applied the *Blockburger* test, multiple convictions based on the same acts are not allowed.[612]

394. In their respective designations of the issues on appeal, Muci} and Deli} reiterate the issue as follows:

> Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches for the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.[613]

The relief sought by the appellants is dismissal of one of the counts; they do not indicate which one.

395. According to the Prosecution, the *Kupreskic* Judgement represents an unwarranted departure from the prior practice of both the Tribunal and the ICTR.[614] In *Kupreskic*, the Trial Chamber held that the primary applicable test is whether each offence contains an element not required by the other.[615] An additional test, which ascertains whether the various provisions at issue protect different values, can be used in conjunction with and in support of the primary test.[616] The Trial Chamber in *Kupreskic* found that an individual cannot be convicted of both murder as a crime against humanity and murder as a war crime, because murder as a war crime does not require proof of elements that murder as a crime against humanity requires.[617]

396. The Prosecution maintains that the solution should be sought in the practice of the International Tribunals, rather than in particular national systems, although the latter contain useful terminology that can be employed in an analysis of the issues.[618] After discussing the terminology found in various national systems, the Prosecution examines in detail the practice

---

[611] Appellant-Cross Appellees Zdravko Muci} and Hazim Deli}'s Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 7 Apr. 2000, para 21.
[612] *Ibid* at para 24.
[613] Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, p 4; Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, para 7.
[614] Prosecution Response to the Appellants' Supplementary Brief, 25 Apr. 2000, para 4.5.
[615] *Kupreskic* Judgement, para 682.
[616] *Ibid* at para 693-695.
[617] *Ibid* at para 700-701.
[618] Prosecution Response to Supplementary Brief, para 4.7.

of this Tribunal and the ICTR, and concludes that the "*Tadic-Akayesu* test is consistent with the weight of precedent in both Tribunals, and consistent with international standards of justice."[619]

397. In *Tadic*, the Prosecution states, the Trial Chamber rejected the challenge to the cumulative charges in the indictment and convicted the accused cumulatively of a number of crimes.[620] The Trial Chamber imposed concurrent sentences upon the accused.[621] The Prosecution appealed on various grounds, and the *Tadi}* Appeal Judgment resulted in the accused being convicted cumulatively under two or three articles of the Statute.[622] Under the *Tadic* test, according to the Prosecution, the "accused can be charged with and convicted of as many crimes as the facts of the case disclose"[623] if there is "ideal concurrence." Ideal concurrence describes the situation "where a single act of an accused contravenes more than one provision of the criminal law."[624]

398. Further, the Prosecution explains that the ICTR Trial Chamber in *Akayesu*[625] held that cumulative convictions are acceptable:

> 1. where the offences have different elements;
> 2. where the provisions creating the offences protect different interests; or
> 3. where it is necessary to record a conviction for both offences in order to fully describe what the accused did.[626]

399. The Prosecution finally states that the *Tadic* and *Akayesu* tests can be reconciled if "the *Akayesu* test is considered as a test for distinguishing between cases of ideal concurrence and cases of apparent concurrence."[627]

---

619 *Ibid* at para 4.94.
620 *Ibid* at paras 4.9, 4.10.
621 *Id.*
622 *Ibid* at paras 4.11-4.12.
623 *Ibid* at para 4.78(1).
624 *Ibid* at para 4.8.
625 *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 Sept. 1998.
626 Prosecution Response to Supplementary Brief, para 4.50.
627 *Ibid* at para 4.83. According to the Prosecution, the relevant principles under a combined "*Tadi}-Akayesu*" test would be as follows: (1) In cases of ideal concurrence [...], the accused can be charged with and convicted of as many crimes as the facts of the case disclose. The fact that multiple counts relate to the same conduct is considered relevant only at the post-conviction stage, in relation to sentencing. (*Tadi}* test). (2) Two crimes will stand in a relationship of ideal concurrence [...] (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. (*Akayesu* test.). *Id.*

A. Discussion

1. Cumulative Charging

400. Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.

2. Cumulative Convictions

401. Before examining the relevant provisions of the Statute of the International Tribunal, the jurisprudence of the Tribunal and of national jurisdictions may be considered for guidance on this issue.

402. During the proceedings in the present case, a bench of the Appeals Chamber had to decide whether the accused Delić's complaint, that he was being charged on multiple occasions throughout the indictment with two different crimes arising from one act or omission, justified the granting of leave to appeal.[628] The bench quoted the reasoning of the Trial Chamber in *Tadic*,[629] and stated that it did not consider that the reasoning in *Tadic* revealed an error, much less a grave one, justifying the granting of leave to appeal.[630]

403. Based upon the Prosecution's appeal from the Trial Chamber judgment in *Tadic*, the Appeals Chamber overturned the acquittal of Tadic on all relevant Article 2 counts and on four cumulatively charged counts relating to the killing of five victims from the village of Jaskici.[631] The Appeals Chamber did so even though all of the Article 2 counts related to conduct for which the accused had already been convicted under other provisions of the Statute, namely Articles 3 and 5. As a result, Tadic was cumulatively convicted with respect to the same

---

[628] *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

[629] The Trial Chamber in *Tadic* stated: "In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading." *Prosecutor v Dusko Tadic*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-94-1-T, 14 Nov. 1995, p. 10.

[630] *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

[631] *Tadic* Appeal Judgement, p 144.

conduct, based on numerous different groups of counts.[632] The problem of multiple convictions was not addressed as such by the Chamber. The multiple convictions were however taken into account in the *Tadic* Sentencing Appeal Judgement, where the Appeals Chamber imposed concurrent sentences on the accused.[633]

404. During the *Aleksovski* Appeal, the Appeals Chamber briefly addressed the issue of multiple convictions for the same acts, in connection with sentencing.[634] The Trial Chamber in that case had acquitted the accused on Counts 8 and 9 of grave breaches of the Geneva Conventions but convicted him on Count 10 of a violation of the laws or customs of war.[635] The Appeals Chamber stated:

> The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.[636]

405. This analysis of the Tribunal's jurisprudence reveals that multiple convictions based on the same acts have sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase. The Appeals Chamber of the ICTR has not made any pronouncements on the issue of multiple convictions as yet.

406. National approaches vary with respect to cumulative convictions. Some countries allow such convictions, letting the record reflect fully each violation that occurred, and preferring to address any allegations of unfairness in the manner of sentencing. Other countries reserve such convictions for acts resulting in the most severe of crimes, whereas still others require differing

---

[632] The counts and convictions were as follows:
(1) Counts 8, 9, 10, and 11: Various beatings of prisoners; Convictions: Article 2(b) (inhuman treatment); Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).
(2) Counts 12, 13, and 14; Counts 15, 16, and 17; Counts 21, 22 and 23; Counts 32, 33, and 34; Convictions: Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).
(3) Counts 29, 30, and 31; Convictions: Article 2(a) (wilful killing); Article 3 (common Article 3(1)(a) (murder); Article 5(a) (murder).

[633] *Prosecutor v Tadic*, Case No. IT-94-1A and IT-94-1-Abis, Judgement in Sentencing Appeals, p 33, 26 Jan. 2000.

[634] *Aleksovski* Appeal Judgement, pp 59-60, 24 Mar. 2000.

[635] *Id.* at 59. The counts are as follows.
Count 8: a grave breach as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3);
Count 9: a grave breach as recognised by Articles 2(c) (wilfully causing great suffering or serious injury to body or health), 7(1) and 7(3);
Count 10: a violation of the laws or customs of war (outrages upon personal dignity) as recognised by Articles 3, 7(1) and 7(3).

[636] *Aleksovski* Appeal Judgement, at 60.

statutory elements before cumulative criminal convictions may be imposed. A few examples will demonstrate these different approaches.

407. Under German law, for example, the judgment of the court details every crime that has been perpetrated as a result of a single act. In cases of ideal concurrence:

> the perpetrator receives only one sentence, but because he is convicted of all crimes committed by him, or of the multiple commissions of a crime, the judgement documents which crimes have been fulfilled or how often the perpetrator has fulfilled a crime.[637]

408. In Zambia, on the other hand, multiple convictions based on the same act can only be imposed for capital crimes. Under the Zambian Penal Code:

> [a] person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.[638]

409. In the United States, by contrast, the *Blockburger* ruling establishes that multiple convictions can be imposed under different statutory provisions if each statutory provision requires proof of a fact which the other does not.[639] This test has been more recently affirmed in the *Rutledge* case decided by the U.S. Supreme Court in 1996.[640]

410. Another approach, that of a United States military tribunal established at the end of World War II to prosecute persons charged with crimes against peace, war crimes, and crimes against humanity, is also instructive. According to the Law Reports of Trials of War Criminals, the United States Military Tribunal established pursuant to Allied Control Council Law No. 10 was of the opinion that:

> war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may also amount to crimes against humanity.[641]

411. The Law Reports note that it seemed as if the tribunal "was willing to agree that acts taken in pursuance of the *Nacht und Nebel Plan* constituted crimes against humanity as well as

---

[637] Prosecution Response to Supplementary Brief, para 4.92 (citing A. Schönke/H. Schröder, *Strafgesetzbuch: Kommentar* 697 (25th ed. Munich: 1997) (counsel's translation)).
[638] Republic of Zambia Penal Code Act, Ch. 87 of the Laws of Zambia, p 28.
[639] *Blockburger* at 304.
[640] *Rutledge v. U.S.*, 517 U.S. 292, 297 (1996).
[641] Law Reports of Trials of War Criminals, U.N. War Crimes Commission VI, p 79 (London: 1948).

war crimes."[642] In the *Trial of Josef Altstötter and Others (The Justice Trial)*, the tribunal found numerous defendants guilty of war crimes as well as crimes against humanity based on exactly the same acts,[643] thus appearing to uphold the possibility of cumulative convictions, at least when war crimes and crimes against humanity are involved.

412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

413. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.

414. In this case, defendants Mucic and Delic have been convicted of numerous crimes under Articles 2 and 3 of the Statute, which crimes arise out of the same acts. The chart below summarises their convictions.

Article 2 (Grave Breaches of Geneva Convention No. IV	Article 3 (Violations of the Laws or Customs of War—Common Article 3)
1. wilful killings	1. murders
2. wilfully causing great suffering or serious injury to body or health	2. cruel treatment
3. torture	3. torture
4. inhuman treatment	4. cruel treatment

[642] *Id.*

[643] *Ibid* at 75-76. *See also* Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc S/25274 ("The Commission notes that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict. It is therefore possible for the same act to be a war crime and a crime against humanity."). However, the Report does not indicate whether *convictions* based on the same acts are possible under provisions for war crimes and crimes against humanity.

Land'o was cumulatively convicted under Articles 2 and 3, as to categories 1, 2, and 3 above (see chart). Although he did not file an appeal on this issue, the Appeals Chamber finds that reasons of fairness and the consideration that only distinct crimes may justify multiple convictions, merit the application of the same principles to his convictions as well.

415. Under Article 2 of the Statute,

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> a. wilful killing;
>
> b. torture or inhuman treatment, including biological experiments;
>
> c. wilfully causing great suffering or serious injury to body or health;
>
> d. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> e. compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> f. wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> g. unlawful deportation or transfer or unlawful confinement of a civilian;
>
> h. taking civilians as hostages.

416. The appellants have been convicted under Geneva Convention IV. Article 147 of this Convention proscribes grave breaches such as wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health, if committed against persons or property protected by the Convention. The Convention defines "protected persons" as those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[644] The ICRC Commentary (GC IV) explains that the term "in the hands of"

> is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or hands' of the Occupying Power.... In other words, the expression in the hands of' need not necessarily be understood in the physical sense; it simply means that the person *is in territory which is under the control of the Power in question.*[645]

---

[644] Article 4, Geneva Convention IV.

[645] ICRC Commentary (GC IV), p. 47 (emphasis provided). At page 46, the ICRC Commentary lists further limitations to the granting of protected person status. On the territory of belligerent States, protection is accorded under Article 4 to "all persons of foreign nationality and to persons without any nationality," but the following are excluded:

417. The definition of "protected person" under Geneva Convention IV is further limited by the fact that "persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall *not be considered as protected persons within the meaning of the present Convention.*"[646]

418. However, it should be noted that this Tribunal's jurisprudence has held that "protected persons" may encompass victims possessing the same nationality as the perpetrators of crimes, if, for example, these perpetrators are acting on behalf of a State which does not extend these victims diplomatic protection or to which the victims do not owe allegiance.[647]

419. Under Article 3 of the Statute, "[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war."[648] The origins of the convictions at issue—murder, cruel treatment, and torture—lie in common Article 3 of the Geneva Conventions, which states in the pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

---

(1) Nationals of a State which is not bound by the Convention;
(2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;
(3) Persons covered by the definition given above [...] who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.
In occupied territories, protection is accorded to "all persons who are not of the nationality of the occupying State," but the following are excluded:
(1) Nationals of a State which is not party to the Convention;
(2) Nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State;
(3) Persons covered by the definition given above [...] who enjoy protection under one of the three other Geneva Conventions of August 12, 1949.

646 Article 4, Geneva Convention IV (emphasis provided).

647 *See Tadic* Appeal Judgement, paras 168-169. *See also Aleksovski* Appeal Judgement, paras 151-2 ("In the *Tadic* Judgement, the Appeals Chamber, after considering the nationality criterion in Article 4, concluded that not only the text and the drafting history of the Convention, but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.").

648 Article 3, Statute.

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment; ?...g[649]

420. Common Article 3 of the Geneva Conventions is intended to provide minimum guarantees of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities. Its coverage extends to *any* individual not taking part in hostilities and is therefore broader than that envisioned by Geneva Convention IV incorporated into Article 2 of the Statute, under which "protected person" status is accorded only in specially defined and limited circumstances, such as the presence of the individual in territory which is under the control of the Power in question, and the exclusion of wounded and sick members of the armed forces from protected person status; while protected person status under Article 2 therefore involves not taking an active part in hostilities, it also comprises further requirements. As a result, Article 2 of the Statute is more specific than common Article 3. This conclusion is further confirmed by the fact that the Appeals Chamber has also stated that Article 3 of the Statute functions as a "residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[650] Finally, common Article 3 is present in all four Geneva Conventions, and as a rule of customary international law, its substantive provisions are applicable to internal and international conflicts alike.[651]

421. Applying the provisions of the test articulated above, the first issue is whether each applicable provision contains a materially distinct legal element not present in the other, bearing in mind that an element is materially distinct from another if it requires proof of a fact not required by the other.[652]

---

[649] Article 3, Geneva Conventions of 1949.

[650] *Tadic* Jurisdiction Decision, para 91.

[651] *See Nicaragua*, para 218 ("Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called elementary considerations of humanity").

[652] It should also be borne in mind that Article 2 applies to international conflicts, while Article 3 applies to both internal and international conflicts. However, this potentially distinguishing element does not come into play here, because the conflict at issue has been characterised as international as well. *See* discussion above, at para

422. The first pair of double convictions concerned are "wilful killing" under Article 2 and "murder" under Article 3. Wilful killing as a grave breach of the Geneva Conventions (Article 2) consists of the following elements:

a. death of the victim as the result of the action(s) of the accused,

b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,[653]

c. and which he committed against a protected person.

423. Murder as a violation of the laws or customs of war (Article 3) consists of the following elements:

a. death of the victim as a result of an act of the accused

b. committed with the intention to cause death[654]

c. and against a person taking no active part in the hostilities.

The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of wilful killing under Article 2. Therefore, the first prong of the test is not satisfied, and it is necessary to apply the second prong. Because wilful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.

424. The second pair of double convictions at issue are "wilfully causing great suffering or serious injury to body or health" under Article 2, and "cruel treatment" under Article 3. The former is defined as

a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health,[655]

50, on this point. In addition, both Articles 2 and 3 require a nexus between the crimes alleged and the armed conflict.

653 *Blaskic* Judgement, para 153.

654 *Jelisic* Judgement, para 35; *Blaskic* Judgement, para 181.

655 *Blaskic* Judgement, para 156.

b. committed against a protected person.

Cruel treatment as a violation of the laws or customs of war is

a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,[656]

b. committed against a person taking no active part in the hostilities.

The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. As a result, the first prong of the test is not satisfied, and it thus becomes necessary to apply the second prong of the test. Because wilfully causing great suffering under Article 2 contains an additional element and more specifically applies to the situation at hand, that conviction must be upheld, and the Article 3 conviction must be dismissed.

425. The third pair of double convictions at issue are torture under Article 2 and torture under Article 3. Because the term itself is identical under both provisions, the sole distinguishing element stems from the protected person requirement under Article 2. As a result, torture under Article 2 contains an element requiring proof of a fact not required by torture under Article 3, but the reverse is not the case, and so the first prong of the test is not satisfied. Again, it becomes necessary to apply the second prong of the test. Because torture under Article 2 contains an additional element that is required for a conviction to be entered, that conviction must be upheld, and the Article 3 conviction must be dismissed.

426. The final pair of double convictions at issue are "inhuman treatment" under Article 2 and "cruel treatment" under Article 3. Cruel treatment is defined above.[657] Inhuman treatment is

a. an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,[658]

b. committed against a protected person.

---

[656] *Jelisi}* Judgement, para 41; Trial Judgement, para 552; *Blaskic* Judgement, para 186.
[657] *See* para 424 above.
[658] *Blaskic* Judgement, para 154; *see* also Trial Judgement, para 543.

Again, the sole distinguishing element stems from the protected person requirement under Article 2. By contrast, cruel treatment under Article 3 does not require proof of a fact not required by its counterpart. Hence the first prong of the test is not satisfied, and applying the second prong, the Article 3 conviction must be dismissed.

B. Conclusion

427. For these reasons, the Appeals Chamber finds that, of the double convictions entered by the Trial Chamber, only the Article 2 convictions must be upheld, and the Article 3 convictions must be dismissed.

Mucic: Count 13: upheld

Count 14: dismissed

Count 33: upheld

Count 34: dismissed

Count 38: upheld

Count 39: dismissed

Count 44: upheld

Count 45: dismissed

Count 46: upheld

Count 47: dismissed.

Delic: Count 1: dismissed--see section on Delić factual grounds

Count 2: dismissed--see section on Delić factual grounds

Count 3: upheld

Count 4: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld[659]

[659] Delić was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 18: upheld

Count 19: dismissed

Count 21: upheld

Count 22: dismissed

Count 42: upheld

Count 43: dismissed

Count 46: upheld

Count 47: dismissed.

Landžo: Count 1: upheld

Count 2: dismissed

Count 5: upheld

Count 6: dismissed

Count 7: upheld

Count 8: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld[660]

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 15: upheld

Count 16: dismissed

Count 24: upheld

Count 25: dismissed

Count 30: upheld

Count 31: dismissed

Count 36: upheld

[660] Land'o was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 37: dismissed

Count 46: upheld

Count 47: dismissed

C. Impact on Sentencing

428. If, on application of the first prong of the above test, a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently.[661]

429. It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive.[662] In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle),[663] or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

430. Therefore, the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

431. Of the double convictions imposed on the accused in this case, only the Article 2 convictions have been upheld; the Article 3 convictions have been dismissed. The Appeals

---

[661] Such sentences have been confirmed by the Appeals Chamber in the *Tadic* Sentencing Appeal Judgement and the *Furund'ija* Appeal Judgement.

[662] *See* also Rule 101(C) of the Rules: "The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently."

[663] "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate.' (footnote omitted) D.A. Thomas, *Principles of Sentencing* (Heinemann: London, 1980), p 56; *See also R v Bocskei* (1970) 54 Cr. App. R. 519, at 521: "[...] when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive." Section 28(2)(b) Criminal Justice Act 1991 preserves this principle. It applies in all cases where consecutive sentences are imposed, *e.g., R v Reeves,* 2 Cr. App. R (S) 35, CA; *R v Jones,* [1996] 1 Ar. App.R (S) 153; In Canada *see e.g., R v M (CA),* [1996] 1 SCR 500: "the global sentence imposed should reflect the overall culpability of the offender and the circumstances of the offence"; In Australia: *Postiglione v R,* 145 A.L.R. 408; *Mill v R* (1988) 166 CLR 59 at 63; *R v Michael Arthur Watts,* [2000] NSWCCA 167 (the court should look at the individual offences, determine the sentences for each of them and look at the total sentence and structure a sentence reflecting that totality); *R v Mathews,* Supreme Court of New South Wales, 16 July 1991.

Chamber acknowledges that if the Trial Chamber had not imposed double convictions, a different outcome in terms of the length and manner of sentencing, might have resulted. Because this is a matter that lies within the discretion of the Trial Chamber, this Chamber remits the issue of sentencing to a Trial Chamber to be designated by the President of the Tribunal.

432. Judge Hunt and Judge Bennouna append a separate and dissenting opinion in relation to the issues arising in this chapter.

VII. DELIC GROUNDS OF APPEAL ALLEGING ERRORS OF FACT

A. Introduction

433. Delic has filed two grounds of appeal in relation to each of the convictions which he has challenged. The first is that the evidence was not what was described as *legally* sufficient to sustain the convictions; the second is that the evidence was not what was described as *factually* sufficient to sustain the convictions.

434. The issue as to whether there is a *legal* basis to sustain a conviction usually arises at the close of the Prosecution case at trial, a situation now covered by Rule 98*bis*(B),[664] following the earlier practice of seeking a judgement of acquittal upon the basis that, in relation to one or more charges, there is no case to answer. The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[665] In the present case, the Trial Chamber ruled that there was a case to answer,[666] and there was no appeal from that decision. The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which *no* reasonable tribunal of fact *could* have reached.[667]

435. If an appellant is *not* able to establish that the Trial Chamber's conclusion of guilt beyond reasonable doubt was one which no reasonable tribunal of fact could have reached, it follows that there must have been evidence upon which such a tribunal could have been satisfied beyond reasonable doubt of that guilt. Under those circumstances, the latter test of legal sufficiency is therefore redundant, and the appeal must be dismissed. Similarly, if an appellant *is* able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the appeal against conviction must be allowed and a judgement of acquittal entered. In such a situation it is unnecessary for an appellate court to

---

[664] Rule 98*bis*(B) provides: "The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges".

[665] The jurisprudence of the Tribunal in relation to Rule 98*bis*(B) and the earlier practice was recently reviewed in *Prosecutor v Kunarac*, Case No IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000, at paras 2-10.

[666] *Prosecutor v Delalic et al*, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, 18 Mar 1998.

[667] *Tadic* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

determine whether there was evidence (if accepted) upon which such a tribunal could have reached such a conclusion.

436. The Appeals Chamber intends, therefore, to consider only the issue as to whether the evidence was *factually* sufficient to sustain the conviction, in the sense already stated.

437. Delic also argues in relation to a number of these grounds that the Prosecution has failed to show (1) that the victim was a protected person under the Geneva Conventions and (2) that common Article 3 provides for individual international criminal liability as a matter of customary international law.[668] These two matters, which raise questions of whether the Trial Chamber committed an error of law, have been addressed by the Appeals Chamber elsewhere in this Judgement. The present consideration is limited to whether the Trial Chamber committed any error of fact.

B. Issues 9 and 10: Convictions under Counts 1 and 2

438. Counts 1 and 2 related to killing of one Ščepo Gotovac ("Gotovac") in the Čelebici prison camp late in June 1992. The appellants Delic and Landžo were alleged, with others, to have beaten Gotovac for an extended period of time and to have nailed an SDA badge to his forehead. Gotovac is said to have died soon after from the resulting injuries. Count 1 charged the two accused with a grave breach of the Geneva Conventions (wilful killing); Count 2 charged them with a violation of the laws or customs of war (murder).

439. The Trial Chamber found that Delic and Landžo approached Gotovac, who sat near to the door inside hangar 6, and that Delic accused him of having killed two Muslims in 1942. He also referred to some old enmity between their families, and he told Gotovac that he should not hope to remain alive. When Gotovac denied these allegations, Delic started to beat him. Gotovac was taken outside the hangar, and the sound of blows and his moaning could be heard inside the hangar. After some time, he was dragged into the hangar.[669] All of these findings were clearly open to the Trial Chamber on the evidence.

440. The Trial Chamber also found that Gotovac was again taken out of the hangar a few hours later, and that both Delic and Landžo again administered a severe beating. A metal badge was pinned to his head, and Landžo threatened the rest of the detainees in the hangar that he

[668] Delic Brief, para 303.
[669] Trial Judgement, para 817.

would kill anyone who dared to remove it. As a consequence of this *second* beating, the Trial Chamber found, Gotovac died in the hangar some time later.[670]

441. The limitation of the finding that Gotovac's death resulted from the *second* of those beatings is vital to the resolution of these grounds of appeal, the issue being whether a reasonable tribunal of fact could have concluded that Delic participated in the second beating. It was very properly conceded by the Prosecution that there was no finding by the Trial Chamber that there was any causal connection between Gotovac's death and the first beating, and that the evidence was not such as to establish such a connection as the only reasonable conclusion available.[671]

442. No witness gave evidence of having actually seen Delic involved in this second beating, but the Trial Chamber effectively concluded that he was involved, its finding being based on circumstantial evidence. The Trial Chamber stated that, in view of what the witnesses had seen and heard inside the hangar, it could reasonably be said that they were in a position to know what was happening outside.[672] The Trial Chamber went on to say that, when everything which had been seen and heard inside the hangar was considered together, there was no room for doubt that Delic and Landžo "participated" in the beating which resulted in the death of the victim.[673]

443. The only circumstance upon which the Trial Chamber explicitly relied which specifically identified Delic was the threat which he made before the earlier beating that Gotovac should not hope to remain alive, and his involvement in that earlier beating. Those findings which were clearly open to the Trial Chamber on the evidence. The remaining circumstances upon which the Trial Chamber explicitly relied were that Gotovac was brought back into the hangar in a poor condition, he was taken out again later the same day, the sounds of blows and the moans and cries of Gotovac could be heard, he was carried back into the hangar after a short time with the metal badge stuck on his forehead, Landžo's threat that anyone who removed the badge would be similarly treated, and the discovery the next morning that Gotovac had died.[674] None of these additional circumstances were disputed in Delic's appeal.

---

[670] *Ibid*, para 818.
[671] Appeal Transcript, pp 523-524.
[672] Trial Judgement, para 820.
[673] *Ibid*, para 821.
[674] *Ibid*, para 820.

444. There was also evidence from Landžo that he had been asked by Delic (and by Mucic) to kill Gotovac, but this evidence was rejected by the Trial Chamber on the basis that Landžo was an unreliable witness.[675] The evidence which Landžo gave was that others were involved with him in the second beating, but he did not suggest that Delic was ever present at the second beating.[676]

445. A number of detainees called by the Prosecution gave evidence of the circumstances surrounding the beatings of Ščepo Gotovac, and this evidence must be examined briefly to see whether it provides any basis for a finding that Delic had participated in the second beating.

446. Branko Gotovac (no relation) gave evidence of having seen Ščepo Gotovac taken outside the hangar and beaten "several times".[677] However, when the witness was asked to give details of what he saw, he was able to describe no more than what (by reference to all the other evidence) could only have been the first beating.[678] During cross-examination,[679] he said that he saw Ščepo Gotovac –

> [...] when two of them brought him in. He was like dead [...] and soon thereafter he was dead.

This may have been a reference to the second beating, but this was never made clear. Nor was the witness asked to identify the "two of them" were who brought Ščepo Gotovac in.

447. Witness F gave evidence that he did not know who called Gotovac out on the second occasion, and he was not asked who brought him back.[680] He did not suggest that Delic was present on this second occasion, and he was not asked whether he was. Stevan Gligorevic described Gotovac being beaten twice, but he was able to identify only Landžo as having called him out on both occasions. He also made no reference to any participation by Delic in the beatings.[681] Witness N said that Delic had beaten Gotovac "several times" *inside* the hangar, but he then goes on to describe the events surrounding what (by reference to all the other evidence) could only have been what has been called the second beating *outside* the hangar, and he identified only Landžo as having been involved in those circumstances.[682] When asked who

---

[675] Trial Judgement, para 822.
[676] Trial Transcript, pp 15045–15047.
[677] *Ibid*, p 985.
[678] *Ibid*, pp 986, 1103.
[679] *Ibid*, pp 1098-1099.
[680] *Ibid*, p 1322.
[681] *Ibid*, pp 1469-1470.
[682] *Ibid*, pp 1916-1917.

else was in the area who could have seen Gotovac being taken out and beaten, he did not suggest that Delic had been there.[683]

448. Dragan Kuljanin gave evidence of Gotovac being called out several times by the guards, but he said that he did not know the names of the guards who did so.[684] He did not see the beating himself.[685] He made no reference to any participation by Delic in the second beating. Mirko Đordic said that it was Landžo who called Gotovac out of the hangar on the second occasion, and that it was Landžo who ordered some prisoners to carry Gotovac out.[686] He did not suggest that Delic had participated in the second beating.

449. Branko Sudar gave evidence in relation to both beatings. He firmly identified Delic as having participated in the first of them.[687] He said that it was Landžo who took Gotovac out for the second beating.[688] In cross-examination, he repeated the evidence which he had given, apparently in relation to the first beating without nominating the occasion as such,[689] but the Prosecution asked no questions which may have led to a change in the only reasonable conclusion from his evidence, that he was in fact still speaking of the first occasion only. Risto Vukalo described both beatings. Of the second beating, he identified only Landžo as being involved – as having called Gotovac out and as having ordered two of the detainees to bring him back inside the hangar.[690] Witness R described the threat made by Delic as having occurred on a quite separate occasion from any beating. In relation to the one beating which he saw, which (by reference to all the other evidence) could only have been the second, Witness R identified only Landžo as having been involved.[691]

450. None of the detainees so far discussed supported the Prosecution case that Delic participated in the second beating which caused the death of Gotovac. There were three other detainees upon whose evidence some reliance was placed in the appeal.

451. Witness B gave evidence of the threat made by Delic to Gotovac, that he should not hope to leave alive.[692] He referred to the first beating as having occurred the same evening,

---

683 *Ibid*, p 1999.
684 *Ibid*, p 2346.
685 *Ibid*, p 2411.
686 *Ibid*, p 4782.
687 *Ibid*, p 5766.
688 *Ibid*, p 5767.
689 *Ibid*, p 5945.
690 *Ibid*, pp 6280-6281.
691 *Ibid*, p 7795.
692 *Ibid*, p 5055.

without identifying who was involved in it.[693] He said that he thought that the second beating occurred the next evening, and said:

> He was called out again outside, at night fall. I remember Zenga, Esad Landžo. He came in. He came into the hangar. I think that Delic was near the door, outside. He didn't want to go out. He was – and then two other prisoners were ordered to help him get up and push him out, outside the door. This was right next to me in the hangar. They started beating him and by the number of blows, the movements and everything we could hear, there must have been a large group of people, several people.[694]

The "he" who did not want to go out was clearly Gotovac. Witness B was not asked to identify who "they" were who started beating Gotovac. He later described the threat by Landžo concerning the badge on Gotovac's forehead.[695]

452. The Prosecution argued that the sentence "I think that Delic was near the door, outside" should be interpreted as expressing doubt not as to whether Delic was there at the time of the second beating, but only as to where he was standing.[696] Such an argument would have greater force if Witness B had elsewhere in his evidence identified Delic as having been present, but he did not do so. The presence of Delic during the second beating was a vital piece of evidence linking him to that beating. It is the obligation of the Prosecution to ensure that its vital evidence is clear and unambiguous. An accused person should not be convicted upon the basis of a verbal ambiguity in that vital evidence. This sentence of Witness B's evidence, read literally, expresses some doubt as to whether Delic was present, not merely as to where he was standing. Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution.

453. Rajko Draganic described Delic and Landžo as beating Gotovac on the first occasion.[697] In relation to what may have been either the first or the second beating (the evidence is ambiguous), he said:[698]

> [...] and that Delic said, Zenga [Landžo], I do not know exactly, he said two people should come and carry him inside.

---

693 *Ibid*, p 5056.
694 *Ibid*, p 5056.
695 *Ibid*, p 5057.
696 Appeal Transcript, pp 519-520.
697 Trial Transcript, p 6929.
698 *Ibid*, p 6930.

It is clear from this evidence that the witness was unable to say which of the two accused had requested the assistance upon whichever occasion it was. Insofar as this uncertainty may suggest that Delic was present at the second beating, and that the only uncertainty related to *which* of the accused had requested assistance, the same ambiguity exists as in relation to the last witness. It is perhaps significant that, when the Trial Chamber identified the details of the circumstantial case upon which it relied to find beyond reasonable doubt that Delic participated in the second beating, it did not include any *direct* evidence that Delic was present in the area when the second beating took place.[699]

454. Mirko Babic gave evidence that Delic had come to the door of the hangar with Landžo, that he had threatened Gotovac that he would be killed and that Delic was one of three men who had taken Gotovac out of the hangar for the first beating.[700] He then said that, an hour or so later, Delic again came to the door of the hangar, with Landžo, that Gotovac was "told the same thing as the first time", and that Delic had put a knife "next" to Gotovac when they took him out and beat him again.[701] In cross-examination, Babic asserted that he had been an eyewitness to these events.[702] This was the only evidence in the case which unambiguously involved Delic in the events leading to and following the second beating. If accepted, it would lead to the inevitable conclusion that Delic had participated in that beating – either as one of those who inflicted the beating personally, or as an accessory aiding and abetting it.

455. On appeal, Delic pointed out that, in relation to charges of torture and cruel treatment of Mirko Babic by Landžo and himself,[703] the Trial Chamber did not consider the unsupported evidence of Babic of the mistreatment which he alleged that he had received to be "wholly reliable".[704] Delic argued, therefore, that the evidence which Babic gave in support of the counts presently under consideration was "also insufficient to support a factual finding that [he] participated in the fatal beating" alleged in those counts, particularly as no one else gave evidence of having seen him there.[705] The Prosecution responded that a finding that Babic's evidence in relation to another incident was not "wholly reliable" does not amount to a

[699] Trial Judgement, para 820.
[700] Trial Transcript, pp 284-285.
[701] *Ibid*, p 285.
[702] *Ibid*, p 413.
[703] Counts 27, 28 and 29.
[704] Trial Judgement, para 988.
[705] Delic Brief, para 282b.

conclusion that Babic was a completely unreliable witness who could not be believed in all circumstances.[706]

456. In the circumstances of this case, the Appeals Chamber does not accept the "fine distinction" which the Prosecution sought to draw between not being satisfied beyond reasonable doubt as to the reliability of a witness's evidence and a finding that the witness was lying.[707] The nature of the evidence which Babic gave in support of the torture and cruel treatment charges was of such a nature that, if true, it established those charges beyond reasonable doubt. It was not just the absence of supporting evidence which led to the acquittal on those charges. There was a wealth of evidence which demonstrated that Babic was lying in relation to them, including evidence that the injuries which he alleged had resulted from the mistreatment (which included having his leg doused in petrol and set alight) had occurred sometime prior to his detention at the Célebici prison camp.[708]

457. But this debate concerning the evidence of Babic does not need to be resolved in this appeal, as it is apparent from the judgement itself that the Trial Chamber did not rely upon it. As already stated, the Trial Chamber did not include in the circumstantial case upon which it relied in finding beyond reasonable doubt that Delic participated in the second beating any direct evidence that Delic was present in the area when the second beating took place. If the evidence of Babic that Delic was present *had* been accepted, it was of such a vital nature that it would inevitably have been included in the statement of the circumstances relied on. Its absence from that statement demonstrates that the Trial Chamber did *not* accept that evidence, and that it did not interpret the evidence of either Witness B or Rajko Dragonic as demonstrating that Delic was present on the occasion of the second beating.

458. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him – here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.

---

[706] Appeal Transcript, pp 517.
[707] *Ibid*, p 518.
[708] Trial Judgement, paras 986-987.

459. The Appeals Chamber is satisfied that, without some acceptable evidence that Delic *was* present at the time of the second beating, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that Delic participated in the second beating from the circumstances identified by the Trial Chamber in this case. The enmity between Delic and Gotovac, his threat to Gotovac that he would be killed, and his participation in the earlier (and separate) beating do not, even in combination, eliminate the reasonable possibility that he was not there at the time. Such a possibility arises from the absence of any acceptable evidence from any of the many witnesses who were present that Delic was also present. No finding that he participated in the second beating was therefore available.

460. The conviction of Delic on Counts 1 and 2 must accordingly be quashed, and a judgement of acquittal entered on both counts.

C. Issues 11 and 12: Convictions Under Counts 3 and 4

461. Delic was convicted under Counts 3 and 4 of the Indictment for a grave breach of the Geneva Convention (wilful killing) and with a violation of the laws or customs of war (murder) in respect of the death of Željko Miloševic ("Miloševic"). It was alleged that Delic selected Miloševic from Tunnel 9 where he was detained and brought him outside where Delic and others severely beat him, and that, by the following morning, Miloševic had died from his injuries.

462. The Trial Chamber found that Delic had inflicted numerous beatings on Miloševic while he was detained in the camp. Prior to his death, journalists had visited the camp and Miloševic had been taken out by Delic to make "confessions" in front of them, which Miloševic refused to do. After that incident, Delic called Miloševic out of the tunnel at night, and then beat him severely for a period of at least an hour, such that his screaming and moaning could be heard by the detainees inside the tunnel. The dead body of Miloševic was seen outside the tunnel the next morning. The Trial Chamber found that the beating inflicted on this occasion caused the death of Miloševic.[709]

463. In challenging his conviction under these counts, Delic contends that only two witnesses, Milenko Kuljanin and Novica Đordic, testified to direct knowledge of Delic's involvement in the beating to death of Miloševic, that their testimony is incredible as their

[709] Trial Judgement, paras 832 and 833.

versions of the incident are inconsistent and that their testimony as to events leading up to the death of Milošević conflicts with the testimony of other Prosecution witnesses.[710]

464. The Prosecution argues that the fact that the witnesses did not see the beating which occasioned the victim's death is not of itself a basis for concluding that there was an error of fact. It is contended that the Trial Chamber found that the witnesses were able to confirm that Delic administered the fatal beating and that none of the inconsistencies referred to by Delic establish that this finding was unreasonable.[711]

465. Regarding its findings as to the events leading up to the death of Milošević, the Trial Chamber relied upon the testimony of two witnesses, Milenko Kuljanin and Novica Đordic. The Trial Chamber described Novica Đordic as having testified that he was situated only a very short distance from the door of Tunnel 9, from where he was in a position to see and hear what was going on outside the door when it was open. He conceded that he did not see the final beating as the door of Tunnel 9 was closed, but that he heard Delic calling Milošević out of the tunnel, a discussion, beatings and finally a shot. Milošević did not return to Tunnel 9 that night.[712]

466. The Trial Chamber held that the testimony of Novica Đordic was supported by that of Milenko Kuljanin. It described Milenko Kuljanin as testifying that Delic called Milošević and personally took him out of Tunnel 9. He then heard the victim screaming, moaning and crying out for over an hour, indicating the severity of the beating inflicted upon him.

467. The Trial Chamber stated that the following morning the motionless body of Milošević was observed by a number of Prosecution witnesses, including Novica Đordic, Milenko Kuljanin and Witness J, lying "near the place where [the prisoners] were taken to urinate".[713] The Trial Chamber found that, although there were "some variations between the testimony provided by the witnesses to these events, the fundamental features of this testimony, as it relates to Željko Milošević's last evening of life, are consistent and credible".[714]

468. Delic submits that the inconsistencies between the testimony of Milenko Kuljanin and Novica Đordic were "so great that they are unreliable and they cannot be used to establish the

---

[710] Delic Brief, pp 128-132.
[711] Prosecution Response, paras 11.9-11.11.
[712] Trial Judgement, paras 831-832.
[713] Trial Judgement, para 832.
[714] Trial Judgement, para 832.

facts and reach a judgement".[715] As indicated above, the Trial Chamber did accept that there were some variations in the witnesses' testimony but did not identify specifically what these were. The Appeals Chamber will consider whether the matters referred to by Delic were in fact inconsistencies in the evidence and then consider whether any effect they may have had on the evidence on these counts referred to the Trial Chamber when taken as a whole was such as to make it unreasonable to find that the "fundamental features" of the testimony were sufficiently consistent and credible to justify a finding of guilt beyond reasonable doubt.

469. The first inconsistency identified by Delic relates to the manner in which Miloševic was removed from Tunnel 9. Milenko Kuljanin testified that Delic called Miloševic and personally took him out of Tunnel 9 but that, according to Novica Đordic, Miloševic left the tunnel upon the call of Delic's voice; he made no mention of Delic taking Miloševic out personally.

470. Milenko Kuljanin testified that prior to Miloševic's death, journalists had visited the prison-camp and Miloševic was taken out of Tunnel 9 by Delic and asked to make "confessions" in front of these journalists, which he refused to do.[716] Milenko Kuljanin's evidence as to what followed was that:

> Delic returned [Miloševic and another detainee Rajko Đordic] to tunnel number nine, from which they had come, and when the journalists had left, he entered the tunnel again and said that they would remember him well. Zeljko [Miloševic], however, remained for another couple of days in the tunnel. Delic then came and told him to get ready around 1 pm. Then Deli} came and called Miloševic. I cannot say exactly when he came. It was night. It was perhaps midnight or 2 o'clock am. It was pitch dark. He took Zeljko out personally. He called him to come out and took him out. After they had gone out, we heard Zeljko screaming and moaning and crying out. In the morning when they took us out to go to the toilet, Zeljko Miloševic was behind the door lying there dead.[717]

Novica Đordic testified that:

> And indeed, as Hazim had said, that night -- I don't know what time it was -- his voice could be heard outside building Number 9 and he called out Zjelko Miloševic. Zjelko went out. The door was closed behind him. We heard talk, but this time it was a bit further away from the entrance, so we couldn't understand as well as the previous days when it was just outside the door, but we heard the discussion, later beatings and finally a bullet.[718]

471. There is a difference in the accounts: Novica Đordic testified only that Delic's voice could be heard outside the tunnel and that he "called out" Miloševic, who "went out", and Kuljanin stating that Delic "took him [Miloševic] out personally." It is not possible to understand this as a loose way of saying that he *called* Miloševic out personally in light of his further evidence: "He called him to come out *and took him out.* After *they* had gone out [...]".

---

[715] Appeal Transcript, p 498.
[716] Trial Transcript, pp 5480-81.
[717] Trial Transcript, p 5481.

There is thus a difference in the evidence as to whether Delic came into the tunnel or simply called Milošević from outside. It is apparent that the Trial Chamber found only that Delic had called Milošević out, relying on the fact that the two witnesses had recognised his voice, and did not rely on Milenko Kuljanin's evidence relating to Delic having also personally taken him out. The only relevance of the inconsistency would therefore be as to Kuljanin's credit, which the Appeals Chamber will consider in the context of the other inconsistencies alleged by Delic.

472. The second inconsistency referred to is that, following the sound of beating and screaming, to which the witnesses testified, Novica Đordic heard a "bullet".[719] Milenko Kuljanin did not testify to hearing any shot. Again, the Trial Chamber, having found Milošević died from the *beating* inflicted upon him (to which both witnesses testified), did not rely on the evidence as to the sound of a shot and the only relevance of the matter could be to the credibility of the witnesses.

473. Delic submits that the evidence of Kuljanin and Delic as to the location of Milošević's body on the day following the beating was inconsistent with that of Witness J. Kuljanin gave evidence that:

> In the morning when they took us out to go to the toilet, Zeljko Milošević was behind the door lying there dead.[720]

And then, in response to questioning:

> Q. You say that in the morning, going to the toilet outside you saw the body outside of the tunnel entrance. Did you see the body, both going to the toilet and coming back from the toilet?
>
> A. Yes, it was there on our way and when we were coming back to the tunnel, both times.[721]

Novica Đordic testified that:

> In the morning – I think it was very early – we were taken out in groups of five or six to the toilet or rather the hole, and when I went out right next to the hole on the northern side of the hole was Zjelko Milošević's corpse covered with some kind of rag or tee-shirt over his forehead with a large blood stain.[722]

---

[718] Trial Transcript, p 4179.
[719] Trial Transcript p 4179.
[720] Trial Transcript, p 5481.
[721] Trial Transcript, p 5483.
[722] Trial Transcript, p 4179.

474. Delic points out that the Trial Chamber erred when saying that Milenko Kuljanin saw the dead body "near the place where they were taken to urinate"[723] as the witness testified that he saw the body behind or outside the door of Tunnel 9. Although the Trial Chamber's description of Milenko Kuljanin's testimony appears on its face to be slightly inaccurate, as he testified that he saw the body lying behind the door of Tunnel 9,[724] this inaccuracy, and the alleged inconsistency between the witnesses' testimony as to the location at which the body was found are more apparent than real, when the evidence is taken in context. It appears from the evidence that the hole where the prisoners were taken to urinate was in fairly close proximity to Tunnel 9 and that the area outside the tunnel entrance or door was close enough to where the prisoners were taken to urinate that witnesses referring to the locations by the different descriptions could reasonably be referring to essentially the same place. When asked to describe where the hole was and where the body of Milošević had been found, Novica Đordic responded that:

> The hole was just here, somewhere in the middle of Tunnel Number 9. You pass this small concrete wall and it was just here. The body was right next to the hole.[725]

And in cross-examination, when asked again about the location of the body, the following interchange took place:

> Q. Point again where you saw the corpse?
>
> A. (Indicating) Here *next to a hole that was dug in as a toilet.* He was right next to it in the middle here.
>
> Q. So all of that occurred *behind Tunnel 9*?
>
> A. *Somewhere behind the entrance*, yes.[726]

This witness therefore considered that the relevant location could be described as both "next to the hole" and "behind the entrance" to Tunnel 9.

475. This understanding appears to have been shared by Witness J, who described the location at which he saw Milošević's body as being:

> [...] close to this local [*sic*] which we used to relieve ourselves, we were taken out there. When we were taken there to urinate, we all saw him lying there next to the hole, lying dead and all of us could see him, all the detainees could see him.[727]

---

[723] Trial Judgement, para 832.
[724] Trial Transcript, p 5481.
[725] Trial Transcript, p 4181.
[726] Trial Transcript, p 4232 (emphasis added).
[727] Trial Transcript p 7497.

When asked again where he had seen Miloševic's body, he later elaborated, making indications on a plan of the camp, that it was behind Tunnel 9:

> This was the pit where we went to the toilet and his body was lying next to it. This is also behind number 9. If this is number 9, it would be up here, around this area. I know that it was not far.[728]

The Appeals Chamber therefore regards the evidence as to the location of Miloševic's body on the morning following his beating as fully supporting the Trial Chamber's finding.

476. Delic also argues that the testimony of Witness J that the body of Miloševic was all yellow is inconsistent with that of the two other witnesses who said that his head was covered with some kind of garment stained with blood.[729] The Appeals Chamber considers that there is no necessary inconsistency between these accounts, as it is quite plausible that the skin on those parts of Miloševic's *body* which were visible, was yellow perhaps from ill health, but that he also had a *head* injury which was indicated by the fact that his head was fully or partly covered with a blood stained cloth.

477. Delic alleges that there is an inconsistency in the evidence as to when the incident occurred, as Novica Đordic and Milenko Kuljanin "did not agree on the date that the alleged events occurred".[730] Although Milenko Kuljanin was not able to recall precisely the time of the killing in terms of dates in time,[731] he was able to situate it by reference to other events. His evidence, that it followed shortly after the visit of the journalists,[732] is in no way contradicted by Novica Đordic and Witness J, who did not give specific evidence as to the date on which the fatal beating occurred.

478. Delic contends further that Milenko Kuljanin and Novica Đordic's testimony relating to the death of another detainee, Slavko Šusic, which is similar to that given in relation to the death of Miloševic, was rejected by the Trial Chamber. In relation to the evidence of Novica Đordic, it is not apparent from the Trial Judgement that the Trial Chamber rejected his evidence. It referred to his evidence that he had seen Delic and Landžo take Slavko Šusic out of Tunnel 9, that he had seen Šusic pushed back in a long time later, and that he had died shortly

---

[728] Trial Transcript, p 7510.
[729] Delic Brief, para 293.
[730] Delic Brief, para 293.
[731] *See* Trial Transcript, p 5482: "I spent around 110 days in the tunnel. All this took place during this 110 days which I spent there. Whether it was the beginning of July or the end of June, I cannot really tell. I do not orient myself really quite well, because we really, at least as far as I myself am concerned, cannot remember these more important dates because I could not orient myself in the space of time there. So I cannot say exactly. Possibly, it was the end of June or July, but his killing took place after Slavko Susic's incident".
[732] Trial Transcript, p 5481.

afterwards. The Trial Chamber appeared to accept, rather than to reject it.[733] The fact that the Trial Chamber did not find that Delic and Landžo were responsible for the death of Šusic was not because it disbelieved the witnesses, but because none of them gave sufficient evidence to establish that by the beating Delic and Landžo were responsible for his death. The Trial Chamber did accept that the evidence established that Delic and Landžo had severely beaten Šusic, and on that basis entered convictions for wilfully causing great suffering or serious injury to body or health and cruel treatment.[734]

479. Milenko Kuljanin's testimony in regard to the killing of Slavko Šusic was that, from his position in the Tunnel, he had been able to see Šusic being mistreated in various ways outside the tunnel door, which was open. This was not accepted by the Trial Chamber, on the basis that it "was not convinced that from this location he would have been able to have a clear sight of the mistreatment meted out to Slavko Šusic".[735] It also observed that not all of his evidence was consistent with other witnesses' testimony, but not because of any inherent problem with his credibility which would affect his evidence in relation to all other matters on which he gave evidence.[736] The Appeals Chamber is of the view that it was open to the Trial Chamber, having examined Milenko Kuljanin's testimony in the context of the whole of the evidence in relation to the counts relating to Miloševic, to accept that evidence even though it did not rely on his evidence in relation to other matters for reasons specific to those matters.

480. The Trial Chamber also relied upon evidence as to beatings to which Delic had subjected Miloševic during his detention at the camp which, in combination with evidence as to certain statements made by Delic shortly before the fatal beating of Miloševic, demonstrated Delic's intention at least to inflict serious bodily injury upon him. Upon the evidence presented by numerous Prosecution witnesses,[737] the Trial Chamber found that Miloševic was subjected by Delic and sometimes Landžo to a series of beatings and other abuses prior to the fatal incident. All were either inside Tunnel 9 or outside its entrance and could in general be seen as well as heard by the prisoners in the tunnel.[738]

---

[733] Trial Judgement, para 863.
[734] Trial Judgement para 866.
[735] Trial Judgement, para 862.
[736] Trial Judgement, para 863.
[737] Among the number of Prosecution witnesses relied upon by the Trial Chamber were Miro Golubovic, Novica Đordic, Milenko Kuljanin, Witness P, Risto Vukalo and Witness J. Trial Judgement para 830.
[738] Trial Judgement, para 830. Novica Đordic testified in relation to the occasion on which Miloševic was taken out in front of the journalists that "Zjelko Miloševic was taken out in front of Tunnel Number 9. That means just in front of the door of Tunnel 9, so you can hear very well and see what's happening outside, if we were allowed to look. [...] In his case I remember a piece of cable was used, electrical cable which was about 2 cms thick and it had a steel wire inside this cable, and every time he was taken out, he was beaten very severely, and later led

481. Delic argues that there is an inconsistency in the evidence in relation to these beatings as the Prosecution witness Assa'ad Harraz, one of the journalists who came that day to the camp, denied that detainees were beaten in the presence of the journalists as Milenko Kuljanin and Novica Đordic testified. The Trial Chamber did not refer to the testimony of Assa'ad Harraz in the Judgement in reaching its findings on this issue, but there is no indication that the Trial Chamber did not weigh all the evidence that was presented to it. A Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching particular findings. The Appeals Chamber is satisfied that it was open to the Trial Chamber, which saw the witnesses give their testimony, to prefer the evidence of Milenko Kuljanin and Novica Đordic insofar as any inconsistency arose with the testimony of Assa'ad Harraz.

482. More specifically, there was compelling evidence before the Trial Chamber that Delic had made specific threats to Miloševic warning him that he would be coming for him on the evening on which he was killed. The Trial Chamber referred[739] to the testimony of Milenko Kuljanin that:

> Delic returned [Miloševic and another detainee Rajko Đordic] to tunnel number nine, from which they had come, and when the journalists had left, he entered the tunnel again and said that they would remember him well. Zeljko, however, remained for another couple of days in the tunnel. Delic then came and told him to get ready around 1 pm. Then Delic came and called Miloševic. I cannot say exactly when he came. It was night. It was perhaps midnight or 2 o'clock am.[740]

He reiterated later in his evidence that Delic "...had actually forewarned him [Miloševic] of what was to come and told him to be ready at one, and that was what happened".[741]

483. Although not specifically referred to by the Trial Chamber, Novica Đordic also gave evidence of Delic's specific threats to Miloševic:

> [...] the day before this night [of Miloševic's death], Hazim Delic told him that that night at 1.00 am he would "go to the toilet". I beg your pardon for using the word "to piss".
>
> [...] And indeed, as Hazim had said, that night – I don't know what time it was – his voice could be heard outside building number 9 and he called out Zjelko Miloševic.[742]

---

back in." Trial Transcript, pp 4173-4174. He stated at 4174-4175 that it was Delic who would call Miloševic out. He confirmed at 4176 that the door to the tunnel was mostly open.

[739] Trial Judgement, para 832.

[740] Trial Transcript, p 5481.

[741] Trial Transcript, p 5483.

[742] Trial Transcript, pp 4177 and 4179.

It is reasonable to assume that the Trial Chamber was taking this evidence into account when making its findings as to the threats made by Delic to the victim which demonstrated an intent to cause at least very serious bodily injury to him.[743]

484. As to the inconsistencies in the evidence of the witnesses which Delic has alleged, the only two which the Appeals Chamber can regard as demonstrating genuine differences related to whether Delic called Miloševic out of the tunnel or whether he also personally came in to take him out, and to whether there was a final gunshot. These must be considered in light of the significance of the matters on which the witnesses gave consistent evidence:

- During Miloševic's detention in the prison-camp, he was singled out by Delic for frequent interrogation and was repeatedly beaten or otherwise mistreated by him, including outside the doors of Tunnel 9.
- Shortly prior to his death, Miloševic was taken out of Tunnel 9 by Delic and, with another detainee, was asked to make confessions to visiting journalists which he refused to do. On this occasion too he was beaten.
- Some time after this incident, Delic threatened Miloševic and told him specifically that he would come for him at one o'clock at night.
- At a time late at night, Delic came to Tunnel 9 and called out Miloševic, spoke to him outside the door of Tunnel 9 and then the sounds of beating and the screams, cries and moans of Miloševic could be heard for over an hour.
- The dead body of the victim was seen the following morning near the hole where the prisoners were taken to urinate, behind Tunnel 9.

In the face of this body of evidence, the Appeals Chamber does not believe it was unreasonable for the Trial Chamber to regard these inconsistencies as being of inadequate significance to undermine the fundamental features of the evidence.

485. As is clear from the above discussion, the other matters raised by Delic as undermining the credibility of the witnesses are not, in the view of the Appeals Chamber, of such a character as would require a reasonable Trial Chamber to reject their evidence. The Appeals Chamber is satisfied that on the evidence before the Trial Chamber it was open to accept what it described as the "fundamental features" of the testimony.

486. Having made the findings set out above, it was reasonable to find that Delic had subjected Miloševic to a prolonged and serious beating, that this beating had caused his death, and that it was inflicted with an intention to kill or at least to cause serious bodily injury. It was

[743] Trial Judgement, para 833.

therefore not unreasonable for the Trial Chamber to regard the totality of the evidence, when taken as a whole, as establishing beyond reasonable doubt Delic's guilt.

487. Deli}'s grounds of appeal relating to Counts 3 and 4 must accordingly be dismissed.

D. Issues 13 and 14: Convictions Under Counts 18 and 19

488. In Counts 18 and 19, Delic was found guilty of torture for the rape of Grozdana Cecez (for the purposes of this section, "the victim").[744] It was found that the victim was taken to the Celebici camp on 27 May 1992 and on her arrival was brought to a room in which Delic was waiting. She was interrogated by Delic, during the course of which he slapped her. She was then taken to another room with three men including Delic. Delic subsequently raped her.[745] It was found that these rapes constituted the offence of torture.[746]

489. Delic's principal argument centres on the victim's testimony, submitting that it was so weak and contradicted, that the Trial Chamber's conclusions were clearly wrong.[747] In particular, he refers to elements of her testimony which illustrate her unreliability because: (1) she failed to identify Delic properly;[748] (2) her own evidence was weak and contradictory when given in relation to certain issues;[749] (3) her evidence contradicted evidence given by other witnesses, in particular Milojka Antic;[750] and (4) she was unable to recall certain events,[751] illustrating what he describes as her "selective memory".[752]

490. As to the reliability of the testimony presented in relation to these counts, the Trial Chamber in general found:

> the testimony of Ms. Cecez, and the supporting testimony of Witness D and Dr. Grubac, credible and compelling, and thus concludes that Ms. Cecez was raped by Delic, and others, in the ^elebici prison-camp.[753]

491. The argument made under these grounds attacks the credibility and reliability of the main witness on whom the Trial Chamber relied to convict. The Appeals Chamber recalls that

---

[744] Specifically, Delic was found guilty of torture as a Grave Breach of Geneva Convention IV (Article 2(b) of the Statute) and as a Violation of the Laws or Customs of War (Article 3 of the Statute): Trial Judgement para 943.
[745] Trial Judgement, para 937.
[746] Trial Judgement, para 941.
[747] Delic Brief, para 304; Appeal Transcript, p 499.
[748] Delic submits that although she later identified him by name, she was unable to identify him in a photograph array prepared by the Prosecution and she was not asked to identify him in court. Delic Brief, para 305.
[749] Appeal Transcript, p 501.
[750] Delic Brief, para 302.
[751] Appeal Transcript, p 500.
[752] Delic Brief, para 306.
[753] Trial Judgement, para 936.

the Trial Chamber was in the best position to hear, assess and weigh this testimony. It was accordingly for the Trial Chamber to consider whether the witness was reliable and her evidence credible. In such circumstances, the Appeals Chamber must always give a margin of deference to a Trial Chamber's evaluation of the evidence and findings of fact.[754] It is for Delic in these circumstances to demonstrate that this evidence could not reasonably have been accepted by any reasonable person, that the Trial Chamber's evaluation was wholly erroneous and that therefore the Appeals Chamber should substitute its own finding for that of the Trial Chamber.[755]

492. Delic does not dispute the fact that the Rules do not require corroboration of a victim's testimony.[756] However, although the Trial Chamber also relied on additional testimony to support the principal account, the only direct evidence (and that disputed) in relation to the rapes carried out by Delic was that of the victim. Delic states that this testimony was not worthy of belief, due primarily to inconsistencies in the evidence which he claims illustrate its unreliability.

493. As to these alleged inconsistencies, Delic firstly alleges that the victim's identification of him as the person who raped him was suspect, as she could not identify him in a photograph array and was not asked to identify him directly in court.[757] The Trial Chamber found that: "Upon her arrival at the prison-camp she was taken [...] to a room where a man with a crutch was waiting, whom she subsequently identified as Delic".[758] The Appeals Chamber notes that the victim, having identified Delic at the start of her testimony as "the man with a crutch", confirmed this identification throughout her testimony,[759] while also referring to him by name.[760] The Appeals Chamber sees no reason to question the evaluation of this identification by the Trial Chamber.

---

[754] *Tadic* Appeal Judgement, para 65; *Aleksovski* Appeal Judgement, para 63.
[755] *Aleksovski* Appeal Judgement, para 63.
[756] Rule 96(i) of the Rules provides that in cases of sexual assault, "no corroboration of the victim's testimony shall be required".
[757] Delic Brief, paras 297 and 305.
[758] Trial Judgement, para 937.
[759] In testimony, she stated: "When I entered that room, it was a very small room. I saw a man with a crutch. There was a crutch next to him. His leg was bandaged". Trial Transcript p 491. She continued to refer to him as the "the man with the crutch", (*e.g.*, Trial Transcript p 492, when asked who slapped her) and '[t]he one with the crutch" (*e.g.*, Trial Transcript p 494, when asked who raped her). She then stated: "At that time I still did not know who he was but later I found out. Soon after that I found out who and what he was Hazim Delic" (Trial Transcript p 494).
[760] In particular, when asked again to confirm the identification, Grozdana Cecez stated that although she did not know who Delic was when he raped her, she "learned shortly [after]. [ ] The women from Bradina had come, and somebody from the entrance was looking for Hazim Delic and he appeared, so I realised that he was the man. He was carrying a crutch and he was limping, so I knew straight away who he was". She further testified

494. Delic specifically points to the fact that the victim failed to identify Delic from a photograph array. The Appeals Chamber notes that when questioned as to her inability to identify Delic from the photographs, the victim replied: "I am not sure. All those pictures were of bald-ish men. So I didn't dare say which one. Maybe the man has changed. After all, I haven't seen him for five years. So I was not sure".[761]

495. The Appeals Chamber determines that it has no reason to find that the Trial Chamber erred in its findings as to the victim's identification of Delic. The Appeals Chamber notes that the victim identified Delic by name on several occasions throughout her testimony and continued to refer to him as such throughout.[762] In addition, although not a necessary requirement, the Appeals Chamber notes that there were corroborating accounts before the Trial Chamber of the fact that Delic was identified as using a crutch.[763] The simple fact that the victim failed to identify him in a photograph array (or rather, as it appears to the Appeals Chamber, was too cautious to try to identify him), several years after the incident took place, does not suffice to illustrate fault on behalf of the Trial Chamber's overall appreciation of the evidence and treatment of identification.[764]

496. Delic also refers to certain inconsistencies in the victim's testimony, which he states illustrate that it was unreliable.[765] The Appeals Chamber notes that as an introduction to its consideration of the factual and legal findings, the Trial Chamber specifically discussed the

---

that she "saw him quite frequently", that he was there all the time and that she heard his name frequently (Trial Transcript pp 513-514, 517).

761 Trial Transcript, p 516.

762 *See* Trial Transcript, p 510-511.

763 Corroboration is not *required* either in general (*see* for example: *Aleksovski* Appeal Judgement, para 62: "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration"); *Tadic,* Appeal Judgement, para 65, or in particular, in relation to testimony by victims of sexual assault. In any event, the testimony of other witnesses, although not expressly referred to by the Trial Chamber, did refer to the identifying feature that Deli} used a crutch. For example, Dr Grubac (Trial Transcript pp 5998-5999), whose testimony was relied upon by the Trial Chamber to convict on these counts, finding it also to be credible and compelling (Trial Judgement, para 939). He testified that: "A day after my arrival to Celebici I met Hazim Delic.[...]. Knowing him I thought I could address him and I did, and I told him, 'here I am' [...]. At that time he was carrying a crutch under his armpit. He said his leg had been injured; he was limping a little bit and using this crutch". *See* also the testimony of Mirko Dordic (Trial Transcript p 4718) and Dr Jusufbegovic (Trial Transcript p 11963).

764 *See Furundžija* Appeal Judgement, paras 103-107, where the Appeals Chamber agreed with the Trial Chamber finding that the identification of the accused by the victim in that case was satisfactory, because despite minor and reasonable inconsistencies in her identification, there was "in any event [...] other evidence of the Appellant's identity on the basis of which it would be reasonable for the Trial Chamber to be satisfied with the identification of the Appellant" (para 107).

765 In particular, he refers to: her failure to recollect when she made corrections to a statement made to investigating magistrates in Yugoslavia; her failure to recall being interviewed on television; the fact that her testimony contradicted that of another witness, Milojka Antic, when she stated that she had given her contraceptive pills and that of her physician who stated that he did not recommend for her contraceptive pills.

nature of the evidence before it.[766] It found that often the testimony of witnesses who appear before it, consists of a "recounting of horrific acts"[767] and that often "recollection and articulation of such traumatic events is likely to invoke strong psychological and emotional reactions [...]. This may impair the ability of such witnesses to express themselves clearly or present a full account of their experiences in a judicial context".[768] In addition, it recognised the time which had lapsed since the events in question took place and the "difficulties in recollecting precise details several years after the fact, and the near impossibility of being able to recount them in exactly the same detail and manner on every occasion [...]."[769] The Trial Chamber further noted that inconsistency is a relevant factor "in judging weight but need not be, of [itself], a basis to find the whole of a witness' testimony unreliable".[770]

497. Accordingly, it acknowledged, as it was entitled to do, that the fact that a witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime. With regard to these counts, the Trial Chamber, after seeing the victim, hearing her testimony (and that of the other witnesses) and observing her under cross-examination chose to accept her testimony as reliable. Clearly it did so bearing in mind its overall evaluation of the nature of the testimony being heard. Although the Trial Chamber made no reference in its findings to the alleged inconsistencies in the victim's testimony, which had been pointed out by Delic, it may nevertheless be assumed that it regarded them as immaterial to determining the primary question of Delic's perpetration of the rapes.[771] The Appeals Chamber can see no reason to find that in doing so it erred.

498. The Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable. Delic has failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the

[766] Trial Judgement, paras 594-598.
[767] Trial Judgement, para 595.
[768] Trial Judgement, para 595.
[769] Trial Judgement, para 596.
[770] Trial Judgement, para 597.
[771] *See* also Prosecution Response, para 11.14.

evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond a reasonable doubt on these grounds.[772]

499. Accordingly, these grounds of appeal must fail.

E. Issues 15 and 16: Convictions under Counts 21 and 22

500. Counts 21 and 22 related to repeated incidents of forcible sexual intercourse and rape of Witness A (Ms Antic)[773] over six weeks by Delic. Count 21 charged Delic with a grave breach of the Geneva Conventions (torture) under Article 2 of the Statute. Count 22 charged him with a violation of the laws or customs of war, based on common Article 3 of the Geneva Conventions (torture), under Article 3 of the Statute.

501. Based upon the testimony of Ms Antic, the Trial Chamber identified and discussed in the Judgement three occasions when Ms Antic was raped by Delic. The first time was on the night of her arrival in the Celebici camp, in Building B, when Delic interrogated her and threatened to shoot her or transfer her to another camp if she did not comply with his orders.[774] The second time occurred in Building A, after Deli} had ordered Ms Antic to wash herself in Building B. On that occasion Delic was found to have penetrated her both anally and vaginally.[775] The third rape occurred in Building A during the day.[776] The Trial Chamber noted that on the three occasions Delic was in uniform and armed and threatened her.[777] The Trial Chamber also observed that the victim was constantly crying and had to be treated with tranquilizers, and concluded that "there can be no question that these rapes caused severe mental and physical pain and suffering to Ms Antic".[778] The Trial Chamber found that the rape and severe emotional and psychological suffering of Ms Antic was corroborated by the testimony of Ms Cecez and Dr Gruba~.[779] It also concluded that the purpose of the first rape was to obtain some information and that the rapes were perpetrated by Delic with a

[772] *Aleksovski* Appeal Judgement, para 64.
[773] The witness referred to as Witness A in the Indictment did not seek protective measures at trial and was subsequently referred to as Ms Milojka Antic in the Judgement; *See* para 945, Trial Judgement.
[774] Trial Judgement, para 958.
[775] *Ibid*, para 960.
[776] *Ibid*, para 961.
[777] *Ibid*, para 963.
[778] *Ibid*, para 964.
[779] *Ibid*, para 959.

discriminatory intent.[780] The Trial Chamber accordingly found Delic guilty of torture under Counts 21 and 22 of the Indictment.[781]

502. Deli} contends that the Trial Chamber erred in relying on the testimony of the victim only, which was not consistent and not credible. He further argues that the Trial Chamber wrongly relied on a "presumption of reliability" in favour of the rape victim who gave testimony in court, thus shifting the burden of proof to the defence to rebut that presumption. He submits that Rule 96(i) of the Rules merely removes a presumption of unreliability of victims of sexual offence but does not create a legal presumption that victims are reliable witnesses, which would be contrary to Article 21(2) of the Statute. Deli} submits that acquittals should be substituted on these counts or that a new trial should be ordered.[782]

503. The Prosecution submits that the testimony of a single witness on a material fact may be sufficient to establish guilt beyond reasonable doubt. Contrary to Deli}'s contention, the Trial Chamber's reference to a presumption of reliability in relation to victims of sexual assault does not imply that the accused is presumed guilty. In the Prosecution's submission, Deli}'s arguments as to unreliability do not demonstrate that the Trial Chamber's findings were unreasonable.[783]

504. The arguments put forward by Deli} are primarily concerned with the standard used by the Trial Chamber to assess the testimony of the victim of the sexual assaults perpetrated by him. The relevant paragraph of the Judgement reads:

> The Trial Chamber notes that sub-Rule 96(i) of the Rules, provides that no corroboration of the victim's testimony shall be required. It agrees with the view of the Trial Chamber in the *Tadi} Judgement*, quoted in the *Akayesu Judgement*, that this sub-Rule:
>
> > accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of other crimes, something long been denied to victims of sexual assault by the common law.[784]

505. The Trial Chamber in this paragraph was expressing its agreement with the holding of another Trial Chamber that victims of sexual assault should be considered as reliable as victims of other crimes. The use of the term "presumption of reliability" was inappropriate as there is no such presumption. However, the Appeal Chamber interprets that holding as simply affirming that the purpose of Rule 96(i) is to set forth clearly that, contrary to the position taken

---

[780] *Ibid*, para 963.
[781] The Trial Chamber dismissed Count 23, a violation of the laws or customs of war, with which Deli} was charged in the alternative; *See* para 965.
[782] Deli} Brief, paras 308-319; Deli} Reply, paras 124-128, and Appeal Transcript, pp 502-503.
[783] Prosecution Response, paras 11.15-11.17, and Appeal Transcript, pp 535-538.

in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness. The appellant's argument that the Trial Chamber shifted the burden of proof to the Defence is thus misconceived, as the Trial Chamber did not rely on any "presumption of reliability" to assess the evidence before it. In the paragraph following the one just quoted the Trial Chamber assessed the evidence of Ms Anti} as follows:

> Despite the contentions of the Defence, the Trial Chamber accepts Ms. Anti}'s testimony, and finds, on this basis, and the supporting evidence of Ms.]e}ez, Witness P and Dr. Petko Gruba~, that she was subjected to three rapes by Hazim Deli}. *The Trial Chamber finds Ms. Anti}'s testimony as a whole compelling and truthful, particularly in light of her detailed recollection of the circumstances of each rape and her demeanour in the court room in general and, particularly, under cross-examination.* The alleged inconsistencies between her evidence at trial and prior statements are immaterial and were sufficiently explained by Ms. Anti}. She consistently stated under cross-examination that, when she made those prior statements, she was experiencing the shock of reliving the rapes that she had "kept inside for so many years". Further, the probative value of these prior statements is considerably less than that of direct sworn testimony which has been subjected to cross-examination.[785]

506. As already stated, there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence.[786] What matters is the reliability and credibility accorded to the testimony. Contrary to Deli}'s assertion, the Trial Chamber did not presume that the testimony of Ms Anti} was reliable and credible as it discussed it carefully, and identified particular reasons why it considered her credible. Clearly, the testimony of Ms Anti} was ascertained on its individual merit, and treated as the testimony of any other witness, and the Trial Chamber was careful to discuss the inconsistencies between prior and live testimony.[787] Moreover, as held above and also in this Judgment, the hearing, assessing and weighing of the evidence presented at trial is primarily vested with the Trial Chamber, which is best placed to ascertain whether a witness is reliable in the circumstances of the case.[788]

507. The Appeals Chamber is of the view that the appellant has failed to demonstrate that the Trial Chamber erred in its evaluation of the evidence, and reached a conclusion that no reasonable tribunal could have reached. Accordingly, these grounds of appeal must fail.

---

[784] Trial Judgement, para 956 (footnote omitted).
[785] Trial Judgement, para 957 (emphasis added).
[786] *See* above para 492.
[787] Trial Judgement, para 957.
[788] *Tadic* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

F. Issues 17 and 18: Convictions Under Counts 46 and 47

508. The final convictions against which Delic appeals on the grounds of error of fact are Counts 46 and 47 of the Indictment, which contained the following charges:

> Count 46. A Grave Breach punishable under Article 2(c) (wilfully causing great suffering) of the Statute of the Tribunal; and
>
> Count 47. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.[789]

These charges are based on paragraph 35 of the Indictment, which alleges that:

> [b]etween May and October 1992, the detainees at ^elebi}i camp were subjected to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as sleeping and toilet facilities. These conditions caused the detainees to suffer severe psychological and physical trauma...

The Indictment charged Delic under Article 7(1) of the Statute with having directly participated in creating these conditions, and with responsibility as a superior under Article 7(3).

509. The Trial Chamber found that because Delic could not be held responsible as a superior under Article 7(3), he could not be held responsible for the inhumane conditions which prevailed in the camp generally. However, it found that:

> [...] by virtue of his direct participation in those specific acts of violence with which he is charged in the Indictment and which the Trial Chamber has found proven above, Hazim Delic was a direct participant in the creation and maintenance of an atmosphere of terror in the Celebici prison camp.[790]

It therefore found Delic guilty of Counts 46 and 47 under Article 7(1).

510. The Trial Chamber had found Delic guilty of specific acts of violence under Counts 3 and 4 (killing of Željko Miloševic), 11 and 12 (wilfully causing great suffering or serious injury to and cruel treatment of Slavko Šušic), 18 and 19 (torture and rape of Ms Cecez), 21 and 22 (torture and rape of Ms Antic), and 42 and 43 (inhumane acts involving use of electrical device).[791] Although the Appeals Chamber has found that the Trial Chamber erred in finding Delic guilty of Counts 1 and 2 (killing of Ščepo Gotovac), it notes that in overturning the finding that Delic was responsible for the death of Gotovac it did not disturb the Trial Chamber's finding that Delic had participated in the first beating of the victim.

---

[789] Indictment, 19 Mar 1996, para 35.
[790] Trial Judgement, para 1121.
[791] *Ibid* at para,1285.

511. The Appeals Chamber observes that in imposing these convictions, the Trial Chamber made a number of findings of specific acts of violence inflicted by Delic, based on the testimony of witnesses who testified as to Delic's direct participation in promoting the atmosphere of terror created by the killings, abuse and inhumane living conditions at the Celebici camp.

512. The Trial Chamber found that it was proved beyond reasonable doubt that Delic had raped Ms Antic on three occasions in threatening and coercive circumstances.[792] In her testimony, Milojka Antic described in great detail the three occasions on which she had been raped by Delic.[793] As noted above in relation to the grounds of appeal relating to Delic's convictions for the rape of Ms Antic under Counts 21 and 22, the Trial Chamber accepted Ms Antic's testimony as being overall "compelling and truthful"[794] and the Appeals Chamber has accepted that the Trial Chamber acted reasonably in arriving at that conclusion. The Trial Chamber also found that Delic raped Ms Cecez.[795] Again, the Appeals Chamber has considered this finding in relation to Delic's appeal against his conviction under Counts 18 and 19 of the Indictment and has found that the Trial Chamber considered the testimony of Ms Cecez, after a discussion of the nature of such evidence, and was not unreasonable in accepting her evidence and convicting him under those counts.

513. The Trial Chamber found that Delic had participated in the beating of a group of detainees and had ordered at least one guard to do the same.[796] In relation to that incident, a number of witnesses testified that, following the burning of the village of Bradina, Delic ordered as a vindictive measure that all detainees from Bradina be beaten. Evidence as to this and other collective beatings was given by Witness R,[797] Witness F,[798] Witness M,[799] Mirko Đordic[800] and Hristo Vukalo.[801] This evidence was adduced largely for the purpose of indicating Delic's superior authority, but was not accepted by the Trial Chamber as proving that status. However, it was accepted by the Trial Chamber as being "indicative of a degree of

[792] Trial Judgement, paras 958-965.
[793] Trial Transcript, pp 1779-1800.
[794] Trial Judgement, para 957.
[795] Trial Judgement, para 936.
[796] Trial Judgement, para 804
[797] Trial Transcript, p 7801.
[798] Trial Transcript pp 1323, 1337.
[799] *Ibid* at pp 5048, p 5050.
[800] *Ibid* at pp 4760-4761.
[801] *Ibid* at p 6269.

influence Hazim Delic had in the Celebici prison-camp on some occasions, in the criminal mistreatment of detainees".[802]

514. Delic was also convicted of inhuman treatment and cruel treatment under Counts 42 and 43 of the Indictment for the use of a device emitting electrical current on Milenko Kuljanin and Novica Đordic.[803] The Trial Chamber found that:

> [...] Hazim Delic deliberately used an electric shock device on numerous prisoners in the Celebici prison-camp during the months of July and August 1992. The use of this device by Delic caused pain, burns, convulsions, twitching and scaring [*sic*]. Moreover, it frightened the victims and reduced them to begging for mercy from Delic, a man who derived sadistic pleasure from the suffering and humiliation that he caused.[804]

This finding was based on the testimony of at least six witnesses, explicitly identified in the Trial Judgement.[805] Delic's conviction under these counts was not the subject of appeal.

515. The Appeals Chamber has also reviewed the Trial Chamber's findings in relation to Delic's participation in the incidents relating to Ščepo Gotovac. Although the Appeals Chamber has found that the Trial Chamber's finding that Delic was responsible for the death of Ščepo Gotovac and therefore his conviction under Counts 1 and 2 of the Indictment cannot stand, it has accepted that the Trial Chamber's finding that Delic was involved in at least one violent beating of Gotovac was clearly open on the evidence.

516. In relation to Counts 11 and 12 which charged the wilful killing and murder of Slavko Šušic, the Trial Chamber found that despite there being a "strong suspicion" that Šušic died as a result of the severe beating and mistreatment inflicted upon him by Delic and Landžo, it was not absolutely clear who inflicted the fatal injuries. As a result the Trial Chamber found Delic and Landžo not guilty of wilful killing and murder but did convict them both of wilfully causing great suffering or serious injury to and cruel treatment on the basis that it was "clear that Delic and Landžo were, at the very least, the perpetrators of heinous acts which caused great physical suffering to the victim".[806] In reaching that finding the Trial Chamber referred to the evidence of four witnesses who had witnessed Delic personally beating Šušic.[807]

---

[802] Trial Judgement, para 806.
[803] Trial Judgement, para 1059.
[804] Trial Judgement, para 1058.
[805] Witness P, Witness B, Witness R, Novica Đordic, Milenko Kuljanin and Stevan Gligorevic. *See* Trial Judgement, paras 1053-1056; based on testimony at Trial Transcript at pp 4560 (Witness P), 5047 (Witness B), 7782 (Witness R) 4197 (Novica Đordic), 5453 (Milenko Kuljanin) and 1455 (Stevan Gligorevic).
[806] Trial Judgement, para 866.
[807] Trial Judgement, para 864. The transcripts confirm that this was in fact the evidence of the identified witnesses: Grozdana Cecez (Trial Transcript pp 547-548), Miljoka Antic (pp 1804-1806), Miro Golubovic (pp 2132-2134), Witness P (pp 4544-4554).

517. Although the Trial Chamber did not rely on Delic's involvement in the creation of the prevailing inhumane living conditions at the camp, it did refer in its findings under this count to the testimony of certain witnesses as to Delic's direct participation in creating those conditions. The Trial Chamber described as "compelling" the evidence of Witness R that access to water became increasingly restricted until it reached a stage where "under threat of heavy beatings and even death, not a drop of water could be brought in without the knowledge and permission of the deputy commander Hazim Delic".[808] With regard to the provision of medical care, the Trial Chamber referred specifically to the testimony of Witness R who stated that "when confronted with a request for medical care by a detainee, Hazim Delic would respond "sit down, you have to die anyway, whether you are given medical assistance or not".[809] The Trial Chamber also referred specifically to the testimony of Mirko Dordic as to Delic's participation in creating severely restricted access to toilet facilities:

> Hazim Delic would force us to go to urinate in a group of 30-40 people. We had to run there. Upon his command he would say: 'Take it out. Stop.' This was very short, the time we had. We just ran out and had to run back, so that there were people who just didn't have enough time to finish.[810]

The Trial Chamber referred to the testimony of four other witnesses which confirmed this account.[811]

518. The above evidence, consisting of testimony stating that Delic perpetrated acts of rape and cruelty in the Celebici camp, led the Trial Chamber to the conclusion that Hazim Delic was very much involved in the abuse and ill-treatment of the detainees at the camp. In particular, the Trial Chamber observed that testimony of the witnesses suggested that on many occasions, he was a direct participant and primary actor in acts of inherent cruelty.

519. However, Delic presents three specific arguments in support of his claim that the convictions under Counts 46 and 47 were not based on factually sufficient evidence. In particular, Delic submits that the Trial Chamber ignored the testimony of Dr Bellas, a forensic pathologist, according to whom there would have been evidence of widespread infectious diseases, deaths or injuries due to heat stroke, or evidence of more injuries, greater severity of

---

[808] Trial Judgement at para 1097, referring to Trial Transcript at p 7706-7707.

[809] Trial Judgement at para 1089, referring to Trial Transcript at p 7774. Other evidence given by Witness R in relation to specific persons supports this account: Trial Transcript at pp 7706-7 as did the evidence of other witnesses, *see e.g.*, Nedeljko Draganic who testified that he was injured and that "whenever [he] would ask to go [to the infirmary] so that they could clean the wound, very often Delic would not allow [him] to go". Trial Transcript, p 1631.

[810] *Ibid* at p 4726, referred to by the Trial Chamber in the Trial Judgement at para 1109.

[811] Trial Judgement, para 1109.

injuries and more complications, if the Prosecution's witnesses were truthful.[812] Delic also submits that an Egyptian journalist, Mr Harraz, visited the camp and saw no signs of mistreatment or cruel treatment of the prisoners.[813] Finally, Delic submits that the Trial Chamber should have considered the defence of necessity, which "generally allows a person to break the law—so long as it does not involve the intentional killing of an innocent—so long as the benefit of violating the law is greater than the danger the law is designed to prevent".[814]

520. These arguments could be rejected by reference alone to the fact that they misconceive the basis upon which the Trial Chamber found Delic guilty under Counts 46 and 47 of the Indictment. These arguments focus on the evidence relating to the general conditions in which the detainees were kept. However, as noted above, the Trial Chamber did not find that Delic was responsible generally for the living conditions within the camp. Delic was found guilty under Counts 46 and 47 for having been "a direct participant in the creation and maintenance of an atmosphere of terror in the Celebici prison-camp" by virtue of each of the specific acts of violence with which he had been charged in the Indictment and which the Trial Chamber had found to be proved.[815] As already observed, it was clearly open to the Trial Chamber to make those findings on the basis of the evidence before it. The Appeals Chamber will nevertheless consider the specific objections raised by each of the arguments.

521. An examination of the testimony of Dr Bellas reveals that, contrary to Delic's submissions, it is not inconsistent with the witnesses' testimony detailed above. When asked whether, given the conditions in the Celebici camp, he would have expected to see numerous cases of heat stroke, Dr Bellas replied: "Well, if not numerous, I could expect to have some people with real, real problems about the environmental temperature".[816] This indicates that *numerous* cases of heat stroke need not have resulted. With regard to infectious diseases, Dr Bellas admitted that he was not stating that one would expect to a reasonable medical probability that there would be a cholera epidemic in the camp.[817] He stated that diarrhoea was also an infectious disease, and that some prisoners did in fact suffer from it.[818] He agreed that there are many open wounds that do not develop gangrene,[819] and that some infections remain localized, without spreading to other parts of the body.[820] In addition, he maintained that

---

[812] Delic Brief, para 329 (g).
[813] *Ibid* at para 330.
[814] *Ibid* at para 337.
[815] Trial Judgement at para 1121.
[816] Trial Transcript at p 13954.
[817] *Ibid* at p 14024.
[818] *Ibid*.
[819] *Ibid* at p 14025.
[820] *Ibid* at pp 13994-13995.

portions of the transcript indicating that persons lost consciousness and died as a result of beatings were not inconsistent with his medical opinion.[821] He also indicated that rib fractures "can heal spontaneously with time".[822]

522. It is also apparent from the testimony of Dr Bellas that it was difficult for him to be statistically precise about injuries and illnesses, because he was relying on transcripts, not on medical examinations of the victims following these incidents, and a more precise evaluation of each incident depended on crucial factors unknown to him – namely, the degree of force used, the positioning of instruments of force, and the individual resistance of a person. As a result, the Appeals Chamber concludes that it is completely open to a reasonable tribunal of fact to find that this evidence in no way undermines the strength of the evidence concerning Delic's acts of abuse and cruelty.

523. In evaluating Mr Harraz's testimony as to its capacity to undermine the testimony of the witnesses discussed above, it should be noted at the outset that Mr Harraz stated that he believed the visit took forty-five minutes to an hour, and that when he talked to a few of the prisoners, officials from the camp were also present.[823] He was not allowed to visit the area reserved for "hard cases".[824] In the large ward, he only "*quickly* scanned the faces of the prisoners".[825] The combination of these factors make it unlikely that Mr Harraz would have been able to perceive evidence of abuse. In addition, the following exchange contained in the transcript is significant:

> Mr Moran (In cross examination): So if someone were to come and say that people were beaten for an hour in front of you and your cameraman, those people would either be mistaken or they would be lying, would they not?
>
> Mr Harraz: I do not know, perhaps they are talking about what happened in front of other reporters. I can only say what happened before me in that place and I think even if any torture, beating or humiliations happened, *I do not think that would happen before cameras.*[826]

524. Mr Harraz also admitted that while the general impression he received was that the camp was not a place where acts of torture were carried out, "of course, the persons in charge of the camp knew that [they] were coming on the next day to visit the camp".[827] These statements reveal that Mr Harraz himself acknowledged that acts of abuse could have been carried out in

---

[821] *Ibid* at p 14026.
[822] *Ibid* at p 13963.
[823] *Ibid* at p 5820.
[824] *Ibid* at p 5830.
[825] *Ibid* at p 5831 (emphasis added).
[826] *Ibid* at p 5895 (emphasis added).
[827] *Ibid* at p 5831.

the camp. Therefore, a reasonable tribunal of fact could not conclude that Mr Harraz's testimony disproves the testimony of the witnesses concerning Delic's acts of violence and mistreatment.

525. Finally, the defence of necessity, also raised by Delic in relation to his convictions under Counts 46 and 47, is simply inapposite. Such a defence could not be used to justify the acts of cruel treatment upon which the Trial Chamber founded these convictions. The Trial Chamber disposed of this argument, correctly, on the basis that the legal standards regulating the treatment of the detainees were "absolute, not relative.[828] They delineate a minimum standard of treatment, from which no derogation can be permitted". Further, as previously observed by the Appeals Chamber, even assuming the existence of a defence of necessity under international law, it is simply not possible to raise such a defence in relation to an allegation of *active* mistreatment of detainees for which no justification could exist.[829]

526. Having considered the evidence provided by the above witnesses, the Appeals Chamber can arrive at only one conclusion: the evidence was factually sufficient to support Delic's convictions under Counts 46 and 47 of the Indictment. The evidence overwhelmingly indicates that Delic wilfully caused great suffering to the prisoners (Count 46) and treated them cruelly (Count 47). No reasonable tribunal of fact would conclude merely on the basis of Dr Bellas' and Mr Harraz's testimony that Delic did not commit these acts. As a result, this Chamber cannot hold that the conclusion of guilt beyond a reasonable doubt is one that *no* reasonable tribunal of fact could have reached.

527. For the foregoing reasons, the Appeals Chamber therefore rejects these grounds of appeal and upholds the convictions against Hazim Delic under Counts 46 and 47.

[828] Trial Judgement, para 1117; *see* also para 1118.
[829] *Aleksovski* Appeal Judgement, para 54.

VIII. THE PROSECUTION INTERVIEWS WITH MUCIC

528. Mucic has appealed against (1) a decision by the Trial Chamber admitting into evidence interviews conducted with him following his arrest and (2) a decision by the Trial Chamber refusing to issue a subpoena to an interpreter.[830] Although these decisions were confirmed in the Trial Judgement,[831] the original interlocutory decisions were issued by the Trial Chamber on 2 September 1997 ("the Exclusion Decision")[832] and 8 July 1997 ("the Subpoena Decision")[833] respectively. The Appeals Chamber notes that although Mucic has separated his submissions in relation to each decision, in fact both relate to the same issue, that is whether or not Mucic voluntarily waived the right to have counsel present during certain of his interviews. Mucic's ultimate submission is that the Trial Chamber erred in finding that this waiver was voluntary and as a result, evidence of all of the interviews should have been excluded from the trial proceedings.

(i) Background

529. On 8 May 1997, Mucic filed a motion seeking to exclude from evidence interviews conducted with him following his arrest.[834] Between 2 June and 11 June 1997, the Trial Chamber heard testimony from the Prosecution witnesses through whom these interviews would be admitted. On 2 June 1997, Mucic filed an *ex parte* motion seeking an order compelling an interpreter present throughout the interviews to give evidence. On 12 June 1997, the Trial Chamber heard oral arguments from the parties on the motion to exclude evidence following which it made an oral ruling on the same day. On 8 July 1997, the Trial Chamber issued the Subpoena Decision and on 2 September 1997 it issued the Exclusion Decision.

---

[830] Although Mucic filed his Notice of Appeal on 27 November 1998, on 26 July 1999 he filed the Particulars of the Grounds of Appeal of the Appellant Zdravko Mucic Dated The 2nd July 1999. In this document, he separated this issue into two grounds of appeal, labelled ground 5 (concerning the admission into evidence of Mucic's interviews held from 19 – 21 March 1996) and ground 6 (concerning the refusal of the Trial Chamber to issue a subpoena to an interpreter). By Order dated 31 March 2000 (Order on Motion of Appellants Hazim Delic and Zdravko Mucic for leave to file supplementary brief and on Motion of Prosecution for leave to file supplementary brief), Mucic was ordered *inter alia* to file a document identifying his amended grounds of appeal. On 31 May 2000 this document was filed (Appellant Zdravko Mucic's Final Designation of his Grounds of Appeal) and in doing so he renumbered and re-organised the issues, filing this issue as one ground of appeal (concerning the admission into evidence of the prosecution interviews). The Appeals Chamber will however consider the two separate issues raised by this ground of appeal, noting that in any event they are clearly related.

[831] Trial Judgement, paras 59 and 63.

[832] Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 Sept 1997. The Trial Chamber initially ruled orally on this motion on 12 June 1997 (Transcript, pp 4093 – 4098).

[833] Decision on the Motion *ex parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997.

[834] Motion to Exclude Evidence, 8 May 1997.

530. In the Exclusion Decision, the Trial Chamber found that statements made by Mucic to the Austrian Police Force on 18 March 1996 ("the First Interviews") should be excluded from evidence as having been obtained in breach of his right to counsel under Article 18 of the Statute and Rule 42 of the Rules. It reached this decision on the basis that Mucic was denied the right to counsel during the First Interviews because the Austrian procedural rules did not recognise the right of a suspect to have counsel present during questioning. However, statements made to Prosecution investigators on 19, 20 and 21 March 1996 ("the Second Interviews") were ruled admissible, on the basis that Mucic was clearly informed of his right under the Rules to have counsel present and he voluntarily waived it.[835]

531. Mucic points out that it is clear that the Trial Chamber relied upon the Second Interviews in the course of its Judgement and consequent conviction of him. However, he submits that as the interviews as a whole[836] amounted "to a course of interviewing conduct which was irrevocably tainted, at least in the mind or consciousness of [Mucic...]; all of the interviews should have been thereby excluded."[837] He submits that the overall objective in considering what is said in interviews is that the Trial Chamber should be fair and that the decision by the Trial Chamber breaches this objective.[838]

(ii) Discussion

532. The Appeals Chamber notes that Mucic does not dispute the overall factual findings of the Trial Chamber with regard to the conduct of both the First Interviews and the Second Interviews.[839] However, as a matter of law, he alleges for several reasons that the Trial Chamber erred in the exercise of its discretion in admitting the Second Interviews, having excluded the First Interviews. The Appeals Chamber recalls that for such a ground of appeal to succeed, although an appellant must discharge an initial burden of raising arguments in support of an alleged error of law with the Appeals Chamber, the Appeals Chamber may proceed to examine whether or not the alleged error is such that it invalidates the Trial Chamber's decision.[840]

533. As to the Trial Chamber's decision, the Appeals Chamber notes that a Trial Chamber exercises considerable discretion in deciding on issues of admissibility of evidence. As a result,

---

[835] Exclusion Decision, para 63.
[836] That is, including the First Interviews.
[837] Mucic Brief, Section 2, p 1 (underlining in original).
[838] Appeal Transcript, p 462.
[839] As pointed out by the Prosecution with regard to the Second Interviews in the Prosecution Response, para 16.8.
[840] Article 25(1)(a) of the Statute. *See Furundžija* Appeal Judgement, paras 35-36.

a Trial Chamber should be afforded a certain degree of deference in making decisions based on the circumstances of the case before it. To this extent the Appeals Chamber agrees with the Prosecution submissions on this point during the hearing on appeal.[841] Nevertheless, the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it. Indeed the Appeals Chamber has intervened in the past to do so.[842] In these decisions, the Appeals Chamber confirmed that a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable. If evidence is admitted and an appellant can subsequently show that prejudice has been caused by a failure by the Trial Chamber to properly apply such protections, then it may be found that the Trial Chamber has erred and exceeded its discretion. This is when Rule 89(D) and Rule 95 of the Rules may come into play and in these circumstances a ground of appeal may succeed.

534. In its oral ruling on the Exclusion Decision, the Trial Chamber found that the Second Interviews were "reliable and admissible [...]. The weight to be attached and the probative value will be determined by considering all the other circumstances in these proceedings."[843] Mucic submits that "it is plain that the Trial Chamber relied upon the second interview in the course of [its] judgement."[844] This cannot be disputed. The Trial Chamber, in convicting Mucic under Article 7(3) of the Statute[845] found:

> In his interview with the Prosecution, Mucic admitted he had authority over the camp, at least from 27 July 1992. However, in the same interview he admitted that he went to the prison-camp daily from 20 May 1992 onwards.[846]

---

[841] Appeal Transcript, pp 475–476. The Prosecution submits that "[...] in making [...] determination of this final matter, the Trial Chamber is required to weigh all the facts in evidence before it, and in some cases involving issues of this kind, it may be required to receive evidence and hear witnesses, and so in accordance with general principles, it would be necessary to afford a considerable margin of deference to the finding of the Trial Chamber, and it would only be where the decision of the Trial Chamber could be shown to be an abuse of discretion that there would be justification in the Appeals Chamber intervening on appeal."

[842] *See* for example: *Prosecutov Kordic and Cerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No IT-95-14/2-AR73.5, 21 July 2000; *Prosecutorv Kordic and Cerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000; *The Prosecutor v Kupreškic et al*, Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition, Case No IT-95-16-AR73.3, 15 July 1999.

[843] Trial Transcript, p 4098.

[844] Mucic Brief, Section 2, p 1.

[845] Trial Judgement, para 775.

[846] Trial Judgement, para 737. *See* also, para 767: "Zdravko Mucic had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure the maintenance of order. Mucic himself admits he had all such necessary disciplinary powers. He could confine guards to barracks as a form of punishment and for serious offences he could make official reports to his superior authority at military headquarters. Further, he could remove guards, as evidenced by his removal of Esad Land'o in October 1992." (Footnotes referring to Trial Exhibit 101-1 – (record of interview with Prosecution) omitted).

535. In addition, it noted that:

> Mucic admitted in his interview with the Prosecution that he was aware that crimes were being committed in the prison-camp at Celebici in June and July 1992 and that he had personally witnessed detainees being abused during this period.[847]

536. Mucic's argument is that the Trial Chamber erred in the admission of the Second Interviews into evidence. However, as a result of this decision and in its findings in the Trial Judgement, the Trial Chamber relied *inter alia* on this evidence to convict. Accordingly, it is logical to conclude that Mucic's argument must include an allegation that the Trial Chamber also erred in subsequently relying in part on the Second Interviews in this conviction.

537. Mucic's arguments may be summarised as follows. He submits that contrary to the Trial Chamber's findings, the First Interviews and the Second Interviews should have been considered as one continuing event.[848] If they had been, he submits that the Trial Chamber would have found that the Second Interviews should be excluded. As noted above, the First Interviews were excluded because the Trial Chamber found them to be in breach of Mucic's right to counsel during questioning, guaranteed by Article 18 of the Statute[849] and Rule 42 of the Rules.[850] Mucic submits that as he was informed that he had no right to counsel during the First Interviews, it was not unreasonable to expect that he would believe this prohibition to continue to apply in the Second Interviews, despite the fact that he had been informed to the contrary. Such expectation arose from the fact that the interviews were conducted very close together. He was in a foreign country and should not have been expected to perform "the necessary intellectual gymnastics to give informed consent" to the Second Interviews, when he had been informed he was not entitled to be represented by counsel in the First Interviews.[851] He submits that although he may have stated that he did not want counsel present in the Second Interviews, this waiver was neither informed nor voluntary. He argues that in considering whether or not he voluntarily waived the right to counsel in the Second Interviews, the Trial Chamber should have applied a subjective test and found that in the circumstances, his consent was not voluntary.

---

847 Trial Judgement, para 769.

848 Mucic Brief, Section 2, pp 1, 7-8.

849 Article 18(3) of the Statute provides: "If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands."

850 Rule 42(A)(i) of the Rules provides that a suspect shall have "the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it." Rule 42(B) provides that "[q]uestioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

851 Mucic Brief, Section 2, p 11.

538. Several issues arise. Initially, the Appeals Chamber notes that Mucic relies considerably on precedent drawn from the United Kingdom. The Appeals Chamber recalls that reference to principles applied in national jurisdictions can be of assistance to both Trial Chambers and the Appeals Chamber in interpreting provisions of the Statute and the Rules.[852] However, Rule 89(A) of the Rules expressly provides that the Chambers "shall not be bound by national rules of evidence." What is of primary importance is that a Trial Chamber "apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[853] The Appeals Chamber notes that the Trial Chamber found that implicit in this principle was "the application of national rules of evidence by the Trial Chamber."[854] On the contrary, the Appeals Chamber confirms that rules of evidence as expressly provided in the Rules should be primarily applied, with the assistance of national principles only if necessary for guidance in the interpretation of these Rules.

539. The particular precedent relied upon by Mucic concerns generally the exclusion of evidence of interviews obtained by oppression, in circumstances likely to render them unreliable or which would render it unfair to the accused to admit it. In particular he refers to Section 76(2) and Section 78(1) of the Police and Criminal Evidence Act 1984 ("PACE") applicable in the United Kingdom.[855] Although the principles drawn therefrom may arguably be of some assistance, the Appeals Chamber turns primarily to Rule 89(D) and Rule 95 of the Rules, which expressly apply to this issue.

Rule 89(D)

A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

---

[852] *See* for example, *Furundžija* Appeal Judgement, paras 183-188; *Aleksovski* Appeal Judgement, para 186.

[853] Rule 89(B) of the Rules. Although strictly speaking this relates to "cases not otherwise provided for" in Section 3 of the Rules (the title being "Rules of Evidence") nevertheless, the general principle is important. *See Prosecutor v Kordic and Cerkez,* Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000, para 22. *See* also Prosecution Brief, paras 12.11 and 16.11.

[854] Exclusion Decision, para 34.

[855] Section 76(2) PACE provides: "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained – (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid." Section 78(1) PACE provides: "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Rule 95

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antiethical to, and would seriously damage, the integrity of the proceedings.

540. The Appeals Chamber notes that the Trial Chamber correctly referred to these Rules in its consideration of the interviews. It found that:

> where the probative value of [...] evidence is substantially outweighed by the need to ensure a fair trial, it ought to be excluded – Sub-rule 89(D). Also to be excluded by Rule 95, is evidence obtained by means contrary to internationally protected human rights.[856]

It further found that Rule 95 of the Rules in particular enables "the exclusion of evidence antiethical to and damaging, and thereby protecting the integrity of the proceedings."[857] The Appeals Chamber can see no reason why the Trial Chamber should be required to look elsewhere for the applicable legal principles.

541. During the hearing on appeal, the Appeals Chamber questioned the parties as to whether or not it would have been appropriate for the Trial Chamber to hold a *voir dire* to resolve this issue. It was stated that "the very issue of whether or not something is voluntary is the prime example of where a voir dire is often taken"[858] so that for example in this case, Mucic could have been provided with the opportunity to "explain what was affecting his mind."[859] The Appeals Chamber notes that although there is no express provision in the Rules for such a procedure, it is generally available in, *inter alia*, common law jurisdictions. It allows for arguments and evidence to be brought before the court solely on a defined issue and would provide an accused with the opportunity to give evidence on a limited basis, prohibiting questions beyond the issues raised. It would ensure in general that arguments and evidence led be confined to the issue in dispute and not extend to discussion of the facts of the case itself.[860]

542. The Appeals Chamber notes that during proceedings at first instance, the possibility of resolving this issue by way of *voir dire* was in fact raised.[861] In Mucic's motion to exclude the First Interviews and Second Interviews from evidence[862] he submitted that "the appropriate way of dealing with [this issue of admissibility] is that there should be a hearing by way of *voire*

---

856 Exclusion Decision, para 35.
857 Exclusion Decision, para 44.
858 Appeal Transcript, p 482.
859 Appeal Transcript, p 483.
860 *See* for example, Archbold 2000 (Sweet and Maxwell Limited, 2000), paras 15-360 – 15-365.
861 The Appeals Chamber also notes that during the hearing on appeal, both parties appeared unaware of the fact that this issue had been specifically raised at first instance.
862 Motion to Exclude Evidence, 8 May 1997.

[*sic*] *dire* (or 'trial-within-a-trial')".[863] However, he did not submit specifically that in doing so, he wished to have the opportunity to give evidence personally. On the contrary, he submitted generally that this procedure would allow both parties to "call evidence and have witnesses examined, cross-examined and re-examined in the normal way."[864] At that point, he submitted that it would "be apparent that further oral argument [...would] then be appropriate."[865]

543. As stated, this procedure is not expressly provided for in the Rules. However, this does not mean that it would be unsuitable for a Trial Chamber to utilise it if in a particular case it thought it appropriate. In this case, relevant evidence on the issue could be obtained through the testimony of the investigators, including the Prosecution investigators, the interpreter (see below) and Mucic. The Appeals Chamber notes that three witnesses gave evidence on behalf of the Prosecution regarding the circumstances leading up to the Second Interviews, including two of the Prosecution investigators who questioned Mucic during the Second Interviews.[866] The Appeals Chamber has been directed to no record of any occasion when Mucic suggested that he himself wished to give evidence. Indeed during the hearing on appeal, his counsel submitted that in the circumstances of proceedings before the Tribunal such a procedure in general was inappropriate as both the finders of fact and law are the same tribunal.[867]

544. Nevertheless, although the Appeals Chamber does not agree with the latter assertion and notes that this procedure could in theory have been employed by the Trial Chamber to resolve the matter, the Appeals Chamber makes no finding that the Trial Chamber erred in failing to do so. Nor does it find that Mucic should have specifically requested that he be permitted to give evidence on this limited basis.[868] It does however point out that in any event, evidence in relation to the issue in dispute was heard by the Trial Chamber in the course of the Trial and relied upon by it in both decisions.

545. As stated above, Mucic submits that the Trial Chamber should have considered the First Interviews and the Second Interviews as one continuing event and that because Mucic must have done so, the reasons for excluding the First Interviews applied to the Second Interviews. He submits that the interviews as a whole amounted to a course of interviewing conduct which

---

863 Motion to Exclude Evidence, 8 May 1997, para 18.
864 Motion to Exclude Evidence, 8 May 1997, para 18.
865 Motion to Exclude Evidence, 8 May 1997, para 18. *See* also Trial Transcript, pp 2770-2771.
866 Lieutenant Geschwendt (an officer with the Austrian police), gave evidence on 4 and 5 June 1997. Mr Aribat, a Prosecution investigator gave evidence on 2 June 1997 and Mr d'Hooge, another Prosecution investigator gave evidence on 3 and 11 June 1997. A second Austrian Police Officer, Moerbauer also gave evidence on 5, 9 and 10 June 1997.
867 Appeal Transcript, p 488.

was irrevocably tainted, at least in his mind, and that therefore both sets of interviews should have been excluded. During the hearing on appeal Mucic supplements his arguments by stressing that the issue should have been approached, taking "as the base point complete fairness."[869]

546. On the contrary, the Prosecution submits that the First Interviews do not affect the Second Interviews because before the Austrian authorities the accused had no "right" to have counsel present. The Trial Chamber recognised this and ruled that the First Interviews should be excluded. However, Mucic did have a right to have counsel present in the Second Interviews as they were conducted for the purposes of proceedings before the Tribunal. The Prosecution submits that he was clearly informed of this right and that it is clear that he voluntarily waived it.[870] Accordingly, the Trial Chamber did not abuse its discretion in the Exclusion Decision.

547. The Trial Chamber found:

> It is clear on the evidence before the Trial Chamber that there were two interviews of the suspect. [...] There is evidence that the Austrian Police conducted their investigation and gave the caution and rights of the suspect under Austrian law. The interview with the Prosecution was conducted in accordance with the Rules. There is no doubt [...] that different teams conducted each interview. [...] The contiguity of time and the environment around which they took place should not obscure the fact that there were two independent and separate interviews of the suspect. The interview by the Prosecution cannot be regarded as a continuation of the interview of the Austrian Police. The interview of the Austrian Police was directed towards the extradition of the Accused. That of the Prosecution towards establishing substantive offences within the jurisdiction of the International Tribunal. The purposes are distinct and different.[871]

548. The Appeals Chamber can find no error in these findings and finds that the contention that Mucic could subjectively have regarded the First Interviews and the Second Interviews as one continuous event cannot be borne out. The Trial Chamber found that the First Interviews were conducted by the Austrian police over one day, specifically in relation to extradition proceedings. The Second Interviews were conducted by different investigators, in the absence of the Austrian police officers, over the next three days, for a different purpose and at different times. At the start of the Second Interviews Mucic was informed that it was being conducted by investigators from the Office of the Prosecutor of the Tribunal. It is clear to the Appeals Chamber that as found by the Trial Chamber, the interviews were at all times conducted separately and distinctly. Accordingly there can be no reason to find that Mucic could have

---

868 As stated elsewhere in this Judgement, an accused before the Tribunal has an absolute right to remain silent during his or her trial (Rule 85(C)).
869 Appeal Transcript, p 466.
870 Prosecution Brief, paras 16.7-16.19.

been led to believe that they were one continuing interview. The Appeals Chamber can find no error in the Trial Chamber's analysis.

549. Mucic submits that the Trial Chamber erred in rejecting any argument that his cultural background and the fact that he was under arrest in a foreign country should be considered in determining if he voluntarily waived the right to remain silent.[872] He submits that the Trial Chamber should have applied a subjective test in considering the admissibility of the Second Interviews and that it erred in solely applying an objective test in interpreting the Rules.[873] "The fact that somebody is being interviewed in a language other than his, probably in a jurisdiction or a place [of] which he has no cultural or personal knowledge, and the fact that he is being interviewed about matters which have arisen from an extraordinary and extra-national set of circumstances [...] is very germane."[874] He submits further that this impacted on his decision making and because the First Interviews were excluded, the logical consequence should be that he would have considered the same rules to apply in the Second Interviews.[875] He also submits that although Rule 42 of the Rules may have been read to him, it is not the words that matter in a legal context but the full implication of the effect of the words.[876]

550. The Trial Chamber found:

> [...] the cultural argument difficult to accept as a basis for considering the interpretation of the application of the human rights provisions. The suspect had the facility of interpretation of the rights involved in a language which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.[877]

551. The Appeals Chamber again finds that Mucic has failed to satisfy the Appeals Chamber that the Trial Chamber erred in this reasoning. Rule 42 of the Rules provides that a suspect must be informed prior to questioning of various rights, including the right to be assisted during questioning by counsel of the suspect's choice.[878] It further provides that questioning must not continue in the absence of counsel unless a suspect has voluntarily waived the right to have

---

871 Exclusion Decision, para 40.
872 Mucic Brief, Section 2, p 9; Appeal Transcript, pp 464-466.
873 Mucic Brief, Section 2, p 7.
874 Appeal Transcript, p 465.
875 Mucic Brief, Section 2, p 10.
876 Mucic Brief, Section 2, p 10.
877 Exclusion Decision, para 59.
878 Rule 42(A)(i) of the Rules.

counsel present.[879] This right is neither ambiguous nor difficult to understand. As long as a suspect is clearly informed of it in a language he or she understands, the Prosecution fulfils its obligations. Contrary to Mucic's submissions,[880] an investigator is not obliged to go further.

552. In this regard, the Trial Chamber expressly found that there is no duty incumbent on an investigator to explain in greater depth the implications of Rule 42, "the duty is only to interpret to the suspect the rules in a language he or she understands."[881] As pointed out by the Prosecution, "[p]rovided that the suspect's rights are explained in a language that the suspect understands, it shouldn't matter in what country the suspect is at the time, particularly in the case of an international tribunal which may interview suspects in many different countries and which has a legal system that's different to that in any particular national jurisdiction."[882]

553. The Appeals Chamber agrees with the interpretation by the Trial Chamber that the Rule should be construed objectively. However, it also notes that even if it were to consider the admissibility of the Second Interviews on the basis of a "subjective standard of informed consent" (which it has found is not the appropriate test), nevertheless, a submission that Mucic suffered from cultural and linguistic problems resulting in involuntary waiver has no foundation. Mucic did not dispute that he had been living in Austria for several years prior to his arrest. This was conceded on his behalf before the Trial Chamber, together with the fact that as a result he "was no doubt familiar with the street-wise ways of that country."[883] In addition, he was provided with the assistance of an interpreter throughout the course of the interviews, while also speaking with a lawyer on one occasion (see below). In these circumstances, there can be no basis for an argument that based on a subjective test, he may have had difficulty in understanding the fact that he had a right to counsel in the Second Interviews.

554. The Appeals Chamber finds that it has no reason to doubt that Mucic was fully aware of the fact that although he did not have a right to counsel in the First Interviews, he did have such a right in the Second Interviews. Accordingly, it finds no error in the Trial Chamber's findings that there is clear evidence that Mucic expressed a wish to be interviewed without counsel. The Appeals Chamber finds most persuasive the fact that the record shows that Mucic was informed on numerous occasions that he had a right to have counsel present while being interviewed and

---

[879] Rule 42(B).
[880] Mucic Brief, Section 2, pp 10-11.
[881] Exclusion Decision, para 58.
[882] Appeal Transcript, p 480.
[883] Transcript, p 4026. Counsel proceeds to state: " [...] but the fact of the matter is that over a period of four days he was subjected to two quite different cultures. [...]. Within a space of four days he was subjected to those

on each occasion declined. The Trial Chamber found that there was evidence that "several times during the interview, the suspect was asked whether he was prepared to carry on without counsel, and on each occasion he unequivocally answered in the affirmative.[884] Even when counsel [...] assigned to him appeared to assist him, the Accused indicated he did not need his assistance, and he left."[885] As submitted by the Prosecution, Mucic "manifested all the indicia of understanding and of voluntarily waiving his rights."[886] Mucic has failed to establish that the evidence illustrates that he could have been confused regarding his right to have counsel present and the Appeals Chamber can find no error in the same conclusion reached by the Trial Chamber.

555. Finally, as to Mucic's argument that fairness should be the base point in considering the admissibility of the interviews, the Appeals Chamber does not dispute such a contention. However, it also finds no reason to hold that the Trial Chamber failed to apply this principle. It is not disputed that a Trial Chamber should not admit relevant evidence if in doing so, an accused's right to a fair trial is violated. If admission of evidence is outweighed by the need to have a fair trial, then Rule 89(D) and Rule 95 of the Rules provide a mechanism for exclusion. As seen above, these provisions were specifically applied by the Trial Chamber in its consideration of both the First Interviews and the Second Interviews. In particular, the Trial Chamber pointed out that "[t]here is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95."[887] However it also found for the reasons set out above, that there was no reason to conclude in this case that the Second Interviews fell within the provisions of either Rule violating Mucic's right to a fair trial such that they should have been excluded. The Appeals Chamber can find no error in the Trial Chamber's decision.

(iii) Rejection of the request to issue a subpoena

556. Mucic submits that the Trial Chamber erred in refusing to issue a subpoena to the interpreter, Alexandra Pal. It was recorded that at 15:10 on 19 May 1996, Mucic expressed a

---

two quite distinct systems, which, in my respectful submission, are pretty well opposed to one another in the terms of the kinds of rights that they afford." Transcript, pp 4026-4027.

884 In particular, the Appeals Chamber notes Trial Exhibit 101-1, pp 1, 14, 33, 52. The Appeals Chamber notes the following exchange on pp 51-52 as being exemplary of Mucic's attitude to the Second Interviews: "Investigator (interpreted): [...]. Do you agree to continue the interview tomorrow? Mucic: By all means. Investigator (interpreted): You have a choice. Mucic: I want to continue it. Investigator (interpreted): So, you agree to continue the interview tomorrow morning? Mucic: Yes."

885 Exclusion Decision, para 62.

886 Prosecution Brief, para 16.19.

desire to have counsel present during the Second Interviews. At 15:30 on the same day, the Second Interviews began and it was recorded that contrary to his previously expressed wish, he was in fact happy to be interviewed un-represented. In reading Mucic his rights at the start of the Second Interviews, the Prosecution investigators asked, *inter alia*: "do you agree to answer our questions without the presence of an attorney, *in accordance with our previous conversation*?"[888] Mucic submits that this remark refers to a previous conversation which he alleges must have taken place during the twenty minute gap immediately before the Second Interviews began, during which an unrecorded exchange took place between the Prosecution investigators and Mucic while the investigators were setting up their equipment. It is alleged that because Mucic changed his mind during this short period of time, "something was said and/or done to persuade him to" do so.[889] It is submitted that the interpreter present in this interval could have testified as to the contents of any such conversation and consequently the reason for Mucic's sudden change of mind and decision finally to proceed without counsel.[890] It is ultimately alleged that whatever was said resulted in Mucic involuntarily waiving the right to counsel.[891]

(iv) Discussion

557. These arguments were brought before the Trial Chamber in an *ex parte* motion,[892] and on 8 July 1997 it decided that it would not issue this subpoena. It determined that:

> [...] [t]he Trial Chamber is not satisfied that the Defence has established that there is indeed an omission in the record of proceedings of the interview of Mucic. The Defence has alleged an unrecorded interrogation and founded its allegation on suppositions of what might have been said or done therein. This is clearly not a satisfactory ground on which to base the application. There is no undisputed evidence of the "previous conversation" alleged to have taken place.[893]

558. The Appeals Chamber agrees. As pointed out by the Trial Chamber, an application to issue a subpoena may be granted under Rule 54 of the Rules if an applicant shows "that the order is necessary for the purposes of investigation. Alternatively, it must be shown that it is

---

[887] Exclusion Decision, para 41.
[888] Mucic Brief, Section 2, p 12 (emphasis added).
[889] Mucic Brief, Section 2, p 13.
[890] Mucic Brief, Section 2 p 13.
[891] Mucic Brief, Section 2 p 13.
[892] *See* "Background" Section above.
[893] Subpoena Decision, para 16.

necessary for the preparation or conduct of the trial."[894] The Trial Chamber found that it was "not persuaded by the contention [...] that the only way to fill the [alleged] gap [...] is through testimony of the interpreter."[895] It found that based on the evidence before it, it could not be satisfied that "an order is necessary for investigation into the evidence of whether there was a previous conversation and the context of such a conversation."[896] In fact, the Appeals Chamber notes that as also found by the Trial Chamber, Mucic had "founded [his] allegation on supposition of what might have been said or done therein",[897] and simply speculated as to what may have occurred.[898] The Appeals Chamber agrees that there could be no error in a finding that such speculation cannot discharge the burden under Rule 54 of the Rules to persuade a Trial Chamber to issue a subpoena.

559. However, the Appeals Chamber also notes that this allegation was in any event not left unchallenged. Although as noted above, it appears that Mucic did not request that he should be provided with the chance to testify before the Trial Chamber on this sole issue in the context of a *voir dire* and in fact he could not be required to have done so, nevertheless, he was provided with the opportunity to challenge the Prosecution investigators present at the time as to whether or not this alleged conversation took place. During their testimony the allegation was denied and it was stated that any conversation with Mucic was simply to inform him in general terms of his rights during interview.[899] The Trial Chamber was entitled to assess this evidence and find that it was reliable and credible.[900] The Appeals Chamber cannot accept a general allegation by Mucic that simply because they work for the Prosecution, "the investigators who gave evidence...would have a motive to conceal what had caused this sudden change of mind."[901]

---

[894] Subpoena Decision, para 12. Rule 54 of the Rules provides in full: "At the request of either party, or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[895] Subpoena Decision, para 15.

[896] Subpoena Decision, para 16.

[897] Subpoena Decision, para 16.

[898] *See* also, later in the Exclusion Decision where the Trial Chamber found that "[t]he challenge by the Defence of the waiver of the right to counsel is based on speculation of what might have transpired [...]". Exclusion Decision, para 62.

[899] *See* Trial Transcript, pp 3211-3305 (testimony of Mr Aribat in which he denies that the alleged conversation took place). Mucic submits that because Mr Aribat knew at the start of the interviews that Mucic did not want a lawyer, he must have had a conversation with Mucic regarding this in the twenty minute period before the interview began. At trial his counsel submitted that "something did happen in those twenty minutes, something which Mr Aribat has concealed [...] and that the only possible and proper inference to draw [...] is that something did take place, and it was oppressive, and it was designed to get him to agree not to have a lawyer." (Transcript, pp 4037-4039).

[900] *Tadi}* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

[901] Mucic Brief, Section 2, pp 14-15. The Appeals Chamber notes that such a finding would mean that all Prosecution employees must be viewed as being *prima facie* unreliable, simply by virtue of their job.

560. However, it is clear to the Appeals Chamber that the allegation that Mucic was improperly persuaded by the Prosecution investigators to refuse the assistance of counsel, is primarily rebutted by the fact that throughout the Second Interviews it is recorded that he repeatedly asserted that he was happy to be interviewed un-represented.[902] Ultimately, this satisfied the Trial Chamber that his consent was voluntary and refuted any allegation or speculation to the contrary. The Trial Chamber found in the Exclusion Decision:

> There is no doubt the Accused understood that he had a right to counsel during the interview. It was obvious also that he was aware of his right to waive the exercise of the right to Counsel. It appears to us obvious that the suspect voluntarily waived the exercise of the right to counsel. The Defence has not established to the satisfaction of the Trial Chamber that the discussion of the unrecorded portion of the interview was responsible for the exercise by the suspect of his right to waive the exercise of his right to counsel. It would be dangerous to act on the several ingenious speculations of Defence Counsel as to what could have transpired.[903]

561. The Appeals Chamber agrees and finds that Mucic has failed to put forward any reason as to why the Trial Chamber erred in making this finding. Save for the so-called "ingenious speculations", he has failed to establish how the evidence of the interpreter could refute these findings and was necessary for the investigation or conduct of the trial, such that the Trial Chamber would be justified in issuing a subpoena under Rule 54 of the Rules.

562. Mucic also challenges the finding of the Trial Chamber that in principle an interpreter should not be called to give evidence as it could compromise his or her integrity or independence.[904] This independence is guaranteed by the requirement under Rule 76 of the Rules for an interpreter to solemnly declare to act independently and impartially.[905] The Appeals Chamber notes that in the Trial Judgement the Subpoena Decision was summarised as finding that:

> (1) the interpreter cannot be relied upon to testify on the evanescent words of the interpretation in the proceedings between the parties; and (2) it is an important consideration in the administration of justice to insulate the interpreter from constant apprehension of the possibility of being personally involved in the arena of conflict, on either side, in respect of matters arising from the discharge of their duties.[906]

Although the findings are summarised as being two-fold, the Appeals Chamber concludes that in fact the Trial Chamber's primary reason for refusing to issue the subpoena rested on its determination discussed above. That is, that save for a vague speculative assertion, Mucic had

---

[902] This wish is also illustrated by the fact (referred to in paragraph 554 above) that although he was provided with the assistance of counsel, Mucic still preferred to continue un-represented.
[903] Exclusion Decision, para 63.
[904] Mucic Brief, Section 2, p 13.
[905] Rule 76 of the Rules provides in full: "Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality."
[906] Trial Judgement, para 59.

failed to put forward any reason as to why further investigation into the alleged previous conversation "was necessary to the proceedings," justifying the issuance of a subpoena to the interpreter.[907] It did however proceed to examine the circumstances in which an interpreter could in theory be called to give evidence. In doing so, it stated that although it was not the case that an interpreter could never be called to give evidence,

> [...] this would depend on one of the following factors. First, there should be a legal duty on [... the interpreter] to make a record of the interpretation between the parties; secondly, in the interest of justice, there should be no other way of obtaining the evidence sought other than through the testimony of the interpreter; or thirdly, the determination of the issue should depend entirely on the evidence to be given by the interpreter.[908]

563. The Appeals Chamber sees no reasons to dispute this finding. As pointed out by the Trial Chamber:

> [i]t would not only be undesirable but also invidious to compel an interpreter into the arena of conflict on behalf of either party to the proceedings, for the determination of an issue arising from such proceedings. It should not be encouraged where other ways exist for the determination of the issue.[909]

Although these findings may have contributed to the Trial Chamber's ultimate decision, they were secondary considerations. In view of the aforementioned primary reason for refusing to issue the subpoena, the Appeals Chamber finds that it is not necessary to discuss in detail Mucic's further submissions on this issue.

564. For these reasons, the Appeals Chamber can see no reason to find that the Trial Chamber abused its discretion in admitting into evidence the Second Interviews and in refusing to issue a subpoena to the interpreter. Further, it can find no error in the Trial Chamber subsequently relying *inter alia* on the Second Interviews to convict Muci}. The Appeals Chamber agrees with the overall finding by the Trial Chamber that the evidence illustrates that Mucic was fully informed of his right to have counsel present in the Second Interviews and that he voluntarily waived it. The Trial Chamber did not err in refusing to issue a subpoena to the interpreter and in admitting the Second Interviews. This ground of appeal is therefore dismissed.

---

[907] Subpoena Decision, para 16.
[908] Subpoena Decision, para 17.
[909] Subpoena Decision, para 20.

IX. DIMINISHED MENTAL RESPONSIBILITY

A. Background

565. Landžo was found guilty of grave breaches of the Geneva Conventions by reason of his wilful killing of three detainees in the Celebici prison camp – Ščepo Gotovac,[910] Simo Jovanovic,[911] and Boško Samoukovic[912] – and of violations of the laws or customs of war by reason of their murders.[913] The Trial Chamber made findings that the death of each of these three detainees resulted from severe or brutal beatings.[914] The beating of Gotovac by Landžo himself was accompanied by the act of pinning a metal badge to the victim's head, and it was so merciless that the victim was unable to walk, and he died a few hours later as a result of his injuries.[915] Landžo was found guilty as an accessory to the "prolonged and vicious" beating of Jovanovic which caused his death, an accessory who had knowingly facilitated the beating inflicted by others.[916] The beating of Samoukovic by Landžo himself was carried out with a wooden plank about a metre long and five or six centimetres thick, and it lasted for about twenty minutes until Samoukovic fell down.[917] The beating caused broken ribs and the death of the victim shortly thereafter.[918] It was described by the Trial Chamber as merciless as well as brutal.[919]

566. Landžo was also found guilty of grave breaches of the Geneva Conventions by reason of his torture of Momir Kuljanin,[920] Spasoje Miljevic,[921] and Mirko Đordic,[922] and of violations of the laws and customs of war by reason of that torture.[923] The Trial Chamber made findings that Landžo had forced Kuljanin to hold a heated knife in his hand, causing a serious burn to his palm, and that he then cut the victim's hand with the knife twice, for the purposes of punishing and intimidating him.[924] Landžo put a gas mask on the head of Miljevic (apparently to prevent his cries being heard by others), tightening the screws to such an extent that the victim felt suffocated, and then he repeatedly heated a knife and burnt the victim's hands, left leg and

---

[910] Count 1.
[911] Count 5.
[912] Count 7.
[913] Counts 2, 6 and 8.
[914] Trial Judgement, paras 818, 841, 855.
[915] *Ibid*, paras 823, 1273.
[916] *Ibid*, paras 842, 845.
[917] *Ibid*, paras 851-852.
[918] *Ibid*, para 852.
[919] *Ibid*, para 855.
[920] Count 15.
[921] Count 24.
[922] Count 30.
[923] Counts 16, 25 and 31.

thighs. He next kicked and hit Miljevic, and then he forced him to eat grass, as well as filling his mouth with clover and forcing him to drink water.[925] The Trial Chamber said that it was appalled by the cruel nature of Landžo's conduct.[926] Landžo forced open Đordic's mouth and inserted a pair of heated pincers, burning the victim's mouth, lips and tongue.[927] He also forced Đordic on a number of occasions to do push-ups, usually ten at a time but sometimes as many as fifty,[928] as well as subjecting him to more general mistreatment.[929]

567. Landžo was found guilty of grave breaches of the Geneva Conventions as well by reason of great suffering or serious injury to body or health caused to Slavko Šušic[930] and Nedeljko Draganic,[931] and of violations of the laws or customs of war by reason of their cruel treatment.[932] The Trial Chamber found that Landžo had taken part in the serious mistreatment of Šušic over a continuous period during the course of one day,[933] and that he had perpetrated "heinous acts which caused great physical suffering" to Šušic,[934] but it did not make clear precisely which acts of those alleged that it had accepted. Some of the evidence given in relation to the treatment of Šušic was criticised by the Trial Chamber, but it did not criticise evidence that Landžo pulled out Šušic's tongue with some kind of implement and that he beat him.[935] Landžo had been charged in relation to the death of Šušic, but the Trial Chamber was not satisfied that his death had resulted from the beatings and mistreatment of Landžo. These verdicts were entered in lieu of convictions upon the charges laid in the Indictment alleging wilful killing and murder, upon the basis that these lesser offences were included within those charged.[936] The Trial Chamber also found that on one occasion Landžo, with others, tied Draganic's hands to a beam in the ceiling of a hangar, and that the victim was hit with wooden planks and rifle butts. Thereafter, Draganic was beaten by Landžo almost every day, usually with a baseball bat, and he was forced, with other detainees, to drink urine. On another

---

[924] Trial Judgement, paras 918, 921, 923.
[925] *Ibid*, paras 971, 974.
[926] *Ibid*, para 976.
[927] *Ibid*, para 995, 996.
[928] *Ibid*, para 995, 997.
[929] *Ibid*, para 998.
[930] Count 11.
[931] Count 36.
[932] Counts 12 and 37.
[933] Trial Judgement, para 861.
[934] *Ibid*, para 866.
[935] *Ibid*, paras 863-864.
[936] *Ibid*, para 866.

occasion, Landžo poured gasoline on Draganic's trousers when the victim was in a seated position, and he set the trousers alight. Draganic's legs were badly burnt.[937]

568. Finally, Landžo was also found guilty of grave breaches of the Geneva Conventions by reason of great suffering or serious injury to body or health caused to other detainees in the Celebici prison camp,[938] and of violations of the laws or customs of war by reason of their cruel treatment.[939] These counts were expressed in general terms, alleging that the detainees at the Celebici prison camp had been subjected to an atmosphere of terror created by the killing and abuse of a number of them.[940] In finding Landžo guilty of these charges, the Trial Chamber relied upon the findings which it had made against him in relation to the specific counts.[941] The Trial Chamber found that the other detainees had continuously witnessed the most severe physical abuse being inflicted on defenceless victims, and that they had been obliged to observe helplessly the horrific injuries and suffering caused by the mistreatment.[942] By their exposure to these conditions, the Trial Chamber found, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse themselves.[943] Their sense of physical insecurity and fear was aggravated by threats made by the guards (including Landžo).[944] The Trial Chamber found that, through the frequent cruel and violent deeds which were committed, aggravated by the random nature of those acts and the threats made by guards, the detainees had been subjected to an immense psychological pressure which could accurately be characterised as "an atmosphere of terror".[945]

569. Landžo admitted having committed some of the acts which formed the basis of his convictions; he was unable to recall some others, and some acts he denied. These findings by the Trial Chamber leading to Landžo's convictions were not challenged by him on appeal.

570. The findings were repeated in substance when the Trial Chamber considered Landžo's sentence. It went on to describe the charges upon which he was convicted as being "clearly of the most serious nature".[946] Reference was made to the "savagery" of Landžo's killing of Gotovac, and the "sustained and ferocious" nature of his fatal attack upon Samoukovic.[947] In

---

[937] *Ibid*, paras 1016-1018.
[938] Count 46.
[939] Count 47.
[940] Indictment, para 35.
[941] Trial Judgment, paras 1086-1087.
[942] *Ibid*, para 1086.
[943] *Ibid*, para 1087.
[944] *Ibid*, para 1089.
[945] *Ibid*, para 1091.
[946] *Ibid*, para 1272.
[947] *Ibid*, para 1273.

addition to the specific acts referred to in these findings, the Trial Chamber noted that Landžo also contributed substantially towards the atmosphere of terror prevailing in the Celebici camp through his brutal treatment of the detainees. The beatings and other forms of mistreatment, the Trial Chamber said, were inflicted "in a manner exhibiting some imaginative cruelty as well as substantial ferocity".[948] Many of the victims of, and witnesses to, his conduct bore permanent physical and psychological scars of Landžo's cruelty.[949] The Trial Chamber commented that Landžo's apparent preference for inflicting burns upon detainees exhibited sadistic tendencies and clearly required premeditation,[950] and that he took some perverse pleasure in the infliction of great pain and humiliation.[951]

571. Landžo was sentenced to imprisonment for various periods, to be served concurrently.[952] His effective sentence is imprisonment for fifteen years.

B. The Issues on Appeal

572. Landžo's principal defence to the charges was what has been described as the "special defence of diminished mental responsibility". Both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii)(b), an issue to which the Appeals Chamber will return.

C. The Trial Chamber's Refusal to Define Diminished Mental Responsibility

573. Landžo filed two grounds of appeal directed to the issue of diminished mental responsibility. The first was in these terms:[953]

> The Trial Chamber Erred in Law, Violated the Rules of Natural Justice, and the Principle of Certainty in Criminal Law, and Denied Appellant a Fair Trial, When It Refused to Define the Special Defence of Diminished Mental Responsibility Which the Appellant Specifically Raised.

574. During the trial, Landžo moved before the Trial Chamber for rulings as to the definition of this "special defence", where the onus lay and the burden (or standard) of proof involved.[954]

---

[948] *Ibid*, para 1272.
[949] *Ibid*, para 1273.
[950] *Ibid*, para 1274.
[951] *Ibid*, para 1281.
[952] *Ibid*, para 1286.
[953] Landžo Brief, p 4, Ground of Appeal 7.
[954] Esad Landžo's Submissions Regarding Diminished or Lack of Mental Capacity, 8 June 1998 ("Trial Submission").

He argued that "diminished capacity"[955] was a "prolific defence relied upon in many jurisdictions", and that it was "best known as having been derived from the Homicide Act of 1957 from England".[956] Then, having referred to a number of decisions in England concerning the Homicide Act, Landžo submitted that the English definition of diminished responsibility, its burden of proof and its standard of proof should be adopted by the Trial Chamber when considering the evidence proffered by him.[957] In his summary, he submitted:

> The special defence of diminished capacity as envisioned by the framers of the Statute and Rules of this Tribunal should be as follows: where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omission in doing or being a party to the killing.[958]

575. The Trial Chamber, noting that the "special defence" was, by reason of Rule 67(A)(ii), "a plea offered by the Defence", ruled (in accordance with Landžo's submission) that a defendant offering such a plea carried the burden of proving it on the balance of probabilities,[959] but it reserved its decision as to the appropriate definition of that defence.[960]

576. This refusal by the Trial Chamber is said by Landžo to have violated the principles of certainty in the criminal law,[961] and of *nullum crimen sine lege*,[962] or *ex post facto* law (as it was described by counsel for Landžo).[963] These objections are misconceived. The law to be applied must be that which existed at the time the acts upon which the charges are based took place. However, the subsequent identification or interpretation of that law by the Tribunal, whenever that takes place, does not alter the law so as to offend either of those principles.[964]

577. Landžo also submitted that the refusal by the Trial Chamber to define the "special defence" in advance of evidence being given in relation to it denied him a fair trial.[965] It is, however, no part of a Trial Chamber's obligation to define such issues *in advance*. Its obligation is to rule upon issues at the appropriate time, after all of the relevant material has

---

[955] He considered that the terms "diminished mental capacity" and "diminished mental responsibility" were interchangeable: Trial Submission, footnote 2.
[956] *Ibid*, p 4.
[957] *Ibid*, p 13.
[958] *Ibid*, p 13.
[959] Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998, p 2.
[960] *Ibid*, p 3.
[961] Landžo Brief, pp 88-89.
[962] Restated in Article 15 of the International Covenant on Civil and Political Rights, 1966: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".
[963] Appeal Transcript, pp 590, 595, 627.
[964] *Aleksovski* Appeal Judgement, paras 126-127, 135.
[965] Landžo Brief, p 89.

been placed before it and after hearing the arguments put forward by the parties. It may well be considered to be appropriate or convenient in the particular case to give a ruling of this type upon an assumed or agreed basis, but whether it is appropriate or convenient to do so in any case is a matter for the Trial Chamber in that case to determine in the exercise of its discretion. There is no basis for suggesting that the exercise of the Trial Chamber's discretion in the present case miscarried in its refusal to give in advance a definition of the "special defence".

578. Nor has any prejudice been demonstrated, as a result of that refusal, to show that Landžo's trial was unfair. First, the Trial Chamber substantially adopted the submission made by him as to the definition of the "special defence". After quoting Section 2(1) of the Homicide Act of 1957 of England and Wales the Trial Chamber said:

> Thus, the accused must be suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury.

And, later (after referring to an English authority):[966]

> It is, however, an essential requirement of the defence of diminished responsibility that the accused's abnormality of mind should substantially impair his ability to control his actions.[967]

Secondly, Landžo was not denied the opportunity of producing any evidence or making any submissions in relation to the "special defence". His counsel told the Appeals Chamber that, in effect, she had produced everything she had.[968] Thirdly, as will be seen when Ground 8 is considered, the "special defence" failed not through lack of evidence but because the Trial Chamber did not accept as true Landžo's evidence as to the facts upon which the psychiatric opinions were expressed.

579. This ground of appeal 7 is rejected.

---

[966] *Ibid*, para 1169.

[967] Trial Judgement, para 1166.

[968] Counsel for Landžo said: "We have a saying back home that, when you are not given the parameters like that, you throw everything against the wall and see what sticks" (Appeal Transcript, p 589); and: "But they didn't give us any guidance. They didn't tell us which law to use at that point. So I had to just throw everything out there [...]" (Appeal Transcript, p 600).

D. Does Diminished Responsibility Constitute a Defence?

580. As stated earlier, both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii).[969] That sub-Rule is in the following terms:

> As early as reasonably practicable and in any event prior to the commencement of the trial:
>
> [...] the defence shall notify the Prosecutor of its intent to offer:
>
> (a) the defence of alibi; [...];
>
> (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

The Rule is not happily phrased.

581. It is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.

582. On the other hand, if the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong.[970] Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal. It is submitted by Landžo that Rule 67(A)(ii) has also made *diminished* mental responsibility a complete defence to any charge (or has perhaps recognised it as such),[971] an argument which the Trial Chamber had accepted.[972]

---

[969] The Trial Chamber referred to "the special defence provided for in sub-Rule 67(A)(ii)(b)" in the Trial Judgement, para 1163. Landžo also referred to the special defence as having been provided for in the Rules of Procedure and Evidence, in the Landžo Brief, p 85, and Appeal Transcript, p 590.

[970] *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210-211; 4 St Tr (NS) 847 at 930-931.

[971] Landžo Brief, pp 85, 102; Appeal Transcript, p 590.

[972] Trial Judgement, para 1164.

583. Notwithstanding a claim by Landžo to the contrary,[973] there is no reference to any defence of diminished mental responsibility in the Tribunal's Statute. The description of diminished mental responsibility as a "special defence" in Rule 67(A)(ii) is insufficient to constitute it as such. The rule-making powers of the judges are defined by Article 15 of the Tribunal's Statute, which gives power to the judges to adopt only –

> [...] *rules of procedure and evidence* for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[974]

The Appeals Chamber has held that this power does not permit rules to be adopted which constitute new *offences*, but only *rules of procedure and evidence* for the conduct of matters falling within the jurisdiction of the Tribunal.[975] It follows that there is, therefore, no power to adopt rules which constitute new *defences*. If there is a "special defence" of diminished responsibility known to international law, it must be found in the usual sources of international law – in this case, in the absence of reference to such a defence in established customary or conventional law, in the general principles of law recognised by all nations.[976]

584. Landžo has submitted that such a "special defence" based upon the English model, with modifications, should be available in international law because it is "generally accepted as providing a fair and balanced defence",[977] it has been recognised in the domestic laws of many countries[978] and by the statute of the International Criminal Court adopted in 1998 ("ICC Statute").[979] An examination of the domestic laws referred to by the parties and of the ICC Statute does not support that submission.

585. The English *Homicide Act* 1957 provides that a person who kills or who is a party to the killing of another shall not be convicted of murder if he establishes that he was suffering from such an abnormality of mind (as defined) as substantially impaired his mental responsibility for his acts or omissions in doing so or being a party to the killing.[980] The section provides that, instead, he is liable to be convicted of manslaughter.[981] It is thus a partial defence, not a complete defence, to a charge of murder.

---

[973] Landžo Brief, p 85.
[974] The emphasis has been added.
[975] *Prosecutor v Tadic*, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, para 24.
[976] Secretary-General's Report, para 58.
[977] Landžo Brief, p 96.
[978] *Ibid*, pp 102-107.
[979] *Ibid*, p 107.
[980] Section 2(1).
[981] Section 2(3).

586. The partial defence of diminished responsibility originated in Scotland in the 19th century. It was developed there by the courts as a means of avoiding murder convictions for those offenders who were otherwise liable for murder but who did not satisfy the restrictive test for the defence of insanity, but whose mental state was nevertheless impaired.[982] The subsequent English statute, enacted in 1957, provided the model for largely identical legislation in some common law countries.[983] In most (if not all) such countries, the legislation, by reducing the crime from murder to manslaughter, permitted the sentencing judge to impose a sentence other than the relevant mandatory sentence for murder, which was either death or penal servitude for life. The partial defence is in effect, then, a matter which primarily provides for mitigation of sentence by reason of the diminished mental responsibility of the defendant. A recent review of the partial defence of diminished responsibility in Australia concluded that, notwithstanding the abolition of mandatory sentences for murder, the partial defence should be maintained in order to assist in the sentencing process.[984]

587. The ICC Statute provides that a defendant shall not be criminally responsible if, at the relevant time, he or she –

> [...] suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[985]

This is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant's capacity, and it leads to an acquittal. It is akin to the defence of insanity. There is no express provision in the ICC Statute which is concerned with the consequences of an impairment to such a capacity.

588. On the other hand, in many other countries where the defendant's total mental incapacity to control his actions or to understand that they are wrong constitutes a complete

---

[982] *See HM Advocate v Dingwall* (1867) 5 Irvine 466, as discussed in N Walker, *Crime and Insanity in England* (Edinburgh University Press, Edinburgh, 1968) Vol 1, chapter 8. *See* also Glanville Williams, *Textbook of Criminal Law* (2nd edition, Steven & Sons, London, 1983) at 685; Smith & Hogan, *Criminal Law* (9th edition, Butterworths, London, 1999) at 211; NSW Law Reform Commission, Partial Defences to Murder: Diminished Responsibility, LRC 82 (1997) ("LRC 82"), para 3.2.

[983] In Australia: *Crimes Act* 1900 (New South Wales), s 23A; *Criminal Code* 1899 (Queensland), s 304A; *Crimes Act* 1900 (Australian Capital Territory), s 14; *Criminal Code* 1983 (Northern Territory), s 37. Hong Kong: *Homicide Ordinance*, Cap 339, Section 3. Singapore: *Penal Code* Cap 224, section 300, Exception 7. Barbados: *Offences Against the Person Act* 1868, section 3A. The Bahamas: *Homicide Act* 1957, section 2(1). Landžo argued (Landžo Brief, pp 105-106) that it exists also in the United States. He relied upon Section 4.02 of the Model Penal Code (1962) which makes admissible, in relation to the defendant's state of mind where it is an element of the offence, evidence that the defendant suffered from a mental disease or defect. However, that does not constitute diminished responsibility as a defence to the offence, it simply denies one of the elements of that offence.

[984] LRC 82, paras 2.17-2.24.

[985] ICC Statute, Article 31(1)(a).

defence, his diminished mental responsibility does not constitute either a partial or a complete defence, but it is relevant in mitigation of sentence.[986]

589. The Prosecution has submitted that both the Tribunal's full name[987] and the terms of its Statute[988] oblige it to deal with the persons "*responsible* for serious violations of international humanitarian law"[989] according to the degree of their responsibility, so that there would be a complete defence arising out of the defendant's mental state only where he could not be held legally responsible at all for his actions.[990] The defendant's mental state would otherwise be relevant in mitigation of sentence, in accordance with Article 24.2 of the Tribunal's Statute, as one of "the individual circumstances" of the convicted person.[991]

590. The Appeals Chamber recognises that the rationale for the partial defence provided for the offence of murder by the English *Homicide Act* 1957 is inapplicable to proceedings before the Tribunal. There are no mandatory sentences. Nor is there any appropriate lesser offence available under the Tribunal's Statute for which the sentence would be lower and which could be substituted for any of the offences it has to try.[992] The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies

---

[986] In France: *Penal Code* (1992), Article 122-1. In Germany: *Penal Code*, Sections 20-21. In Italy: *Penal Code* (1930), Articles 88-89. In the Russian Federation: *Criminal Code* (1996) (translated by W Butler, *Criminal Code of the Russian Federation*, Simmonds and Hill Publishing, London, 1997), Articles 21-22. In Turkey: *Penal Code* (International Encyclopaedia of Law, ed Prof Blancpain, Kluwer, vol 3), Articles 46-47. In Japan: *Penal Code* (1907), Article 39(2). In South Africa: *Criminal Procedure Act*, 1977, Section 78(7). Notwithstanding the submission of Landžo to the contrary (Landžo Brief, p 107), the position in the former Yugoslavia is the same: *Criminal Code* (1976) of the SFRY, Article 12. *See* also Articles 40 and 42 of the Croatian *Penal Code* (1997).

[987] 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.

[988] Articles 1 and 5 ("the power to prosecute persons responsible for" various violations), and 7.1 ("shall be individually responsible for the crime").

[989] The emphasis has been added.

[990] Prosecution Response, para 12.16.

[991] *Ibid*, para 12.21, relying upon *Prosecutor v Erdemovic*, Case IT-96-22-T, Sentencing Judgement, 29 Nov 1996, ("First *Erdemovic* Sentencing Judgement") p 20. Article 24.2 provides: "In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".

[992] There is a discussion of these complexities in an article upon which both Landžo and the Prosecution relied in relation to different issues, "The Emerging Mental Incapacity Defense in International Criminal Law:

upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.

E. The Trial Chamber's Rejection of Diminished Mental Responsibility

591. The second ground of appeal filed by Landžo relating to diminished mental responsibility was in these terms:

> The Trial Chamber erred in law and made findings of fact inconsistent with the great weight of the evidence when it rejected clear evidence of diminished mental responsibility.[993]

This ground of appeal remains relevant, because Landžo also relied upon diminished mental responsibility in mitigation of sentence.

592. Five psychiatrists gave evidence in relation to Landžo's mental condition. Four of them concluded that he suffered from a personality disorder (albeit described in different terms) and, in essence, that there was a substantial impairment of his mental responsibility for his actions in the Celebici prison camp.[994] Their view was that his capacity to exercise his own free will when given orders was diminished.[995] Only one psychiatrist (who was called by the Prosecution) rejected the existence of a relevant personality disorder.[996] It was accordingly submitted by Landžo that the Trial Chamber's rejection of the evidence of the four psychiatrists in favour of the one dissentient called by the Prosecution (who had spent less time with the accused than had the others) was an arbitrary and capricious exercise of its discretion and an unreasonable one.[997]

Some Initial Questions of Implementation", Peter Krug, 94 the American Journal of International Law (2000) 317, at 331-333.

993 Landžo Brief, Ground of Appeal 8.

994 Although the Trial Chamber purported (at para 1169) to follow the common law authorities relating to the partial defence of diminished mental responsibility, it nevertheless permitted the psychiatrists, contrary to authority, to express their own opinions as to whether there was a substantial diminution of Landžo's mental responsibility. The issue as to whether the impairment of the defendant's mental responsibility for his act was substantial has been held to involve questions of degree, and thus that it is essentially one for the tribunal of fact: *Regina v Byrne* [1960] 2 QB 396 at 403-404. As that is not merely a medical issue of whether there was an impairment but also whether that impairment can "properly" be called substantial, whether the diminution of a person's mental responsibility for an act is not a matter within the expertise of the medical profession; it involves a value judgement by the tribunal of fact representing the community, not a finding of medical fact or opinion: *Regina v Byrne* (at 404); *Walton v The Queen* [1978] AC 788 at 793; *Regina v Ryan* (1995) 90 A Crim R 191 at 196. However, no objection was taken to the psychiatrists expressing their opinions upon the issue.

995 Their evidence is summarised in the Landžo Brief, pp 109-132.

996 His evidence is partly summarised in the Landžo Brief, pp 132-138.

997 Landžo Brief, pp 138-140.

593. This submission misconceives what the Trial Chamber concluded. It rejected the views of the four psychiatrists not because it preferred the views of the one psychiatrist called by the Prosecution, but because it did not accept the truth of the factual history given by Landžo upon which the four psychiatrists had based their opinions.[998] Specifically, it accepted the evidence that Landžo had admitted to one of the psychiatrists that he never had any difficulty inflicting pain and suffering on the prisoners and that he had enjoyed doing so.[999] The Trial Chamber rejected Landžo's evidence that he had committed the criminal acts with which he was charged on the direction of his co-accused Delic.[1000] The Trial Chamber was not persuaded that those criminal acts by Landžo were not the product of his own free will.[1001] Although the Trial Chamber accepted the evidence of the psychiatrists that Landžo suffered from a personality disorder, it considered that the evidence relating to his inability to control his physical acts on account of an abnormality of mind was not at all satisfactory, and it concluded that, despite his personality disorder, Landžo was quite capable of controlling his actions.[1002]

594. All of these findings were clearly open to the Trial Chamber upon the evidence before it. An expert opinion is relevant only if the facts upon which it is based are true. It was nevertheless argued by Landžo that, as the psychiatrists have given evidence that they were trained to detect malingering by a patient, they were able to identify by the psychological testing they performed whether or not the patient was telling the truth,[1003] and that the contrary findings of the Trial Chamber were therefore unreasonable. This argument is rejected. It is for the Trial Chamber, and not for the medical experts, to determine whether the factual basis for an expert opinion is truthful. That determination is made in the light of all the evidence given. Notwithstanding their expertise, medical experts do not have the advantage of that evidence.

595. It has not been demonstrated that the rejection of the "special defence" of diminished mental responsibility was a conclusion which no reasonable tribunal of fact could have been reached. Ground of Appeal 8 is therefore rejected. Although it rejected the "special defence", the Trial Chamber did take into account Landžo's "personality traits" revealed by the psychiatrists when imposing sentence.[1004]

---

[998] Trial Judgement, paras 1181-1185.
[999] *Ibid*, para 1185. Trial Transcript, p 15230, lines 10-18.
[1000] Trial Judgement, para 1185. Landžo admitted in his evidence that he had mistreated prisoners on his own initiative just because he was angry, and without orders to do so (Trial Transcript, pp 15055-15057, 15349-15351).
[1001] Trial Judgement, para 1185.
[1002] *Ibid*, para 1186.
[1003] Appeal Transcript, pp 597-598, 603-604.
[1004] Trial Judgement, para 1283.

X. SELECTIVE PROSECUTION

596. Landžo alleges that he was the subject of a selective prosecution policy conducted by the Prosecution.[1005] He defines a selective prosecution as one "in which the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience."[1006] Specifically, he alleges that he, a young Muslim camp guard, was selected for prosecution, while indictments "against all other Defendants without military rank", who were all "non-Muslims of Serbian ethnicity", were withdrawn by the Prosecution on the ground of changed prosecutorial strategies.[1007]

597. The factual background to this contention is that the Prosecutor decided in 1998 to seek the withdrawal of the indictments against fourteen accused who at that stage had neither been arrested nor surrendered to the Tribunal. This application was granted by Judges of the Tribunal in early May 1998. At that stage, the trial in the present proceedings had been underway for a period of over twelve months. The Prosecutor's decision and the grant of leave to withdraw the indictment was announced in a Press Release, which explained the motivation for the decision in the following terms:

> Over recent months there has been a steady increase in the number of accused who have either been arrested or who have surrendered voluntarily to the jurisdiction of the Tribunal. [...].
>
> The arrest and surrender process has been unavoidably piecemeal and sporadic and it appears that this is likely to continue. One result of this situation is that accused, who have been jointly indicted, must be tried separately, thereby committing the Tribunal to a much larger than anticipated number of trials.
>
> In light of that situation, I have re-evaluated all outstanding indictments *vis-à-vis* the overall investigative and prosecutorial strategies of my Office. Consistent with those strategies, which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the [*sic*] exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw the charges against a number of accused in what have become known as the Omarska and Keraterm indictments, which were confirmed in February 1995 and July 1995 respectively.[1008]

[1005] This ground of appeal states: "The Prosecutor's practice of selective prosecution violated Article 21 of the Statute of the ICTY, the rules of natural justice and of international law." Land`o Brief, p 13.

[1006] Landžo Brief, p 13.

[1007] Landžo Brief, p 15. The Prosecutor stated this change of strategy in an ICTY press release dated 8 May 1998, CC/PIU/314-E ("Press Release"). The Press Release is quoted in part in the Land`o Brief, p 16. The full statement was admitted into evidence by the Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, pp 5-6. The Press Release refers to fourteen accused named in the "Omarska" and "Keraterm" indictments (*Prosecutor v Sikirica*, IT-95-4 and *Prosecutor v Meaki}*, IT-95-8). Press Release, pp 1-2.

[1008] Press Release, p 1.

Although counsel for Landžo submitted that the Prosecution sought and obtained the withdrawal of indictments against *sixteen* accused, "some of whom were already in custody" of the Tribunal at the relevant time,[1009] this was not the case. Although three people[1010] were released from the custody of the Tribunal on 19 December 1997 pursuant to a decision granting the Prosecutor's request to withdraw their indictment,[1011] the withdrawal of those indictments was based on the quite different consideration of insufficiency of evidence. Landžo does not appear to have intended to refer to the withdrawal of any indictments other than those referred to in the Press Release, and the submissions proceeded upon that basis.

598. Landžo accordingly submitted, first at trial and now on appeal, that, because the indictment against him was not also withdrawn, he was singled out for prosecution for an impermissible motive and that this selective prosecution contravened his right to a fair trial as guaranteed by Article 21 of the Statute. Citing a decision of the United States of America's Supreme Court, *Yick Wo v Hopkins*,[1012] and Article 21(3) of the Rome Statute of the International Criminal Court, Landžo submits that the guarantee of a fair trial under Article 21(1) of the Statute incorporates the principle of equality and that prohibition of selective prosecution is a general principle of customary international criminal law.[1013]

599. The Trial Chamber, in its sentencing considerations, referred to Landžo's argument that, because he was an ordinary soldier rather than a person of authority, he should not be subject to the Tribunal's jurisdiction, and then stated:

> [The Trial Chamber] does, however, note that the statement issued in May this year (1998) by the Tribunal Prosecutor concerning the withdrawal of charges against several indicted persons, quoted by the Defence, indicates that an exception to the new policy of maintaining the investigation and indictment only of persons in positions of some military or political authority, is made for those responsible for exceptionally brutal or otherwise extremely serious offences. From the facts established and the findings of guilt made in the present case, the conduct of Esad Landžo would appear to fall within this exception.[1014]

600. The Prosecution argues that the Prosecutor has a broad discretion in deciding which cases should be investigated and which persons should be indicted.[1015] In exercising this discretion, the Prosecutor may have regard to a wide range of criteria. It is impossible, it is said, to prosecute all persons placed in the same position and, because of this, the jurisdiction of the

---

[1009] Appeal Transcript, p 551.
[1010] Marinko Katava (*see* indictment in *Prosecutor v Kupre{ki} et al*, Case IT-95-16); Ivan Santi} and Pero Skopljak (*see* Indictment in *Prosecutor v Kordi} et al*, Case IT-95-14/2).
[1011] *Prosecutor v Kupre{ki} et al, Prosecutor v Kordi} et al*, Decision to Withdraw Indictment, 19 Dec 1997.
[1012] 118 U.S. 356, 6 S.Ct.1064 (1886).
[1013] Landžo Brief, pp 13-14.
[1014] Trial Judgement, para 1280, footnote referring to Press Release omitted.
[1015] Prosecution Response, p 111.

International Tribunal is made concurrent with the jurisdiction of national courts by Article 9 of the Statute.[1016]

601. Article 16 of the Statute entrusts the responsibility for the conduct of investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 to the Prosecutor. Once a decision has been made to prosecute, subject to the requirement that the Prosecutor be satisfied that a prima facie case exists, Article 18 and 19 of the Statute require that an indictment be prepared and transmitted to a Judge of a Trial Chamber for review and confirmation if satisfied that a prima facie case has been established by the Prosecutor. Once an indictment is confirmed, the Prosecutor can withdraw it prior to the initial appearance of the accused only with the leave of the Judge who confirmed it, and after the initial appearance only with the leave of the Trial Chamber.[1017]

602. In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments. This is acknowledged in Article 18(1) of the Statute, which provides:

> The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and *decide whether there is sufficient basis to proceed.*

It is also clear that a discretion of this nature is not unlimited. A number of limitations on the discretion entrusted to the Prosecutor are evident in the Tribunal's Statute and Rules of Procedure and Evidence.

603. The Prosecutor is required by Article 16(2) of the Statute to "act independently as a separate organ of the International Tribunal", and is prevented from seeking or receiving instructions from any government or any other source. Prosecutorial discretion must therefore be exercised entirely independently, within the limitations imposed by the Tribunal's Statute

[1016] Article 9(1) of the Statute reads: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."
[1017] Rule 51(A).

and Rules. Rule 37(A) provides that the Prosecutor "shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor."

604. The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights.[1018]

605. One such principle is explicitly referred to in Article 21(1) of the Statute, which provides:

> All persons shall be equal before the International Tribunal.

This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights,[1019] the 1966 International Covenant on Civil and Political Rights,[1020] the Additional Protocol I to the Geneva Conventions,[1021] and the Rome Statute of the International Criminal Court.[1022] All these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives

---

[1018] Secretary-General's Report, para 106.

[1019] Article 7 provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

[1020] Article 14 provides: "[a]ll persons shall be equal before the courts and tribunals [...]." Article 26 provides explicitly that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[1021] Article 75 (fundamental guarantees) provides in para 1: "Insofar as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria."

[1022] Article 21(3) provides "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination.

606. This reflects principles which apply to prosecutorial discretion in certain national systems. In the United Kingdom, the limits on prosecutorial discretion arise from the more general principle, applying to the exercise of administrative discretion generally, that the discretion is to be exercised in good faith for the purpose for which it was conferred and not for some ulterior, extraneous or improper purpose.[1023] In the United States, where the guarantee of equal protection under the law is a constitutional one, the court may intervene where the accused demonstrates that the administration of a criminal law is "directed so exclusively against a particular class of persons [...] with a mind so unequal and oppressive" that the prosecutorial system amounts to "a practical denial" of the equal protection of the law.[1024]

607. The burden of the proof rests on Landžo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him. Landžo must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants.

608. The Prosecution submits that, in order to demonstrate a selective prosecution, Landžo must show that he had been singled out for an impermissible motive, so that the mere existence of similar unprosecuted acts is not enough to meet the required threshold.[1025]

609. Landžo submits that a test drawn from United States case-law, and in particular the case *United States of America v Armstrong*,[1026] provides the required threshold for selective prosecution claims. Pursuant to this test, the complainant must prove first that he was singled out for prosecution for an improper motive, and secondly, that the Prosecutor elected not to prosecute other similarly situated defendants. There is therefore no significant difference between the applicable standards identified by Landžo and by the Prosecution.

[1023] *R v Inland Revenue Commissioners, ex parte Mead and Cook*, [1993] 1 All ER 772. It has also been accepted in Australia that there may be a principle pursuant to which proof of a selective prosecution may give rise to some relief, including, for example, the exclusion of evidence: *Hutton v Kneipp* [1995] QCA 203.
[1024] *Yick Wo v Hopkins* 118 US 356, 373 (1886); *United States v Armstrong* 517 US 456, 464-465 (1996).
[1025] Prosecution Response, p 111.
[1026] *United States v Armstrong* 517 US 456, 463-465 (1996). *See* also *United States of America v Irish People, Inc.*, 684 F 2d 928, 932-3, 946 (DC Circuit 1983).

610. As observed by the Prosecution, the test relied on by Landžo in *United States of America v Armstrong,* puts a heavy burden on an appellant.[1027] To satisfy this test, Landžo must demonstrate clear evidence of the intent of the Prosecutor to discriminate on improper motives, and that other similarly situated persons were not prosecuted. Other jurisdictions which recognise an ability for judicial review of a prosecutorial discretion also indicate that the threshhold is a very high one.[1028]

611. It is unnecessary to select between such domestic standards, as it is not appropriate for the Appeals Chamber simply to rely on the jurisprudence of any one jurisdiction in determining the applicable legal principles. The provisions of the Statute referred to above and the relevant principles of international law provide adequate guidance in the present case. The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute; here, for example, in contravention of the principle of equality before the law in Article 21. This would require evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle. Because the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one. This essentially reflects the two-pronged test advocated by Landžo and by the Prosecution of (i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted.

612. Landžo argues that he was the only Bosnian Muslim accused without military rank or command responsibility held by the Tribunal, and he contends that he was singled out for prosecution "simply because he was the only person the Prosecutor's office could find to 'represent' the Bosnian Muslims". He was, it is said, prosecuted to give an appearance of "evenhandedness" to the Prosecutor's policy.[1029] Landžo alleges that the Prosecutor's decision to seek the withdrawal of indictments against the accused identified in the Press Release, without seeking the discontinuation of the proceedings against Landžo, was evidence of a discriminatory purpose. Landžo rejects the justification given by the Prosecutor in the Press Release of a revaluation of indictments according to changed strategies "in light of the decision

[1027] Prosecution Response, p 113.
[1028] *Chief Constable of Kent and Crown Prosecution Service, ex parte GL,* (1991) Crim App R 416; *R v Inland Revenue Commissioners, ex parte Mead and Cook,* [1993] 1 All ER 772; *R v Power* [1994] 1 SCR 601.

to except the one Muslim defendant without military rank or command responsibility from the otherwise complete dismissal of charges against Defendants having that status."[1030]

613. The Prosecution argues that a change of prosecutorial tactics, in view of the need to reassign available resources of the Prosecution, cannot be considered as being significative of discriminatory intent. Furthermore, the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy had a discriminatory effect, so that other *similarly situated* individuals of other ethnic or religious backgrounds were not prosecuted. The Prosecution observes that those against whom charges were withdrawn had not yet been arrested or surrendered to the Tribunal, whereas Land`o was in custody and his case already mid-trial.[1031] The Prosecution adds that even if it was to be considered that the continuation of Landžo's trial resulted in him being singled out, it was in any event for the commission of exceptionally brutal or otherwise serious offences.[1032]

614. The crimes of which Landžo was convicted are described both in the Trial Judgement and in the present judgement at paragraphs 565-570. The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landžo was consistent with the stated policy of the Prosecutor to "focus on persons holding higher levels of responsibility, or on those who have been *personally responsible for the exceptionally brutal or otherwise extremely serious offences.*"[1033] A decision, made in the context of a need to concentrate prosecutorial resources, to identify a person for prosecution on the basis that they are believed to have committed *exceptionally* brutal offences can in no way be described as a discriminatory or otherwise impermissible motive.

615. Given the failure of Landžo to adduce any evidence to establish that the Prosecution had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute him, it is not strictly necessary to have reference to the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued. However, the facts in relation to this question support the conclusion already drawn that Landžo was not the subject of a discriminatory selective prosecution.

[1029] Land`o Brief, p 17.
[1030] Land`o Brief, p 16.
[1031] Prosecution Response, p 113.

616. All of the fourteen accused against whom charges were withdrawn pursuant to the Prosecutor's change of policy, unlike Landžo, had not been arrested and were not in the custody of the Tribunal. None of the fourteen persons identified in the Press Release as the subject of the withdrawn indictments had been arrested or surrendered to the Tribunal so were not in the Tribunal's custody.

617. At the time at which the decision was taken to withdraw the indictments on the basis of changed prosecutorial strategy, the trial of Landžo and his co-accused had been underway for over twelve months. None of the persons in respect of whom the indictments were withdrawn were facing trial at the time. These practical considerations alone, which demonstrate an important difference in the situation of Landžo and the persons against whom indictments were withdrawn, also provide the rational justification for the Prosecutor's decisions at the time. The Appeals Chamber notes that the Prosecutor explicitly stated that accused against whom charges were withdrawn could still be tried at a later stage by the Tribunal or by national courts by virtue of the principle of concurrent jurisdiction.[1034] Had Landžo been released with the leave of the Trial Chamber, he would have been subject to trial upon the same or similar charges in Bosnia and Herzegovina.

618. Finally, even if in the hypothetical case that those against whom the indictments were withdrawn were identically situated to Landžo, the Appeals Chamber cannot accept that the appropriate remedy would be to reverse the convictions of Landžo for the serious offences with which he had been found guilty. Such a remedy would be an entirely disproportionate response to such a procedural breach. As noted by the Trial Chamber, it cannot be accepted that "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial".[1035]

619. This ground of appeal is therefore dismissed.

[1032] Prosecution Response, p 114.
[1033] Press Release, p 1 (emphasis added).
[1034] Press Release.
[1035] Trial Judgement, para 180.

XI. JUDGE KARIBI-WHYTE

620. Landžo filed a ground of appeal based on an allegation that the Presiding Judge at trial, Judge Karibi-Whyte, "was asleep during substantial portions of the trial".[1036] This ground of appeal was subsequently adopted by Mucic and Delic,[1037] but it was agreed that counsel for Landžo carried the burden of argument on this ground.[1038] The grounds of appeal are stated as follows:

> Landžo Ground 4
>
> The Participation, As Presiding Judge Of The Trial Chamber, Of A Judge Who Was Asleep During Substantial Portions Of The Trial, Denied Appellants The Right To the Full And Competent Judicial Decision Of Questions of Law, Fact, And Evidence, and Improperly Denied Appellants A Fair Trial, And The Appearance Of A Fair Trial.[1039]
>
> Mucic Ground 3, Delic Issue 20
>
> Whether Mucic and Delic were deprived of a fair trial due to the fact that the Presiding Judge at the Trial Chamber slept during substantial portions of the trial.[1040]

621. Landžo tendered a variety of material in relation to the issue of whether Judge Karibi-Whyte was asleep during the trial, including the audio-visual recordings taken by courtroom cameras during the proceedings, newspaper reports, and affidavits of persons who observed part of the proceedings.

622. The audio-visual records already formed part of the trial record, and thus were not admitted into evidence as such.[1041] However, the Appeals Chamber granted leave for tapes to be made, containing copies of those portions of the audio-visual recordings produced by the courtroom cameras generally focussed on the judges' bench nominated by Landžo and by the Prosecution ("Extracts Tapes"), for use by the Appeals Chamber as a convenient method of viewing the material relevant to this ground of appeal.[1042] The Appeals Chamber declined to admit the other material tendered by Landžo on the grounds that it was not admissible, or that it

---

[1036] Landžo Brief, Ground of Appeal 4, pp 1-2.
[1037] Notice to the Chamber Related to Landžo's Issue on the Presiding Judge Sleeping During Trial, 17 Feb 2000. Leave was granted to add this ground of appeal by the order on Appellants Hazim Delic and Zdravko Mucic's 'Notice' Related to Appellant Esad Landžo's Fourth Ground of Appeal, 30 Mar 2000.
[1038] Transcript of Pre-Appeal Conference, 12 May 2000, pp 29, 43.
[1039] Landžo Supplementary Brief, p 1.
[1040] Appellant Zdravko Mucic's Final Designation of his Grounds of Appeal, 31 May 2000; Appellant-Cross-Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000, p 4.
[1041] Order, 12 Feb 1999, p 3.
[1042] Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999; Order on Esad Landžo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare and Present Further Evidence, and (3) that the Appeals Chamber Take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 Oct 1999, pp 3-5.

was not relevant, or that it had no probative value in relation to the issues raised by the ground of appeal, or that it was repetitive as it would not advance Landžo's case beyond what was already shown in the Extracts Tapes.[1043]

623. Landžo also made an extremely late application for the Extracts Tapes to be viewed by an expert to see whether he could give an opinion as to –

> [...] Judge Karibi-Whyte's ability or inability to perform his duties as Presiding Judge in the manner necessary to afford Appellants and the other accused a fair trial.[1044]

The application was opposed by the Prosecution upon the bases that it was untimely, that a grant of the relief sought would cause delay, that the proposed expert witness testimony would be of uncertain value and that the Prosecution would not have the opportunity to call its own expert witness without delaying the hearing of the appeal.[1045] The application was refused by the Appeals Chamber upon the grounds that, even assuming Landžo's expert could give his opinion without delay, the absence of any reasonable opportunity for the Prosecution to respond with its own expert's evidence without further delaying the hearing of the appeal would be prejudicial to the Prosecution in the exercise of its prosecutorial role which it performs on behalf of the international community. The Appeals Chamber noted also that any further delay in the hearing would be contrary to the interests of justice, that Landžo, who could in the exercise of due diligence have sought relief at an earlier time, could not at that late stage complain of unfairness, and that, as the medical expert would not have access to any medical records relating to Judge Karibi-Whyte or the opportunity to medically examine him, the weight to be afforded to his evidence would not be such as to justify the prejudice to the Prosecution and the other appellants which would be caused by delaying the hearing of the appeal.[1046]

A. The Allegations as to the Presiding Judge's Conduct

624. Based upon what was said to be demonstrated by the Extracts Tapes, a number of allegations as to the conduct of Judge Karibi-Whyte during the trial were made in the

---

[1043] Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 7 Dec 1999, p 5; Order in Relation to Witnesses on Appeal, 19 May 2000, pp 2-3; Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, pp 2-4 and 8-9.

[1044] Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders (Landžo's Fourth Ground of Appeal), 27 Apr 2000, paras 3-4.

[1045] Prosecution Response to Esad Landžo's Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders, and Prosecution Motion for Clarification, 3 May 2000.

[1046] Order on Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders, 9 May 2000, pp 4-6.

Supplementary Brief filed on behalf of Landžo in relation to this ground of appeal. These allegations included the following:

> These portions [of the Extracts Tapes] clearly and unambiguously paint a disturbing picture of a Judge prone to fall asleep during all phases of the trial, at almost any time when he was not speaking, examining a document, or otherwise being actively engaged.[1047]
>
> This is a question of a Judge sleeping deeply, as if in his own bed, at all hours of the day, and regardless of the nature of the events unfolding around him.[1048]
>
> [...] the particulars [i.e. the portions of the audio-visual record in the Extracts Tapes] paint such a clear and unambiguous pattern of continuous sleep, it is not only a reasonable inference, but an almost irresistible one, that the Judge's sleeping in the courtroom continued while the relevant cameras were not trained on him [...].[1049]
>
> [...] the clear evidence provided by the relevant cameras of Judge Karibi-Whyte being deeply asleep [...].[1050]
>
> It was frequently necessary for members of the Registrar's office, and another member of the Trial Chamber, Judge Jan, to awaken the Presiding Judge.[1051]

B. Applicable Legal Principles

625. No precedent in the international context was cited in relation to the specific issue raised by this ground of appeal, and none has been discovered by the Appeals Chamber's own research. Guidance as to the legal principles relevant to an allegation that a trial judge was not always fully conscious of the trial proceedings may therefore be sought from the jurisprudence and experience of national legal systems. The national jurisprudence considered by the Appeals Chamber discloses that proof that a judge slept through, or was otherwise not completely attentive to, part of proceedings is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or other adequate remedy.[1052] The parties essentially agreed that these are the principles which apply to the issue before the Appeals Chamber.[1053]

626. The jurisprudence of national jurisdictions indicates that it must be proved by clear evidence that the judge was actually asleep or otherwise not fully conscious of the proceedings, rather than that he or she merely gave the appearance of being asleep.[1054] Landžo accepted that

---

[1047] Landžo Supplementary Brief, p 3.
[1048] *Ibid*, p 4.
[1049] *Ibid*, p 4
[1050] *Ibid*, p 5.
[1051] *Ibid*, p 2.
[1052] Cases relating to jurors alleged to have been asleep during a trial are included in the present consideration.
[1053] Landžo Supplementary Brief, pp 7-8; Prosecution Response to Landžo Supplementary Brief, para 3.3.
[1054] *R v Caley* [1997] WCBJ 1714 (British Columbia Supreme Court), at para 25 (to grant relief on the basis of the inattention of the judge there must be "clear and overwhelming evidence"); *Sanborn v Commonwealth*

it was necessary to prove by evidence the allegation upon which this ground of appeal is based.[1055]

C. Was the Allegation Proved?

627. The Extracts Tapes were viewed by the Appeals Chamber prior to the hearing of the appeal. Even accepting that the cameras nominated by Landžo were not *always* focussed on the judges' bench, and thus that there is not a complete record of Judge Karibi-Whyte's conduct throughout the trial, the Appeals Chamber is satisfied that the descriptions quoted above are both highly coloured and gravely exaggerated. The descriptions given in the particulars in Exhibit B to Landžo's Supplementary Brief, which identify what is to be seen in each portion of the Extracts Tapes upon which reliance is placed, are similarly coloured and exaggerated, and they appear to have been given with a reckless indifference as to the truth.

628. The appellants have manifestly failed to establish the allegation in the ground of appeal, that Judge Karibi-Whyte "was asleep during substantial portions of the trial". The Extracts Tapes do, however, demonstrate a recurring pattern of behaviour where Judge Karibi-Whyte appears not to have been fully conscious of the proceedings for short periods at a time. Such periods were usually of five to ten seconds only, but this pattern is repeated over extended periods of ten to fifteen minutes on a number of occasions. On very few occasions, this loss of attention lasted up to thirty seconds. On one occasion only, during the course of an excessively lengthy examination of a medical witness by counsel for Landžo, the judge appeared to be asleep for approximately thirty minutes. On a different occasion, Judge Jan leant over to touch Judge Karibi-Whyte when his head had dropped. Judge Karibi-Whyte can also be heard to be breathing very noisily at times, but such times include occasions where he is obviously very fully conscious of the proceedings.

629. Such behaviour revealed by the Extracts Tapes warrants an examination as to whether, notwithstanding their failure to establish the factual basis of these grounds of appeal, the appellants nevertheless have a valid cause for complaint as to the fairness of the trial. It must be

---

975 SW 2d 905 (1998), at 911 (Supreme Court of Kentucky); *Commonwealth v Keaton*, 36 Mass App Ct 81 (1994), at 87; *Bundesgerichtshof*, Vol 11, p 74, Judgement of 22 November 1957 (German Federal Supreme Court of Justice); *Bundesverwaltungsgericht*, Judgement of Supreme Administrative Court, 24 Jan 1986 at para 12; [1986] Neue Juristiche Wochenschrift 2721, at 2721; *Illinois v McCraven* 97 Ill App 3d 1075 (1981) (Appellate Court of Illinois), at 1076; *People v Thurmond* 175 Cal App 3d 865 (1985) (Court of Appeal, 2d District), at 874; *Commonwealth Bank of Australia v Falzon* [1998] VSCA 79, para 10 (Supreme Court of Victoria, Court of Appeal).

[1055] Landžo Supplementary Brief, p 7.

said, firmly, that Judge Karibi-Whyte's conduct cannot be accepted as appropriate conduct for a judge. Even if, as may well be the position, he had no control over his loss of attention, litigants are in general entitled to the full attention of the judges who have to decide their case. The charges being tried in this case were extremely serious, and the consequences of conviction for the accused were equally serious. If a judge suffers from some condition which prevents him or her from giving full attention during the trial, then it is the duty of that judge to seek medical assistance and, if that does not help, to withdraw from the case.

D. Absence of Identifiable Prejudice

630. Such conclusions do not, however, automatically lead to the quashing of the judgement which was given in this case. As stated earlier, the national jurisprudence indicates that, before a remedy will be granted on the basis that a judge has been asleep or otherwise inattentive, it must be proved that some identifiable prejudice was caused thereby to the complaining party.[1056] In some continental systems where the sleeping or inattention of a judge may form the basis for a ground of appeal or revision of a judgement – for example, because the court was thereby not properly constituted[1057] – no separate reference is made to the necessity to demonstrate prejudice before such a ground would succeed. However, in order to establish a violation in those cases, a party must prove that the judge in question was unable to perceive "essential" or "crucial" events in the hearing.[1058] If such a standard of judicial inattention has been proved, some actual prejudice must necessarily have been incurred, or at least the proceedings must necessarily have been defective in a material way. The complaining party must prove the relevant prejudice by clear evidence.[1059] Indeed, it has been held that to grant a new trial on the basis of the inattention of a juror without clear proof of any prejudice caused thereby constitutes "a clear abuse of discretion".[1060]

[1056] *R v Moringiello* [1997] Crim LR 902; *R v Edworthy* [1961] Crim LR 325; *R v Tancred* 14 April 1997, Court of Appeal (Criminal Division); *Kozlowski v City of Chicago* 13 Ill App 513 (the fact that a juror fell asleep during proceedings, absent an affirmative showing of prejudice to the complainant, is not a ground for a new trial); *State of Ohio v Dean*, Ohio App Lexis 3873, Judgement of 20 Sept 1988 (Court of Appeals of Ohio) (must be a showing of "material prejudice").

[1057] *See*, in Germany, the *Strafprozeßordnung*, which provides by Article 338 (1) that an absolute ground for revision of a judgement is that the trial court was not constituted as provided. Article 338 (1) may be violated where a judge or lay assessor is asleep or otherwise "absent".

[1058] *Bundesverwaltungsgericht* (Supreme Administrative Court) Judgement of 24 January 1986, [1986] *Neue Juristiche Wochenschrift* 2721, at 2721; *Bundesgerichtshof* (Federal Supreme Court of Justice) Vol 2, p 14, Judgement of 23 November 1951.

[1059] *State of Ohio v Dean*, Ohio App Lexis 3873, Judgement of 20 Sept 1988 (Court of Appeals of Ohio); *United States of America v White and Keno* 589 F 2^{d} 1283 (1979) (Court of Appeals, 5th Circuit), at 1289.

[1060] *Ferman v Estwing Manufacturing Company*, 31 Ill App 3^{d} 229, at 233.

631. The prejudice which must be proved may be manifested where the judge fails in some identifiable way to assess the evidence properly or expresses an incorrect understanding of the evidence which was given or the submissions which were put.[1061] Elsewhere, it has been held that what must be proved is that the judge is completely inattentive to such a substantial or significant part of the proceedings that there has been a "significant defect" in the proceedings.[1062] The failure of counsel to object or to call attention to a judge's sleeping or inattention during the proceedings is relevant to the question as to whether prejudice has been established. Failure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto.[1063]

632. The necessity that an appellant establish that some prejudice has actually been caused by a judge's inattention before a remedy will be granted is simply a matter of common sense. It is clear that there are a number of legitimate reasons why a judge's attention may briefly be drawn away from the court proceedings before him or her, including taking a note of the evidence or of a particular submission or looking up the transcript to check evidence previously given. It has been recognised in national jurisprudence that instances of inattention of that nature do not cause prejudice or undermine the fairness of the trial, but are an integral part of a judge's task in assessing the case before him or her.[1064]

633. Moreover, where a judge of this Tribunal misses any evidence, there is not only a transcript to be read but also a video-tape to be viewed if the demeanour of the witness needs to be checked, and there are the observations of the other two judges to assist. Indeed, for these reasons it has been recognised in the Rules of Procedure and Evidence of the Tribunal that the short absence of a judge from trial proceedings need not necessarily prevent the continuation of the proceedings in the presence of the remaining two judges. Rule 15*bis*(A) states:

> If (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Trial Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than three days.

[1061] *See, e.g., Espinoza v The State of Texas,* Tex App Lexis 5343, Judgement of 21 July 1999.
[1062] *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106 (Queensland Court of Appeal), at 113.
[1063] *The Chicago City Railway Company v John Anderson* 193 Ill 9 (1901), at 13.
[1064] *Bundesgerichtshof* (Federal Supreme Court of Justice) Vol 11 p 74, 22 November 1957, at 77: "There are numerous matters of behaviour and other circumstances by which a judge may give the impression to participants, especially to a defendant who is a layman in law, that he did not pay attention to a part of the events of the proceedings. Such an impression can even be made by actions to which the judge is legally obliged [*sic*]".

Although this rule was not in force at the time of the *Celebici* trial proceedings,[1065] the fact of its adoption is a clear demonstration that the judges of the Tribunal meeting in plenary considered it to be consistent with the principles of a fair trial and with the Statute of the Tribunal to permit proceedings to be conducted in the temporary absence of one judge.

634. Again, the necessity of establishing some prejudice in order to be entitled to any remedy in relation to this ground of appeal is accepted by Landžo.[1066] However, no specific prejudice has been established by him. The only matter to which reference needs to be made is the fact that Judge Karibi-Whyte slept through thirty minutes of the evidence in chief of one of Landžo's medical witnesses – a psychiatrist who gave evidence upon the issue of diminished mental responsibility. If the Trial Chamber's rejection of the psychiatric evidence given on behalf of Landžo had depended upon a preference for the views of the psychiatrist called by the Prosecution over the views of the four psychiatrists called by Landžo, this fact could possibly have demonstrated a substantial prejudice to his case. However, as stated earlier, this was not the basis upon which the Trial Chamber rejected their views. The Trial Chamber rejected their views because it did not accept the truth of the factual history given by Landžo upon which the four psychiatrists had based their opinions.[1067]

635. Landžo nevertheless relied by way of analogy upon certain domestic cases which, he contended, established that prejudice is *inherent* in a party's counsel sleeping during trial.[1068] However, it is apparent from a reading of these cases that the view that a counsel's sleeping during trial is *inherently* prejudicial has been taken by only one appeals court, other courts having found it necessary to look at the record and the evidence to establish whether the client's interests were in fact "at stake" at the relevant times and therefore prejudiced by the counsel's inattention.[1069] Further, the fact of a *counsel* sleeping or being seriously inattentive to his or her client's case – and thereby providing ineffective assistance – during a trial differs from the issue of judicial inattention, in that defence counsel, who alone truly knows the interests of his or her client, is necessarily obliged to safeguard those interests at every moment during the trial, in order to avoid prejudice which cannot be remedied.

[1065] It was adopted at the Twenty-first Plenary Session, 15-17 Nov 1999, (Revision 17 of the Rules) and entered into force on 7 Dec 1999. The words "or for reasons of authorised Tribunal business" were inserted by Revision 19 of the Rules, with effect from 19 Jan 2001.
[1066] Landžo Supplementary Brief, p 7.
[1067] Trial Judgement, paras 1181-1185. *See* para 593 above.
[1068] *Javor v United States of America*, 724 F 2d 831 (1981) (Court of Appeals, 9th Circuit); *Tippins v Walker* 77 F 3d 682 (1996) (Court of Appeals, 2d Circuit).
[1069] *Tippins v Walker*, cited above, at 685 and 689.

636. Landžo argued that he has proved "necessary and irreversible prejudice" because, as it was Judge Karibi-Whyte's duty to play a full part in the decision of all questions of fact, law and evidence, he had been "deprived of the right to have Judge Karibi-Whyte bring his independent judgment to bear on the conferences in which all three Judges participated [...]".[1070] Landžo and the other appellants were, however, unable to point to any evidence which supports this allegation or which indicates that Judge Karibi-Whyte did not in fact participate in all relevant deliberations during and after the trial. It was in fact acknowledged during oral submissions that the appellants did not know and could not now establish what participation Judge Karibi-Whyte would have had in deliberations with the other judges in relation to the proceedings.[1071] From the conclusions drawn by the Appeals Chamber on the basis of its review of the Extracts Tapes, it rejects the submission that the content of the tapes gives rise to "an almost irresistible inference that the Judge missed much of the evidence and argument".[1072]

637. Reliance was also placed by Landžo on the principle that there must be the appearance of a fair trial,[1073] with the implication that even proof of an *appearance* that a judge was sleeping during proceedings is an adequate foundation for relief without proof of prejudice. An English case, *R v Weston-Super-Mare Justices, ex parte Taylor*, was cited in support of this contention.[1074] There, the Queen's Bench Divisional Court set aside a defendant's conviction on the basis that the chairperson of a bench of magistrates had appeared to be asleep for part of the trial. The defendant's solicitor, believing that the chairperson had been asleep, suggested to her through the clerk of the court that she retire and leave the remaining two magistrates to determine the case. The Divisional Court, having referred to evidence before it as to the magistrate's conduct, found that she had not in fact been asleep. However, it held that the magistrate should have withdrawn in response to the request because it was clear that the defendant's solicitor had formed a genuine view that she had been asleep, and that "the administration of justice required not only that justice was in fact done, but also that justice was seen to be done".[1075]

638. The conclusion in that case turned on the views formed, albeit genuinely, by a single observer, even though they were contradicted by the evidence of other observers which was

[1070] Landžo Supplementary Brief, p 15.
[1071] Appeal Transcript, p 691.
[1072] Landžo Supplementary Brief, p 14.
[1073] Appeal Transcript, p 692.
[1074] [1981] Crim LR 179, cited in Landžo Supplementary Brief, pp 9-10.
[1075] [1981] Crim LR 179.

ultimately preferred by the review court in its finding.[1076] The Appeals Chamber does not accept that this was the correct approach. In relation generally to the right to a fair trial under Article 6 of the European Convention on Human Rights, the European Court of Human Rights has held that, despite

> [...] the importance of appearances in the administration of justice, [...] the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified [...].[1077]

639. Further, the proposition on which *ex parte Taylor* turned – that the perceived *appearance* of sleep means that justice is not being seen to be done, and therefore affects the fairness of the trial – is inconsistent both with other English jurisprudence on the issue of judicial inattention and with the other domestic jurisprudence referred to in paragraphs 625 and 626 above.[1078]

E. Obligation to Raise the Issue at Trial

640. It was submitted by the Prosecution that the principle of "waiver" prevents the appellants from raising the subject matter of this ground of appeal. It contends that the appellants, not having raised the allegations that the Presiding Judge was sleeping during the trial, are now precluded from advancing them for the first time on appeal.[1079] The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party. This principle, established in many national jurisdictions, has been recognised in previous decisions of the Appeals Chamber.[1080]

[1076] In other cases in which counsel for a party gave evidence that they had formed the opinion that the trial judge was sleeping, this was dealt with by the review court as being one part of the relevant evidence on the issue, rather than as proof that, because one observer had formed the opinion that the judge was sleeping, justice was not being seen to be done. *See, e.g., R v Langham and Langham* [1972] Crim LR 457 (Court of Appeal, Criminal Division); *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106, at 110 (Queensland Court of Appeal).

[1077] *Kraska v Switzerland*, Case No 90/1991/342/415, Judgement of 19 April 1993, para 32.

[1078] *See, e.g., R v Langham and Langham* [1972] Crim LR 457 (Court of Appeal, Criminal Division): "The complaint that the judge appeared to be asleep which if true was a matter which the court would certainly deplore but was not a sufficient ground for saying that justice was not seen to be done". *See* also *R v George*, 12 June 1984, Court of Appeal (Criminal Division), where it is said that the appearance of sleep "[...] proves no basis for an appeal unless it can be shown that the learned judge may have been asleep or at any rate that his conduct during the trial had a bearing on the outcome of the trial".

[1079] Prosecution Response to Landžo Supplementary Brief, para 1.5.

[1080] *Furundžija* Appeal Judgement, para 174: "[The Appellant] could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On that basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss his ground of appeal".

641. In cases where it is alleged that a trial judge was sleeping or otherwise inattentive during proceedings, the jurisprudence in national systems demonstrates that there is another significant, and more important, reason for the requirement that the complaining party must raise the issue during the proceedings at the time of the judge's sleeping or inattention. The matter must be raised with the court at the time the problem is perceived in order to enable the problem to be remedied, first by ensuring that the judge's attention is restored to the relevant testimony or submissions, and secondly by having the relevant testimony or submissions repeated. Even if this is not possible, it enables the court or a subsequent review court to identify what portion of the proceedings have not received the attention of the trial judge in order to determine whether any significance should be attached to such inattention.[1081] Thus the requirement that the issue must have been raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief.

642. No attempt was made to raise the issue formally before the Trial Chamber. Counsel for Landžo sought to explain her failure to do so by saying that she had approached "this sensitive issue in the most diplomatic way possible", by raising it with the Registrar and the then President of the Tribunal (Judge Cassese) rather than in court.[1082] She went on to say:

> Judge Karibi-White along with the other two Judges was the fact finder in the trial. He would be determining the guilt and/or innocence, and he would be determining the amount of sentence to be imposed. Direct confrontation with the fact finder at this point in the trial would not have benefited my client. Approaching the Registry and the President of the Tribunal regarding these issues was the direction that I considered most prudent at this juncture in the trial.

643. In another affidavit, counsel for Landžo said that, between August and November 1997, she had "informally" discussed the problem with the Trial Chamber's Senior Legal Officer, who

---

Tadic Appeal Judgement, para 55: In the context of a complaint on appeal that the Defence had not been able to call witnesses essential to the Defence case, the Appeals Chamber stated: "The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case". *See* also *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 20: "[...] no such complaint was made to the Trial Chamber [...] and it should not be permitted to be made for the first time on appeal".

[1081] *Chicago City Railway Company v Anderson* 193 Ill 9 (1901) (Supreme Court of Illinois), at 12-13; *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106, at 113; *R v Grant* [1964] SASR 331, at 338; *R v Moringiello* [1997] Crim LR 902; *R v Tancred* 14 Apr 1997, Court of Appeal (Criminal Division).

[1082] Affidavit of Cynthia McMurrey Sinatra, sworn 25 Sept 1999, p 2, filed with Motion of Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 27 Sept 1999 ("Motion to Obtain Evidence"), which is Exhibit C to Landžo Supplementary Brief.

had responded that "the matter was being addressed by the Tribunal".[1083] In August 1997, she had prepared a "Motion for Mistrial" and her "Resignation under Protest", "because of the sleeping of the Judge and the total disrespect by the Presiding Judge for all those attempting to perform their duties during the trial".[1084] She says that she met with the Registrar, who persuaded her not to resign and who arranged a meeting with President Cassese. President Cassese had assured her that he "would attend to the matter". She had thereafter continued to discuss the "continuing problem" with the Senior Legal Officer of the Trial Chamber.[1085]

644. To have made a complaint to the Trial Chamber itself, it is said, would have been "inappropriate and futile", because it "would necessarily have alienated one of the three triers of fact, causing potentially irreparable harm to Landžo's case".[1086] In pursuing the alternative course, it is said, she "acted in the highest traditions of the Bar".[1087]

645. The Appeals Chamber does not agree. Such an approach fails to recognise that raising the issue before the Trial Chamber is indispensable to the grant of fair and appropriate relief. Moreover, it clearly could be anticipated that, by taking her complaint to the President, it would necessarily be made known to Judge Karibi-Whyte. The issue was, indeed, made known to him.[1088] The "highest traditions of the Bar" require counsel to be considerably more robust on behalf of their client in such circumstances as these than counsel for Landžo was in this case. Co-counsel for Landžo on the appeal referred – for a somewhat different purpose – to his need in the present case to make his submissions on this and other grounds of appeal "in a somewhat more direct manner to the court – respectful, but direct", which he proceeded to do in a robust, but entirely appropriate, manner.[1089] Any counsel of experience will have had the embarrassing duty at some stage of his or her career of saying something unpleasant to a judge.[1090] Counsel for Landžo herself did not flinch from making very serious (although completely baseless)

[1083] Affidavit of Cynthia McMurrey Sinatra, sworn 20 Apr 2000, p 1, annexure to Appellant Esad Landžo's List of Witnesses on Appeal, Submission of Witness Statements and Motion for Issuance of *Subpoena Ad Testificandum*, 15 May 2000 ("Affidavit of 20 April 2000").
Affidavit of 20 April 2000, pp 1-2. The document in fact entitled "Resignation Under Protest" is described in the affidavit as a Motion for Withdrawal.

[1085] *Ibid*, pp 1-2.

[1086] Motion to Obtain Evidence, p 6.

[1087] Landžo Supplementary Brief, p 17.

[1088] A letter written by Landžo to President Cassese concerning Judge Karibi-White's conduct was treated by him as an application under Rule 15 ("Disqualification of Judges"), and it was communicated to the judge and then referred to the Bureau, which requested the judge to state his views on the matter. All this was disclosed to Landžo: Letter dated 3 Sept 1997, annexed to Motion to Obtain Evidence.

[1089] Appeal Transcript, p 641.

[1090] *Stathooles v Mt Isa Mines Ltd* [1997] Qd R 106 at 113.

allegations of impropriety against the Appeals Chamber concerning the compilation of the Extracts Tapes in a filing prior to the hearing of the appeal.[1091]

646. In interlocutory proceedings, the Appeals Chamber held that the discussion between counsel for Landžo and both President Cassese and the Senior Legal Officer of the Trial Chamber fell within the scope of an adjudicative privilege or judicial immunity from compulsion to testify and that, as the evidence could be given by counsel herself, it was inappropriate to request either of them to waive that immunity and give evidence.[1092] It was also held that the discussions counsel for Landžo had with the Registrar were the subject of a qualified privilege, so that the Registrar's evidence could not be compelled if the evidence could be given by counsel herself.[1093] The assertions by counsel for Landžo in her affidavits were therefore uncontradicted. The Prosecution said that it had no knowledge of the facts asserted, and that it was willing to proceed on the basis that they are correct.[1094] It did not seek to cross-examine her upon them. Her evidence was admitted into evidence by the Appeals Chamber "without prejudice to the weight it would ultimately be afforded".[1095]

647. The Appeals Chamber does not place any particular weight upon the assertions of counsel as to what the Senior Legal Officer of the Trial Chamber said to her. It accepts that she complained to him about the judge's conduct (including his sleeping), but no more. There are no contemporaneous records to support the version which she now gives. The Appeals Chamber has not been impressed by her standards of accuracy in other documents filed with the Tribunal. The assertions she made in the particulars as to what is to be seen in each portion of the Extract Tapes upon which reliance is placed,[1096] when compared with what is in fact seen on the tapes themselves, are so coloured and exaggerated in nature and inaccurate in content that the Appeals Chamber does not accept that her assertions concerning the Senior Legal Officer are true.

[1091] Request of Appellant, Esad Landžo, for Information Regarding Certain Portions of the Extracts Tape Produced for Consideration by Appeals Chamber, 7 Apr 2000. The allegations were refuted by the Pre-Appeal Judge in his Decision on Request by Esad Landžo for Information Regarding Extracts Tape, 20 Apr 2000, at pp 3-4.

[1092] Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Evidence on Appeal, 7 Dec 1999, pp 4-6.

[1093] *Ibid*, pp 5-6.

[1094] Prosecution Response to the Motion of Esad Landžo to Admit Evidence on Appeal and for Taking of Judicial Notice, 29 May 2000, para 10.

[1095] Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice", 31 May 2000 ("Order on Evidence on Appeal"), p 4.

[1096] Exhibit B to Landžo Supplementary Brief.

648. When the documents prepared by counsel for Landžo for the purposes of her approach to the Registrar and President Cassese are examined,[1097] as well as the other relevant documents to which reference has been made, it is clear that the primary concern motivating counsel for Landžo was the manner in which she had been treated by Judge Karibi-Whyte, and that his sleeping was only of secondary concern. Allegations are made that Judge Karibi-Whyte made personal attacks on counsel, that he did not respect them and that he was spiteful; even in the secondary complaint that he had slept during the proceedings, reference is made to his "lack of judicial temperament, self restraint and common decency".[1098]

649. Such conduct towards counsel alleged against Judge Karibi-Whyte has not been made the subject of any ground of appeal, and it is not relevant to any issue which the Appeals Chamber must decide. The allegations are referred to only for the purpose of demonstrating that they were the primary source of counsel's complaints to the Registrar and to President Cassese, and that the allegations that the judge slept through the proceedings were only secondary. There is no suggestion that any complaints concerning the judge's alleged sleeping were made following November 1997, notwithstanding that, according to the particulars supplied by Landžo,[1099] his sleeping continued throughout the trial (the last entry being 12 October 1998). For the reasons already given, the Appeals Chamber does not accept the explanation by counsel for Landžo for her failure to raise the issue before the Trial Chamber itself.

F. Conclusion

650. The Appeals Chamber is satisfied that the use now of the secondary complaint concerning the judge's inattention during the trial to found Landžo's fourth ground of appeal is opportunistic. The absence of any actual prejudice caused by the judge's inattention requires that this ground of appeal and the corresponding grounds of appeal by Mucic and Delic be dismissed.

[1097] (Draft) Esad Landžo's Motion for Mistrial, 26 Aug 1997 ("Draft Motion for Mistrial"); (Draft) Cynthia McMurrey's Resignation Under Protest, 26 Aug 1997; Exhibit C to Motion to Obtain Evidence.

[1098] Draft Motion for Mistrial, pp 3-4. The same is true of the letter written by Landžo to President Cassese (see footnote 1089). Reference is made to Judge Karibi-Whyte's "arrogant behaviour towards my defence counsel", whose conduct had been "subject to constant humiliation" and that she appeared to have been singled out for unfair treatment. This reference to the judge falling asleep is referred to only briefly and as a secondary concern.

[1099] Exhibit B to Landžo Supplementary Brief.

XII. JUDGE ODIO BENITO AND VICE-PRESIDENCY OF COSTA RICA

651. Three of the appellants – Delic, Mucic and Landžo – filed grounds of appeal based upon the facts that, whilst still a judge of the Tribunal and engaged in hearing this case, Judge Odio Benito was elected as a Vice-President of Costa Rica and took an oath of office as such. The grounds were in the following terms:

> Delic Issue 1
>
> Whether the Trial Chamber was properly constituted after 8 May 1998 in that Judge Elizabeth Odio Benito was no longer qualified to serve as a judge of the Tribunal in that she did not meet the qualifications in Article 13(1) of the Statute of the Tribunal.[1100]
>
> Mucic Ground 1
>
> Whether Judge Odio Benito was disqualified as a judge of the Tribunal by reason of her election as Vice-President of the Republic of Costa Rica.[1101]
>
> Landžo Ground 2
>
> The Participation at Trial as a Member of the Trial Chamber of a Judge Ineligible to Sit as a Judge of the Tribunal Violated Articles 13 and 21 of the Statute of the ICTY, the Rules of Natural Justice and International Law and Rendered the Trial a Nullity.[1102]

These grounds raise two distinct issues:

(1) Was Judge Odio Benito no longer qualified as a judge of the Tribunal by reason of those facts?

(2) Should Judge Odio Benito have disqualified herself as a judge by reason of those facts because she was no longer independent?

A. Background

652. Judge Odio Benito was elected as a judge of the Tribunal in September 1993, and she was installed as such on 17 November 1993 for a term of four years.[1103] In the elections held on 20 May 1997, neither she nor the other two judges hearing this case were re-elected. On 27 August 1997, the UN Security Council passed a resolution endorsing a recommendation by

[1100] Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1101] Appellant Zdravko Mucic's Final Designation of his Grounds of Appeal, p 1.
[1102] Landžo Brief, p 2.
[1103] Statute of the Tribunal, Article 13.4.

the Secretary-General that these three judges, "once replaced as members of the Tribunal, finish the *Celebici* case which they have begun before expiry of their terms of office [...]".[1104]

653. On 1 February 1998, and during the course of the trial in this case, Judge Odio Benito was elected as the Second Vice-President of the Republic of Costa Rica, and she took an oath of office as such on 8 May 1998. On 25 May 1998, the four accused jointly filed a "Motion on Judicial Independence", addressed to Judge Karibi-White, the Presiding Judge of the Trial Chamber. The four accused submitted that Judge Odio Benito should cease to take any further part in the trial, upon the grounds that, by having taken that oath of office and thereby become a member of the executive branch of the Government of Costa Rica:

(1) she had ceased to meet (a) the qualifications for a judge of the Tribunal, and (b) the criteria required for an independent judge in international law, and

(2) she had acquired an association which may affect her impartiality.[1105]

Pursuant to Rule 15(B) of the Tribunal's Rules, Judge Karibi-White conferred with Judge Odio Benito and then referred the Motion to the Bureau for its determination.[1106]

654. On 4 September 1998, the Bureau determined that Judge Odio Benito was not disqualified from sitting in the trial on the grounds referred to in Rule 15(A).[1107] Although the Bureau acknowledged that its competence conferred by the Rules did not extend to those aspects of the Motion on Judicial Independence which went beyond the scope of Rule 15(A),[1108] it did consider, and it rejected, the claim that Judge Odio Benito had ceased to possess the qualifications required for appointment to the highest judicial offices of her country (and therefore to be a judge of the Tribunal).[1109] There was no challenge at the time to either of these determinations.[1110]

[1104] Security Council Resolution S/RES/1126, 27 Aug 1997 ("Resolution 1126").
[1105] Motion on Judicial Independence, 25 May 1998, p 1.
[1106] Decision of the Bureau on Motion for Judicial Independence, 4 Sept 1998 ("Bureau Decision"), p 4. The four accused, apparently in ignorance of that referral, subsequently filed a request for a hearing of their joint motion or, alternatively, a request that the Presiding Judge refer the matter to the Bureau. This application was disposed of informally (Trial Transcript, pp 14930-14933).
[1107] Bureau Decision, p 11. Rule 15(A) provides: "A judge may not sit on a trial or appeal in any case in which the judge has a personal interest or concerning which the judge has or has had any association which might affect his or her impartiality".
[1108] Bureau Decision, p 11.
[1109] *Ibid*, p 6.
[1110] It was suggested during the hearing of the appeal that this was because the Bureau Decision of Sept 1998 "was not rendered until after the trial had been concluded" (Appeal Transcript, p 724). That is not so. The final submissions concluded on 15 October 1998 (Trial Transcript, p 16372), and Judgement in the trial was delivered on 16 November 1998.

B. Was Judge Odio Benito No Longer Qualified as a Judge of the Tribunal?

655. The qualifications for judges of the Tribunal are stated in Article 13 of the Tribunal's Statute:

> **Article 13**
>
> **Qualifications and election of judges**
>
> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.[1111]

This provision is not stated in terms of qualification for *election* as judges, but rather in terms of continuous application ("The judges shall be [...]"). If, for example, a judge of the Tribunal were to be found guilty of some offence committed during his or her term of office which demonstrated a lack of high moral character or integrity, it could hardly be suggested that such a judge remained qualified within the terms of Article 13 simply because he or she was qualified at the time of election. The Appeals Chamber accepts that a judge must *remain* qualified within the meaning of Article 13 throughout his or her term of office.

656. The appellants have directed their arguments to the requirement of Article 13 that the judges of the Tribunal "possess the qualifications required in their respective countries for appointment to the highest judicial offices". Judge Odio Benito was elected as a judge of the Tribunal on the nomination of her country, the Republic of Costa Rica. The highest judicial office in that country is that of a magistrate of the Supreme Court of Justice of Costa Rica.[1112] The appellants argue that, by reason of her assumption of office as Vice-President of Costa Rica, Judge Odio Benito was constitutionally rendered disqualified for election as such a magistrate and therefore lost her qualifications as a judge of the Tribunal.

[1111] This was the form of Article 13(1) of the Statute at the relevant time. It has since been amended by Security Council Resolution 1329, 30 Nov 2000, so that the opening sentence commences: "The permanent and ad litem judges shall be persons of high moral character [...]".

[1112] Constitution of the Republic of Costa Rica ("Constitution"), Article 156. The Constitution was adopted in 1949. The parties (the Prosecution and Landžo, representing all three convicted appellants) have agreed upon an accurate English language translation of the Constitution (which is written in the Spanish language) as it was in force between 17 Nov 1997 (the date upon which Judge Odio Benito's original term expired) and 16 Nov 1998 (the date upon which the Judgement was delivered): Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding the Constitution of Costa Rica, 28 Jul 2000, para 7. Article 156 provides: "The Supreme Court of Justice is the highest court of the judicial branch [...]".

657. On the other hand, the Prosecution, in addition to disputing the appellants' interpretation of Article 13,[1113] argues that, by reason of the Security Council's resolution permitting Judge Odio Benito (and the other two members of the Trial Chamber) to finish this case notwithstanding that they had been replaced as members of the Tribunal, the provisions of Article 13 no longer applied to them.[1114]

658. For reasons which will be given later in this Judgement, the Appeals Chamber does not accept either of these arguments, but it believes that it is important to state first its interpretation of Article 13 of the Tribunal's Statute.

659. In the opinion of the Appeals Chamber, any interpretation of Article 13 must take into account the restriction imposed by Article 12 of the Statute, that no two judges may be nationals of the same State. The Statute envisages that judges from a wide variety of legal systems would be elected to the Tribunal, and that the qualifications for appointment to the highest judicial offices in those systems would similarly be widely varied. The intention of Article 13 must therefore be to ensure, so far as possible, that the *essential* qualifications do not differ from judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office such as age. Nor was Article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications.

660. This is certainly the way the Security Council has interpreted Article 13 to date. Article 13(2) provides that, before the judges of the Tribunal are elected by the UN General Assembly, the Security Council must submit for consideration by the General Assembly a list of candidates reducing those nominated by the States to a lesser number which takes into due account the need for adequate representation of the principal legal systems of the world. It may safely be assumed that the Security Council would not include within that reduced list any candidate who did not satisfy the requirements of Article 13. Indeed there are concrete examples where the Security Council has interpreted Article 13 in the way set forth by this Chamber.

[1113] Prosecution Response, para 13.42.
[1114] Prosecution Supplementary Brief, para 4.

661. When Judge Odio Benito was included in the list of candidates for election in 1993, she was still (according to her *curriculum vitae* which accompanied her nomination)[1115] the Minister of Justice of the Republic of Costa Rica – which, if the appellants's argument were to be accepted, would have constitutionally rendered her disqualified for election as a magistrate of the Supreme Court of Justice and as a judge of this Tribunal.[1116] Judge Sir Ninian Stephen was already seventy years of age when elected as a judge of the Tribunal in 1993,[1117] and thus was to be seventy four years of age at the conclusion of his term. The highest compulsory retirement age for any high judicial office in his country (Australia) is seventy-two – being for the Supreme Court of New South Wales. In neither of these cases was the judge thought by the Security Council not to be qualified as a judge of the Tribunal for a four year term.

662. It was accepted by the appellants that Judge Odio Benito at all times remained qualified as a judge of the Tribunal in relation to her character, legal qualifications and experience. The Appeals Chamber is accordingly satisfied that Judge Odio Benito did not lose her qualifications as a judge of the Tribunal by reason of her assumption of office as Vice-President of Costa Rica.

663. In any event, the Appeals Chamber does not accept the argument of the appellants that her assumption of office as a Vice-President of Costa Rica rendered Judge Odio Benito constitutionally disqualified for election as a magistrate of the Supreme Court of Justice under the Constitution of that country. It expresses this opinion as a matter of interpretation of the Constitution of Costa Rica, consistently with the jurisprudence of that country as identified by expert evidence during the appeal.

664. The Constitution states:

> The government of the Republic [...] is exercised by three distinct and independent branches: legislative, executive and judicial.[1118]

665. The Constitution has separate sections dealing with the legislative power,[1119] the executive power[1120] and the judicial power.[1121] It makes separate provisions as to the

---

[1115] General Assembly Document A/47/1006, 1 Sept 1993, p 57.
[1116] According to Judge Odio Benito's *curriculum vitae* which accompanied her nomination for election in 1997, she did not resign as Minister of Justice until 1994: General Assembly Document A/51/878, 22 Apr 1997, p 58.
[1117] ICTY 1994 Year Book, p 201.
[1118] Constitution, Article 9.
[1119] *Ibid*, Title IX.
[1120] *Ibid*, Title X.
[1121] *Ibid*, Title XI.

qualifications and disqualifications for election to a position within each of these three branches (or powers):

(1) Those *qualified* for election as deputies to the Legislative Assembly must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), and twenty one years of age.[1122] Those *disqualified* as candidates for election as deputies include anyone occupying within six months prior to the date of the election the positions of President of the Republic, or a cabinet minister or a magistrate of the Supreme Court of Justice, or relatives of the existing President to the second degree of consanguinity or affinity inclusive.[1123]

(2) Those *qualified* for election as the President or a Vice-President must be citizens of Costa Rica, Costa Rican by birth, laymen and over thirty years of age.[1124] Those *disqualified* for election as President or Vice-President include anyone occupying within twelve months prior to the date for election the positions of President, or a Vice-President, or magistrate of the Supreme Court of Justice or a cabinet minister, or certain relatives of the existing President by consanguinity or affinity.[1125]

(3) Those *qualified* for election as a magistrate of the Supreme Court of Justice must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), laymen, over thirty five years of age and legally qualified as defined.[1126] The only persons *disqualified* for election as a magistrate are persons who are related by consanguinity or affinity to the third degree inclusive to a member of the Supreme Court of Justice.[1127]

666. It is significant that, whilst persons holding positions in both the administrative and the judicial supreme powers at the time of the election (or within six months prior thereto) are expressly disqualified as a candidate for election as a deputy to the Legislative Assembly, and persons holding positions in the judicial supreme power at the time of the election (or within twelve months prior thereto) are expressly disqualified as a candidate for election as the President or a Vice-President, *no* person holding positions with either the executive or the

[1122] *Ibid*, Article 108.
[1123] *Ibid*, Article 109.
[1124] *Ibid*, Article 131.
[1125] *Ibid*, Article 132.
[1126] *Ibid*, Article 159. The Article defines the legal qualification as: "Holder of a lawyer's degree issued or legally recognised in Costa Rica, and must have engaged in the profession for at least ten years, except in the case of judicial [officials] with not less than five years of judicial experience". (The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the word "officers" to "officials").

administrative supreme powers at the time of the election is expressly disqualified as a candidate for election as a magistrate. In particular, a Vice-President at the time of the election is not expressly disqualified for election as a magistrate of the Supreme Court.

667. In support of their argument, however, the appellants rely upon Article 161 which provides:

> The position of magistrate is incompatible with that of an official of the other supreme powers.

The expression "supreme powers" is not defined in the Constitution, but it may be accepted that the reference is to the three "distinct and independent branches" which exercise the government of the Republic through the "powers" already identified.

668. Article 161 is one of similar but not identical provisions which relate to each of the three supreme powers:

> [Legislative power]
>
> Article 111 After taking the oath of office no deputy may accept a position or employment with the other powers of the State or the autonomous institutions, under penalty of losing his credentials, except as a cabinet minister. In the latter event, he will be reinstated in the Assembly when the position terminates. [...]
>
> Article 112 The legislative function is also incompatible with the holding of any other elective public office. [...]
>
> [Executive power]
>
> Article 143 The position of minister is incompatible with the exercise of any other public [charge, elective] or otherwise, except where special laws confer functions upon them. [...].[1128]
>
> The vice-presidents of the Republic may hold the position of minister.
>
> [Judicial power]
>
> Article 161 The position of magistrate is incompatible with that of an official of the other supreme powers.

The object of these provisions appears clearly to be to prevent the one person holding more than one of these positions at the one time. If a Vice-President at the time of the election of magistrates, who is otherwise qualified in accordance with Article 159 but not disqualified by

---

[1127] *Ibid*, Article 160.

Article 160, wishes to stand for that election, he or she is permitted to do so, but must, if elected as a magistrate, resign as Vice-President. Such an interpretation of the Constitution itself is consistent with the jurisprudence revealed in the expert opinion of Mr Alejandro Batalla,[1129] although it would appear to be inconsistent with his final conclusion.

669. Citing as authority a decision of the Costa Rican Constitutional Court,[1130] Mr Batalla says:

> [...] the intention of the Constitutional Assembly was to provide the Magistrates with a special level of independence from the other branches to prevent any mixing of their political activity with the justice in order to guarantee impartiality.[1131]
>
> The Constitutional Court argues that holding both positions simultaneously might subordinate the Magistrate psychologically to a certain ideology that can affect and reduce his criteria in such a way.
>
> The body of laws of Costa Rica stipulates, in general terms, the incompatibility of the positions of magistrate and judge[1132] with those positions elected by popular vote such as the position of Vice-President, and the justification lies on the demand of the independence of the judge. In other of its precedents, the Constitutional Court has stated that:
>
> "The position of Judge or Magistrate is incompatible with any other position elected by popular vote or political designation. What is intended is to keep the officials administering justice away from the passions inherent to the political activity which, due to its nature, is very polemical. In this way, this prevents the possibility of establishing a link of psychological subordination of the judge, offering said circumstance, the temptation of adjusting his behaviour to a certain ideology or way of thinking detached from his self, since the freedom of opinion of the judge may be reduced by the influence of an ideological tendency. The system of incompatibilities and the system of prohibitions are guarantees that tend to prevent the creation of links – either of public or private nature – that may lead to the union of two simultaneous qualities in one person; that is, that the status of the Judge may be joined by another quality that may place him, in a submission relationship of any kind. It is possible to prevent the judge from performing any paid job in order to prevent him from establishing links that may restrict his independence".[1133]

670. Mr Batalla then concludes:

> In conclusion, the position of Magistrate of the Supreme Court of Justice has an express restriction on a Constitutional level to be *elected* if he holds another position in any other Supreme Power of Costa Rica.[1134]

[1128] The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the phrase "post, publicly elected" to "charge, elective".
[1129] A Professor of Administrative Law in the Master and Doctoral Program of the Institute of Education and Research of Universidad Autónoma de Centro América.
[1130] Constitutional Court, Decision N 2621-95, quoted in Mr Batalla's opinion at pp 2-3.
[1131] Opinion, pp 3-4.
[1132] [Mr Batalla's footnote] The Judge and the Magistrate are the only officials that may administer justice.
[1133] [Mr Batalla's footnote] Constitutional Court, Decision N 2883-96.
[1134] The emphasis has been added.

If Mr Batalla's ultimate conclusion be correct, the Constitution would have expressed the disqualifications upon candidates for election as a magistrate in substantially different terms. Article 160 would have disqualified as candidates for such election those persons holding positions in both the executive and the administrative supreme powers, in the same way as Articles 109 and 132 have disqualified magistrates as candidates for election, respectively, as deputy of the Legislative Assembly and as President or Vice-President. Significantly, the Constitution has not done so.[1135]

671. Article 161 does not therefore *disqualify* a Vice-President as a candidate for election as a magistrate of the Supreme Court of Costa Rica. It merely requires that such a Vice-President resign that position if *elected* as a magistrate and before assuming office as such.

672. The Prosecution's argument which the Appeals Chamber has not accepted was that the requirements of Article 13(1) of the Statute apply by their terms only to "the judges" of the Tribunal, which means the judges referred to in Article 12 who are elected pursuant to Article 13(2) or appointed pursuant to Article 13(3).[1136] The Prosecution contended that, when the term of office of Judge Odio Benito expired on 17 November 1997, she ceased to be one of "the judges" of the Tribunal, and that the Security Council Resolution 1126 which enabled the judges of the *Celebici* Trial Chamber to finish hearing the case did not affect this.[1137] The terms of Resolution 1126, which authorised the three judges "once replaced as members of the Tribunal, to finish the *Celebici* case which had begun before the expiry of their terms of office", was interpreted by the Prosecution as emphasising that the judges' terms of office had *expired* and that they had been replaced. Although the judges continued to exercise the functions of a judge, it was said, they no longer held the office of judges of the Tribunal.[1138] The source of Judge Odio Benito's authority after 17 November 1997 was not the Statute, but Resolution 1126. The resolution was said to prevail over the Statute in the event of inconsistency, as the Statute itself derives from a Security Council resolution and can be expressly or impliedly amended by a subsequent resolution.[1139]

[1135] An expert opinion by Francisco Villalobos Brenes (a member of the Bar of Costa Rica and Adjunct Professor in the Faculty of Law of the University of Costa Rica) was also tendered. None of the interpretative resources relied upon by Mr Brenes suggest a contrary interpretation of Article 161. Indeed, he expressly concludes (at para 5C) that Article 161 is one of various rules which specifically prohibit the possibility of a person *exercising* the judicial function at the same time as holding a post in the Executive or Legislative Branches (the emphasis has been added).

[1136] Prosecution Supplementary Brief, para 4.

[1137] *Ibid*, paras 6-9.

[1138] *Ibid*, paras 10-12.

[1139] *Ibid*, paras 13-16.

673. However, if the submission that Judge Odio Benito was no longer a "judge" within the meaning of Article 13(1) after the expiry of her initial term of office be correct, it would follow that she was also not a "judge" for the purposes of other articles of the Statute. In that case, since Article 12 provides that the Trial Chambers consist of three "judges", the Trial Chamber would not have been validly composed. Moreover, since it is the "Trial Chambers" which are to pronounce judgements and impose sentences and penalties,[1140] it would follow that the Trial Judgement in this case was not delivered by the body authorised by the Statute to do so. The Appeals Chamber does not accept that this was the intention of the Security Council in adopting Resolution 1126. The Prosecution indeed denied that its interpretation of the resolution has the result that the Trial Chamber was not properly constituted,[1141] and it submitted at the oral hearing that the three judges continued to be judges of the Tribunal with limited functions but that Resolution 1126 nevertheless had the effect that the requirements of Article 13(1) did not apply to them.[1142] This submission is entirely without merit.

674. The words from Resolution 1126 relied upon by the Prosecution must be read in the context of the circumstances in which the resolution was passed. The then President of the Tribunal had written to the Secretary-General seeking from him "an extension of the three judges sitting in the *Celebici* case", and had requested him to submit his letter to the members of the Security Council "for their consideration and approval of the extension of tenure of the three aforementioned judges for 12 months as from 17 November 1997".[1143] The Secretary-General had submitted the letter as requested, describing it in his letters to the Presidents of the Security Council and the General Assembly as requesting "an extension of the terms of office of the non-elected judges of the International Tribunal in order to allow them to dispose of ongoing cases".[1144] His letters continued:

> [...] in the absence of an explicit statutory provision providing for the extension of the term of office of Tribunal judges to complete ongoing cases, an approval of the Security Council, as the parent organ, and of the General Assembly, as the electing organ, would be desirable to preclude any question about the legality of such an extension.

[1140] Statute, Article 23.
[1141] Prosecution Supplementary Brief, para 19.
[1142] Counsel for the Prosecution told the Appeals Chamber that the judges had a "qualified qualification" (Appeal Transcript, p 714). The meaning of that phrase was not explained.
[1143] Letter of 18 June 1997, annexed to Document A/51/958 S/1997/605.
[1144] Letter of 1 Aug 1997, annexed to Document A/51/958 S/1997/605.

Resolution 1126, having noted this correspondence, endorsed the recommendation of the Secretary-General in the terms already partly quoted.[1145]

675. A reading of Resolution 1126 in this context necessarily indicates that its effect was to extend the terms of the judges for the particular purpose of concluding the *Celebici* trial. The terms of office of the judges as extended, although limited in their defined purpose, were otherwise left subject to the relevant provisions of the Statute. Any implied effect on the Statute was not to render Article 13(1) and those other provisions which refer to "judges" of the Tribunal inapplicable to the three judges, as argued by the Prosecution. It was limited to making a narrowly qualified exception to the four year term of office referred to in Article 13(4). The resolution indicates no intention to amend, modify or suspend any other provisions of the Statute, including Article 13(1), in any way.

676. The challenge to Judge Odio Benito's qualifications under Article 13 accordingly fails.

C. Should Judge Odio Benito Have Disqualified Herself as a Judge of the Tribunal?

677. The second issue raised by the appellants based upon the election of Judge Odio Benito as a Vice-President of Costa Rica and her assumption of that office was whether she was thereby disqualified as a judge of the Tribunal because she no longer possessed the necessary judicial independence required by international law.[1146] The appellants relied upon additional material and arguments in relation to this issue.

678. *Appointment as Minister of Environment and Energy:* After she took the oath of office as Second Vice-President, Judge Odio Benito was also appointed as Minister of Environment and Energy in the Government of Costa Rica.[1147]

679. *Membership of Board of Mediators:* A decree issued by the President of Costa Rica on 15 June 1998, dealing with a "Process of National Consensus", provided for a Board of Mediators to be composed of, *inter alia*, the two Vice-Presidents of the Republic. The functions and powers of that Board were to "judge, mediate and propose alternative solutions in those cases where the members of the Consensus Forum [another of the bodies in the Process of

[1145] "Endorses the recommendation of the Secretary-General that Judges Karibi-Whyte, Odio Benito and Jan, once replaced as members of the Tribunal, finish the *Celebici* case which they have begun before expiry of their terms of office [...]".

[1146] Landžo Reply, para 6.18 (which incorporates the arguments in the Motion on Judicial Independence, 25 May 1998); Mucic Brief, para 3.

[1147] Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding Evidence for the Purposes of the Appeal, 19 May 2000 ("Agreement on Evidence"), p 1.

National Consensus] have such disagreements that they are unable to reach decisions by consensus".[1148]

680. *Exercise of Executive Functions:* Reliance was placed upon two media reports, the accuracy of which was not disputed,[1149] to claim that Judge Odio Benito exercised executive functions in Costa Rica whilst still a judge of the Tribunal:

(i) Meeting in April 1998

The first report, dated 28 April 1998, referred to a meeting of the President-elect of Costa Rica and "a group of former Costa Rican legal representatives and high officials" which had been held in order "to evaluate the process of a united national effort before the change in power the following week". The report focused on the release by the group of a communiqué which expressed "profound consternation" at the recent assassination of the Auxiliary Bishop of Guatemala.[1150] The report observed that "Vice-Presidents-elect, Astrid Fischel and Elizabeth Odio, who will assume office this coming May 8", also participated in the meeting.

(ii) Letter of protest

The second report, dated 1 June 1998, stated that an environmental and humanitarian organisation, Foro Emaus, had written to "the vice president of Costa Rica [...] who is furthermore the head of the Department of Environment and Energy" to protest at the deficient labour conditions in which women worked in banana packing plants.[1151]

681. *Separation of Powers:* The appellants assert that Judge Odio Benito exercised an executive function merely by holding the position of Second Vice-President as required by the Constitution of Costa Rica.[1152] They rely upon the doctrine of separation of powers, which is said to prevent a judge of the Tribunal from holding an executive position in a domestic government.[1153] The appellants rely upon the status of Costa Rica as a non-permanent member of the Security Council for a two year period from 1 January 1997 to submit that Costa Rica had

[1148] Landžo Reply, para 6.13; Agreement on Evidence, p 1, and annexed extract from the official gazette.
[1149] The Prosecution denied, however, that the events reported constituted the exercise by Judge Odio Benito of executive functions: Agreement on Evidence, p 2; Prosecution Response, para 13.45.
[1150] "President Elect of Costa Rica Condemns the Assassination of Bishop Gerardi", 28 Apr 1998, translation filed by counsel for Landžo, 5 June 2000.
[1151] "Denunciation of Deficient Labor Conditions in Banana Packing Plants", 1 June 1998.
[1152] Appeal Transcript, p 721.
[1153] *Ibid*, p 654. The submissions made by the appellants in relation to Judge Odio Benito and her position as Vice-President did not always make a clear distinction between the first and second of these issues. This particular submission was described as being relevant to her qualification under Article 13 (the first issue),

"direct political and administrative control over the affairs of this Tribunal",[1154] and that Judge Odio Benito, as a Vice-President of Costa Rica, had the power to give instructions to Costa Rica's representative on the Security Council, placing her "in an executive capacity *vis-à-vis* this very Tribunal".[1155]

682. *Impartiality:* The requirement of a judge's impartiality is stated in Article 13 of the Tribunal's Statute, which has already been quoted. That requirement is reflected in Rule 15(A), which is in these terms:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

This Rule has been interpreted by the Tribunal as encompassing circumstances establishing both actual bias and an appearance or a reasonable apprehension of bias.[1156] No suggestion of actual bias has been made in the present case; the suggestion made is that the contemporaneous holding by Judge Odio Benito of the offices of a judge of the Tribunal and of Vice-President and government minister of Costa Rica carried the appearance of a lack of impartiality.[1157]

683. The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case.[1158] The apprehension of bias must be a reasonable one.[1159] Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold.[1160] A judge of the Tribunal makes a solemn declaration that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1161]

---

but the Appeals Chamber regards it as logically more relevant to her disqualification under Rule 15(A) (the second issue), and it has considered the submission upon that basis.

[1154] Appeal Transcript, p 672.
[1155] *Ibid*, p 681.
[1156] *Furundžija* Appeal Judgement, para 189.
[1157] Mucic Brief, para 7; Landžo Reply, para 6.18.
[1158] *Furundžija* Appeal Judgement, para 189.
[1159] *Furundžija* Appeal Judgement, para 189.
[1160] *Ibid*, para 190.
[1161] Rule 14 of the Rules.

684. The fair-minded observer would also know of the circumstances surrounding Judge Odio Benito's election as Vice-President of Costa Rica. Prior to accepting a nomination as Vice-President, Judge Odio Benito wrote to the then President of the Tribunal (Judge Cassese) undertaking that, if elected, she would not assume any Vice-Presidential functions until the completion of her duties as a member of the Trial Chamber hearing the *Celebici* case ("the Undertaking"). President Cassese submitted that letter to the judges in a Plenary meeting, who unanimously determined, upon the basis of the Undertaking, that her proposed action would not be incompatible with her judicial duties. When she was elected as Vice-President, Judge Odio Benito informed the then President of the Tribunal (Judge McDonald), who submitted the matter again to the judges in a Plenary meeting, where approval was given for her to take the oath of office. The Undertaking given by Judge Odio Benito to the Tribunal was supported by the President of Costa Rica, who wrote to President McDonald to confirm that Judge Odio Benito would continue to discharge her functions as a judge of the Tribunal until the completion of the *Celebici* case[1162] and that she would not assume any functions in the government of Costa Rica before 17 November 1998.[1163] These facts were set out by the Bureau in its decision of 4 September 1998,[1164] and their substance has not been contested by the appellants.[1165]

D. Conclusion

685. The Appeals Chamber does not accept that Judge Odio Benito exercised any executive functions in Costa Rica during the time she was also a judge of the Tribunal. Taking the matters upon which reliance was placed by the appellants by reference to the categories already referred to:

686. *Appointment as Minister of Environment and Energy:* At the same time as Judge Odio Benito was appointed as Minister of Environment and Energy, a substitute minister was appointed to be in charge of that ministry during her absence.[1166] No evidence was produced by

---

[1162] Letter from His Excellency Miguel Angel Rodriguez E, President-Elect of the Republic of Costa Rica, to the President of the Tribunal, 9 Mar 1998.

[1163] Letter from His Excellency Miguel Angel Rodriguez E, President of the Republic of Costa Rica, to the President of the Tribunal, 7 July 1998.

[1164] Bureau Decision, p 3.

[1165] Appeal Transcript, p 653. The Prosecution relied on the Bureau Decision and the facts found therein: Prosecution Response, para 13.45. The Appeals Chamber has not dealt with this matter as an appeal from the decision of the Bureau. The question whether a judge should have been disqualified from hearing a case is relevant to the fairness of the trial: *Prosecutor v Furundžija*, IT-95-17/1, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, 11 Mar 1999, p 2; and it is therefore a valid ground of appeal from a conviction. The *Furundžija* Appeal Judgement proceeded upon the basis that this was a valid ground.

[1166] Agreement on Evidence, para 1.

the appellants that Judge Odio Benito had exercised any of the powers or functions as such minister during the relevant period.

687. *Membership of Board of Mediators:* No evidence was produced by the appellants to suggest that Judge Odio Benito had exercised any of the powers or functions of the Board of Mediators, nor even that the Board as an entity had been called upon to exercise its powers in the relevant period. Given the absence of any such evidence, it must be assumed that the Undertaking of Judge Odio Benito and the formal assurances of the President of Costa Rica, that she would not be assuming any functions of the government of Costa Rica (including those of Vice-President), were adhered to and that her membership of the Board of Mediators remained only a formal one during the relevant period.

688. *Exercise of executive functions*:

(i) Meeting in April 1998

This meeting took place before Judge Odio-Benito had assumed the office of Vice-President, and before she had any executive functions to perform. There is no suggestion that anyone else at the meeting was in a position to perform any such functions either. The "former" Costa Rican legal representatives and high officials could not have been there in any executive capacity. The purpose of the meeting – to evaluate "the process of a united national effort before the change in power the following week" – necessarily excluded any suggestion that the participants could have exercised any executive functions of government at that time. The only action which appears to have been taken by the group was the release of the communiqué, a gesture of the sort which is frequently made by public figures in the circumstances referred to. Judge Odio Benito was a prominent legal figure in Costa Rica – if for no other reason because she was a former Minister of Justice – and her participation in such a communiqué was perfectly natural. It was not an executive function.

(ii) Letter of protest

No evidence was produced by the appellants to suggest that Judge Odio Benito responded in any way to the letter or even that she had personally received it.[1167]

689. *Separation of powers:* It is beyond question that the principles of judicial independence and impartiality are of a fundamental nature which underpin international as well

[1167] Counsel for Landžo appeared to acknowledge the weaknesses in this material when he stated "I don't place much weight on those [two newspaper reports]": Appeal Transcript, p 673.

as national law. They are represented not only in numerous international and regional instruments – including the Universal Declaration of Human Rights[1168] and the International Covenant on Civil and Political Rights[1169] – but also in the Statute of the Tribunal itself, which requires by Article 12 that the Chambers be composed of independent judges and by Article 13 that the judges be impartial. The fundamental importance of the independence of the judiciary has been emphasised in the jurisprudence of the Appeals Chamber.[1170] This jurisprudence has also recognised that the principle of judicial independence in domestic and international systems generally demands that those persons or bodies exercising judicial powers do not also exercise powers of the executive or legislative branches of those systems.[1171]

690. The application of the principle of separation of powers to the factual situation underlying this ground of appeal is nevertheless misconceived. The doctrine applies principally to ensure the separate and independent exercise of the different powers within the same sphere or political system. The purpose of requiring a separation of judicial from other powers is to avoid any conflict of interest. Where the relevant powers arise in separate systems or on different planes – such as the national and the international – the potential for there to be any convergence in the subject matter of the powers, and therefore for a conflict of interest to arise, is greatly reduced.

691. The only basis upon which it is suggested that such a convergence has occurred in the present case relates to Costa Rica's membership of the Security Council at the relevant time. The assumptions necessarily involved in the proposition that, because of that fact, Judge Odio Benito was in an executive capacity *vis-à-vis* the Tribunal itself are, in the opinion of the Appeals Chamber, so remote as to be fanciful. Those assumptions are:

(a) that the Security Council would exercise its administrative functions in relation to the Tribunal in order to affect the judicial decisions of the Tribunal, contrary to the Statute which the Security Council itself had adopted by which the judges were required to be both independent and impartial;

(b) that Costa Rica, as one of the fifteen members of the Security Council,[1172] would be capable of influencing the Security Council in the exercise of such

---

[1168] Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."

[1169] Article 14 provides, in part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[1170] *Tadic Jurisdiction Decision*, para 45; *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, Decision (On Prosecutor's Request for Review or Reconsideration), 31 Mar 2000, Declaration of Judge Rafael Nieto-Navia ("*Barayagwiza* Declaration"), paras 10-14.

[1171] *Barayagwiza* Declaration, para 9.

[1172] Charter of the United Nations, Article 23(1).

functions – notwithstanding the veto power of the five permanent members in relation to non-procedural matters[1173] – to such a degree that it would exercise direct political or administrative control over the affairs of this Tribunal; and

(c) that a Vice-President of Costa Rica has the power to *instruct* that country's representative in the Security Council how to exercise such control over the affairs of this Tribunal, and that Judge Odio Benito would exercise that power, notwithstanding the undertaking which she gave to the Tribunal and the confirmation by the President of Costa Rica, that she would not assume any functions as Vice-President until after her term of office as a judge of the Tribunal had concluded.

It should be noted that no suggestion has been made that the Republic of Costa Rica had any direct interest in the outcome of the present case.

692. The Appeals Chamber is not satisfied that the fair-minded observer would in all those circumstances consider that Judge Odio Benito had placed herself in a position of conflict of interest with her position as a judge of this Tribunal, and that she might therefore not bring an impartial and unprejudiced mind to the issues arising in the *Celebici* case. It follows that no reasonable apprehension of bias has been established, and that there was no basis upon which Judge Odio Benito should have disqualified herself pursuant to Rule 15(A). The challenge to her independence accordingly also fails.

693. Delic Issue 1, Mucic Ground 1 and Landžo Ground 2 are therefore dismissed.

[1173] *Ibid*, Article 27(3).

XIII. JUDGE ODIO BENITO AND THE VICTIMS OF TORTURE FUND

694. Delic, Mucic and Landžo also filed grounds of appeal asserting that, because Judge Odio Benito was, while a judge of the Tribunal and engaged in hearing this case, a member of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture ("Victims of Torture Fund"), she was automatically disqualified from sitting as a judge in this case. The grounds were in the following terms:

> Delic Issue 2
>
> Whether Judge Elizabeth Odio Benito was disqualified in that she had an undisclosed affiliation which could have cast doubt on her impartiality and which might affect her impartiality.[1174]
>
> Mucic Ground 2
>
> Whether Judge Odio-Benito was disqualified as a member of the Trial Chamber by reason of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.[1175]
>
> Landžo Ground 3
>
> The Participation as a Member of the Trial Chamber of a Judge Who Had an Actual or Apparent Conflict of Interest Affecting the Judge's Impartiality as a Member of the Trial Chamber Violated the Rules of Natural Justice and International Law, and, as a Matter of Law, Absent Disclosure by the Judge, and Informed Consent by the Defence, Automatically Disqualified the Judge From Sitting as a Member of the Trial Chamber.[1176]

695. The Victims of Torture Fund was established in 1981 by a resolution of the United Nations General Assembly to extend the mandate of an already existing fund, the United Nations Trust Fund for Chile, and it redesignated the fund by its present name. The mandate of the Victims of Torture Fund, as set out in that resolution, was:

> [...] receiving voluntary contributions for distribution, through established channels of assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims, priority being given to aid to victims of violations by States in which the human rights situation has been the subject of resolutions or decisions adopted by either the Assembly, the Economic and Social Council or the Commission on Human Rights.[1177]

The resolution also determined that the Victims of Torture Fund would be administered in accordance with Financial Regulations of the United Nations by the Secretary-General, with the advice of a Board of Trustees "composed of a chairman and four members with wide

[1174] Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1175] Appellant Zdravko Mucic's Final Designation of His Grounds of Appeal, 31 May 2000, p 2.
[1176] Landžo Brief, p 1.
[1177] General Assembly Resolution 36/151 of 16 December 1981.

experience in the field of human rights, acting in their personal capacity [...]." It was agreed between the parties that Judge Odio Benito was a member of the Board of Trustees of the Victims of Torture Fund throughout the *Celebici* trial.[1178]

696. The appellants contend that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund gave rise to a reasonable apprehension of bias. The appellants argue that, by virtue of her membership of the Board, Judge Odio Benito had undertaken an obligation to further the goals of the Victims of Torture Fund. Since the Indictment in the *Celebici* trial included allegations of torture, there was, it is said, a strong appearance of bias against those accused who were the subject of those allegations. (Landžo's earlier submission, that it was likely that Judge Odio Benito was *actually* biased against him as a person charged with torture,[1179] was abandoned during the oral submissions.)[1180] The appellants argued that Judge Odio Benito should therefore have disqualified herself pursuant to Rule 15(A) of the Rules or made a full disclosure of the association to the accused and their counsel and obtained their informed consent to proceed.[1181]

697. The relevant question to be determined by the Appeals Chamber is thus the same as that already stated in the previous Chapter: whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold in the solemn declaration made when assuming office, that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1182]

698. The Appeals Chamber agrees that, by accepting a position on the Board of Trustees, Judge Odio Benito undertook in her personal capacity to further the mandate of the Victims of Torture Fund. However, given that the objects of the fund as expressed in its mandate are solely focussed on fundraising to enable material assistance to the victims of torture – through the receipt and redistribution of donations for humanitarian, legal and financial aid to victims of

[1178] Agreement on Evidence, para 1.
[1179] Landžo Brief, p 26: "[...] it is at least possible, and in reality very likely, that Judge Odio-Benito had an actual partiality against Appellant Landžo".
[1180] Appeal Transcript, p 685: "We do not for a moment suggest that there is evidence that Judge Odio Benito displayed actual bias towards Landžo or the other appellants".
[1181] Delic Brief paras 48 and 57; Landžo Brief, pp 35-36; Appeal Transcript, pp 645-646.
[1182] *See supra* para 683.

torture and their relatives – the Appeals Chamber does not accept that a commitment by Judge Odio Benito to the objects and the activities of the Fund could reasonably be regarded as in any way inconsistent with the fair and impartial adjudication of charges of torture in her different capacity as a judge of the Tribunal.

699. As noted in the *Furundžija* Appeal Judgement, personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.[1183] In relation to the particular subject of torture, it is difficult to accept that any judge eligible for appointment to the Tribunal – and thus a person of "high moral character, impartiality and integrity", as required by Article 13 of the Tribunal's Statute – would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a crime under international and national laws, would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons responsible for torture should be prosecuted.

700. It was nevertheless submitted that Judge Odio Benito, by reason of her membership of the Board of Trustees of the Victims of Torture Fund, "[...] had a clear identification with the victims of the alleged offences, and therefore, by an inescapable process of logic, against the alleged perpetrators of those offences".[1184] But, while an objective observer may reasonably infer from such membership that Judge Odio Benito sympathises with victims of torture, it is far from "inescapable logic" that she would therefore be biased against persons *alleged* to be perpetrators of torture. A person opposed to torture may be expected to hold the view that those *responsible* for committing that offence should be punished, but this is fundamentally different to bias against any person *accused* of torture. This is particularly so in the case of judges who, as discussed above, are presumed to be impartial,[1185] and are professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in the particular case.[1186]

701. The appellants submitted that, even though the activities of the Victims of Torture Fund are praiseworthy, they are nevertheless incompatible with judicial office because "[j]udges ... have an obligation to set themselves apart from the political fray and the activism on behalf of

---

[1183] *Furundžija* Appeal Judgement, para 203.
[1184] Landžo Brief, p 26. *See* also Mucic Brief, para 5, p 5: "[...] it can reasonably be assumed that, by agreeing to be a trustee of the fund, Judge Odio Benito was sympathetic to its objectives and thus hostile to acts of torture and to those who were, or alleged to have been, engaged in those acts".
[1185] *Supra*, para 683, *see* also *Furundžija* Appeal Judgement, paras 196-197.
[1186] *Prosecutor v Brdanin and Talic*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para 17.

causes".[1187] Such a submission is wholly inapposite to the present case. The purposes of the Victims of Torture Fund are not even remotely political, and Judge Odio Benito's membership of its Board of Trustees, with its overseeing role in the receipt and redistribution of donations for victims of torture, cannot be characterised as activism on behalf of a cause in any natural sense of the term.

702. It is clear that the Statute of the Tribunal, by requiring that the "experience of the judges in criminal law, international law, including humanitarian law and human rights law" be taken into account in composing the Chambers,[1188] anticipated that a number of the judges of the Tribunal would have been members of human rights bodies or would have worked in the human rights field. As Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was included on her curriculum vitae submitted by the Secretary-General to the General Assembly prior to the election of judges of the Tribunal in 1993 and 1997,[1189] it was no doubt considered to be relevant to her experience in the field of human rights law and therefore to the judicial qualification requirements. As noted in the *Furundžija* Appeal Judgement, it would be an odd result if the fulfilment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias.[1190] Counsel for Landžo was obliged to argue that such membership was both a qualification and a disqualification at the same time and that, given the prevalence of allegations of torture in cases to be tried by the Tribunal, Judge Odio Benito should accordingly have spent four years as a judge of the Tribunal doing absolutely nothing.[1191]

703. The appellants placed heavy reliance in their submissions upon the decision of the United Kingdom House of Lords decision in the *Pinochet* case, in which it was determined that a member of the House of Lords (Lord Hoffman) was disqualified from hearing an earlier case because he was a director and chairperson of a charitable organisation which was controlled by Amnesty International, an intervenor in the case.[1192] It was submitted that the facts of the two cases were "almost exactly the same",[1193] and that the result in both cases should be the same.[1194] The Appeals Chamber observes that a single decision from a national court does not (contrary to what was suggested by certain of the appellants' submissions) constitute any kind

---

[1187] Appeal Transcript, p 686.
[1188] Article 13.
[1189] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59.
[1190] *Furundžija* Appeal Judgement, para 205.
[1191] Appeal Transcript, pp 687-689.
[1192] *R v Bow Street Metropolitan Stipendiary Magistrate and Others; Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 ("*Pinochet* Decision").
[1193] Appeal Transcript p 684.

of definitive code for matters arising in the unique context of this international Tribunal. That said, the *Pinochet* Decision is nevertheless of some assistance in applying the law in the present case, because the legal principles it discussed in relation to judicial disqualification are substantially similar to the principles which the *Furundžija* Appeal Judgement has held to govern the issue of disqualification for bias in this Tribunal.[1195]

704. An examination of the reasoning of the members of the House of Lords in the *Pinochet* Decision, however, makes it quite apparent that it does not support the conclusions the appellants seek to draw from it. Contrary to the submissions of the appellants, it was critical to the actual result in that decision that Amnesty International was, as an intervenor in the earlier proceedings, a party to the litigation. The significance of the status of Amnesty International as a party to the proceedings lies in the fact that the House of Lords held that the circumstances in which a judge should be disqualified because of an appearance of bias encompass two categories of case. The first is that, where a judge is party to a litigation or has a relevant interest in its outcome, he is automatically disqualified from hearing the case. The second category is that a judge who is not party to the litigation, but whose conduct or behaviour in some other way gives rise to a reasonable suspicion that he is not impartial, is obliged to disqualify himself.[1196]

705. Lord Browne-Wilkinson, who gave the principal reasons for judgement and with whose reasons the other members of the House of Lords agreed,[1197] found that Lord Hoffman's circumstances fell within the first category of automatic disqualification. His Lordship held that automatic disqualification extended to any judge "who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit", and he found that Lord Hoffman "was disqualified as a matter of law automatically by reason of his directorship of AICL, a company controlled by a party, AI [Amnesty International]".[1198] Lord Browne-Wilkinson then reiterated the exceptional nature of the case, stating:

> The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) [and that] the judge was a director of a charity closely

---

[1194] Landžo Brief, p 34.
[1195] The Appeals Chamber stresses that it does not intend in any way to depart from the principles expressed in the *Furundžija* Appeal Judgement on this issue.
[1196] *Pinochet* Decision, p 281.
[1197] *Pinochet* Decision, p 285 (Lord Goff of Chieveley); p 288 (Lord Nolan and Lord Hope of Craighead), p 291 (Lord Hutton).
[1198] *Pinochet* Decision, p 284.

> allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties.[1199]

In the present case, the Victims of Torture Fund was not a party to the *Celebici* proceedings in any capacity. There was no evidence put forward by the appellants nor any indication of any kind that the Fund was allied to or acting with any party to the proceedings. Landžo submitted that, because both the Fund and the Tribunal are organs of the United Nations, the Fund has a common cause with the Office of the Prosecutor of the Tribunal.[1200] That submission is simply untenable. Even if it is accepted that, in the broadest sense of the concept, the Prosecutor and the Victims of Torture Fund have a common cause, that cause is simply one of opposition to the crime of torture. That is not a disqualifying common interest.

706. The second category of disqualification referred to by Lord Browne-Wilkinson, which substantially reflects the concept of reasonable apprehension of bias as expressed by the Appeals Chamber in relation to the Tribunal, is the only category relevant to the facts of the present case. Because of the conclusion that Lord Hoffman had been automatically disqualified by the application of the first category, Lord Browne-Wilkinson found it unnecessary to consider the question raised by the second category, namely whether the circumstances gave rise to a real danger or suspicion of bias.[1201] The decision is therefore of limited assistance in the present case.

707. The Appeals Chamber has already emphasised that, as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be "firmly established".[1202] The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias. As has been observed in a decision cited by the Appeals Chamber in the *Furundžija* Appeal Judgement:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party [....]. Although it is important

---

[1199] *Pinochet* Decision, p 284. *See* also Lord Goff of Chieveley at p 286: "[...] we have to consider Lord Hoffmann [...] as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings".
[1200] Landžo Brief, p 34; Landžo Reply, para 6.26.
[1201] *Pinochet* Decision, p 284.
[1202] *Furundžija* Appeal Judgement, par 197.

> that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[1203]

708. The Appeals Chamber is not satisfied that a reasonable and informed observer would consider that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund would render her unable to consider and determine with an impartial and unbiased mind the matters, including charges of torture, which were before her in the *Celebici* trial. There was therefore no basis upon which Judge Odio Benito should have disqualified herself, nor (taking the second limb of the appellants' argument) any requirement that she make a formal disclosure of her membership of the Board and obtain consent to proceed from the parties to the *Celebici* case. Although the issue of disclosure is therefore not strictly relevant, the Appeals Chamber does note that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was a matter of public knowledge,[1204] published in three successive Year Books of the Tribunal,[1205] and in documents of the United Nations General Assembly.[1206]

709. Accordingly, Delic Issue 2, Mucic Ground 2 and Landžo Ground 3 are dismissed.

[1203] Per Mason J, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (High Court of Australia), adopted unanimously by the High Court of Australia in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448; cited in the *Furundžija* Appeal Judgement at para 197.

[1204] The Appeals Chamber has already observed in the *Furundžia* Appeal Judgement that because of the numerous public sources of information about the qualifications and associations of Judges of the Tribunal, such information is freely available to the parties: *Furundžia* Appeal Judgement, para 173.

[1205] Yearbook for 1994, p 200; Yearbook for 1995, p 355; Yearbook for 1996, p 23. The fact of Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was also in the Yearbook for 1997 (p 28) which was published after the conclusion of the *Celebici* trial.

[1206] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59. *See* above para 702.

XIV. GROUNDS OF APPEAL RELATING TO SENTENCING

A. Introduction

710. The Appeals Chamber has decided to quash certain of the convictions entered against Landžo, Mucic and Delic where there was more than one conviction imposed on the basis of the same facts. As noted above, it is therefore necessary to consider whether, in relation to those convictions quashed on the basis of cumulative convictions considerations, the sentences imposed upon them in relation to the remaining convictions should be adjusted.

711. Because the Appeals Chamber has had no submissions from the parties on these issues and, because there may be matters of important principle involved, it will be necessary for such consideration to be given after the parties have had the opportunity to make relevant submissions. As the Appeals Chamber cannot be reconstituted in its present composition, and as, in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.

712. As it will be an issue as to whether any *adjustment* should be made to the sentences because of the matters referred to above, and not a complete rehearing on the issue of sentence, it is appropriate that the Appeals Chamber consider and resolve the issues raised in the parties' grounds of appeal relating to sentence insofar as they allege the commission of errors in the exercise of discretion or other errors of law by the Trial Chamber in imposing those sentences, so that the new Trial Chamber will then be in a position to consider what, if any, adjustment should be made to what the Appeals Chamber considers would otherwise have been appropriate sentences.

713. In addition, the Appeals Chamber has determined that the conviction of Delic on Counts 1 and 2 of the Indictment must be quashed on the basis that it was not open to the Trial Chamber to have convicted him on those counts. It would be convenient, when the matter is remitted, for the new Trial Chamber also to consider what adjustments should be made to the sentence of Delic in relation to the reversal of his conviction on those counts.

714. Before turning to consider the issues raised in the parties' particular grounds of appeal relating to sentence, as referred to above, the Appeals Chamber considers it appropriate to first address several general considerations.

715. The Prosecution submits that the Appeals Chamber should determine "basic sentencing principles which should be applied by the Trial Chambers."[1207] The Appeals Chamber notes that the Prosecution made similar submissions in the case of *Furundžija* before the Appeals Chamber, arguing that such principles would assist in order to achieve consistency and even-handedness in sentencing before the Trial Chamber.[1208] The Appeals Chamber in that case decided that, since only certain matters relating to sentencing were at issue, it was inappropriate to set down a definitive list of sentencing guidelines for future reference.[1209]

716. The benefits of such a definitive list are in any event questionable. Both the Statute (Article 24) and the Rules (Rule 101) contain general guidelines for a Trial Chamber to take into account in sentencing. These amount to an obligation on the Trial Chamber to take into account aggravating and mitigating circumstances (including substantial co-operation with the Prosecution), the gravity of the offence, the individual circumstances of the convicted person and the general practice regarding prison sentences in the courts of the former Yugoslavia.[1210] Other than these general principles, no detailed guidelines setting out, for example, what particular factors may be taken into account in mitigation or aggravation of sentence are provided in either the Statute or the Rules.[1211]

717. Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime. To achieve this goal, Trial Chambers are obliged to consider both aggravating and mitigating circumstances relating to an individual accused. The many

---

[1207] Prosecution Reply, para 5.8 and Appeal Transcript, p 730.

[1208] *Prosecutor v Anto Furundžija*, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution Dated 30 Sept 1999, 28 June 2000, Case No IT-95-17/1-A, para 7.17.

[1209] *Furundžija* Appeal Judgement, para 238.

[1210] It is also obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute (Rule 101(B)(iv).

[1211] This was also the case with the implementing legislation for the post-World War II trials (including the International Military Tribunals held at Nuremberg and Tokyo). Article 27 of the Nuremberg Charter provided simply that "the Tribunal shall have the right to impose upon a Defendant on conviction, death or such other

circumstances taken into account by the Trial Chambers to date are evident if one considers the sentencing judgements which have been rendered.[1212] As a result, the sentences imposed have varied, from the imposition of the maximum sentence of imprisonment for the remainder of life,[1213] to imprisonment for varying fixed terms (the lowest after appeal being five years[1214]). Although certain of these cases are now under appeal, the underlying principle is that the sentence imposed largely depended on the individual facts of the case and the individual circumstances of the convicted person.[1215]

718. The Appeals Chamber accordingly concludes that it is inappropriate for it to attempt to list exhaustively the factors that it finds should be taken into account by a Trial Chamber in determining sentence.

719. It is noted that, in their submissions, each party urges the Appeals Chamber to compare their case with others which have already been the subject of final determination, in an effort to persuade the Appeals Chamber to either increase or decrease the sentence.[1216]

---

punishment *as shall be deemed by it to be just*" (Emphasis added). A similar provision is found in Article 16 of the Charter of the International Military Tribunal for the Far East.

[1212] *See e.g.*: *Prosecutor v Tadic,* Sentencing Judgement, Case No IT-94-1-T*bis*-R117, 11 Nov 1999 para 19 (reference to willingness to commit crimes, awareness and enthusiastic support for the attacks); *Prosecutor v Tadic,* Sentencing Judgement, Case No IT-94-1-T, 14 July 1997, paras 56-58 (reference in general to cruel and willing manner in which crimes carried out); *Blaškic* Judgement, paras 783-787 (reference to motive, number of victims, effect of the crime upon victims). Remorse has been considered in for example, the *Blaškic* Judgement at para 775 and *Prosecutor v Jelisic,* Case No IT-95-10-T, 14 Dec 1999 para 127.

[1213] No sentences of imprisonment for the remainder of life have been imposed by this Tribunal. However, they have been by the ICTR. *See Kambanda* Appeal Judgement; *Prosecutor v Rutaganda,* Judgement and Sentence, Case No ICTR-96-3-T, 6 Dec 1999; *Prosecutor v Musema,* Judgement and Sentence, Case No ICTR-96-13-T, 27 Jan 2000; *Prosecutor v Kayishema,* Sentence, Case No ICTR-95-1-T, 21 May 2000; and *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998.

[1214] In the case of *Dra'en Erdemovic.* The sentence of 2 ½ years originally imposed by the Trial Chamber on *Zlatko Aleksovski* was revised by the Appeals Chamber to seven years. Other fixed terms include *Goran Jelisic,* who received 40 years, *Tihomir Blaškic,* who received 45 years, *Anto Furund'ija,* who received ten years (maximum sentence), *Duško Tadic,* who received 20 years (maximum sentence) and *Omar Serushago,* who received 15 years.

[1215] *Blaškic* Judgement, para 765: "The factors taken into account in the various Judgements of the two International Tribunals to assess the sentence must be interpreted in the light of the type of offence committed and the personal circumstances of the accused. This explains why it is appropriate to identify the specific material circumstances directly related to the offence in order to evaluate the gravity thereof and also the specific personal circumstances in order to adapt the sentence imposed to the accused's character and potential for rehabilitation. Notwithstanding this, in determining the sentence, the weight attributed to each type of circumstance, depends on the objective sought by international justice." *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998, para 20: "It is a matter, as it were, of individualising the penalty." *Prosecutor v Rutaganda,* Judgement and Sentence, Case No ICTR-96-3-T, 6 Dec 1999, para 457; *Furund'ija* Appeal Judgement, para 249: "In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness."; *Prosecutor v Musema,* Case No ICTR-96-13-T, 27 Jan 2000, para 987.

[1216] For example, the Prosecution refers to the case of *Zlatko Aleksovski* (Appeal Transcript, pp 734 and 735); Mucic refers to *Duško Tadic* (Delic/Mucic Supplementary Brief, paras 41-48); and Land'o and Delic both refer to *Dra'en Erdemovic* (Land'o Brief, p 141 and Appeal Transcript, p 752 and Delic Brief, para 361) and *Duško*

Although this will be considered further in the context of the individual submissions, the Appeals Chamber notes that as a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.

720. This question has already been considered twice by the Appeals Chamber, and it was concluded in the first such decision that, as the facts of the two cases in question were materially different, assistance from the first rendered was limited.[1217] In the case of *Anto Furund'ija,* the Prosecution submitted that "every sentence imposed by a Trial Chamber must be individualised as there are a great many factors to which the Trial Chamber may have regard in exercising its discretion in each case."[1218] The Appeals Chamber endorses the finding in that case:

> The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise a Trial Chamber is limited only by the provisions of the Statute and the Rules.[1219]

721. Therefore, while the Appeals Chamber does not discount the assistance that may be drawn from previous decisions rendered, it also concludes that this may be limited. On the other hand, it reiterates that, in determination of sentence, "due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case."[1220]

722. Finally, the Appeals Chamber notes that each party has made some submissions as to the standard of review in an appeal against sentence under Article 25 of the Statute.[1221]

Tadic (Land'o Brief, pp 141–143 and Appeal Transcript, pp 752-754, Delic Brief, para 361 and Delic/Mucic Supplementary Brief, paras 36-40).

[1217] *Serushago* Sentencing Appeal Judgement, para 27, distinguishing the case of *Dra'en Erdemovic.*

[1218] *Furund'jia* Appeal Judgement, para 222 (Footnote omitted).

[1219] *Furund'jia* Appeal Judgement, para 250.

[1220] *Furund'jia* Appeal Judgement, para 237.

[1221] Article 25 of the Statute provides: "1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) An error on a question of law invalidating

Certain parties in particular appear to be requesting that the Appeals Chamber revisit the findings of the Trial Chamber, carrying out a *de novo* review of the sentence and factors taken into account by the Trial Chamber, without necessarily pointing to any abuse of discretion. Land'o requests that the Appeals Chamber essentially reconsider the evidence and mitigating circumstances submitted on his behalf before the Trial Chamber, including that provided orally by several defence witnesses. In doing so, he asks the Appeals Chamber to carry out a *de novo* review of his sentence on appeal.[1222] Although neither Delic nor Mucic make detailed submissions in relation to the standard of review to be applied in an appeal against sentence,[1223] it appears to the Appeals Chamber that they are also essentially requesting a similar *de novo* review of the sentence imposed by the Trial Chamber, despite the fact that they also point to several factors and arguments which they believe were wrongly decided by the Trial Chamber or to which they submit insufficient weight was attached.[1224]

723. The Prosecution submits that, in accordance with the Appeals Chamber decisions in the *Tadic* Sentencing Appeal Judgement[1225] and the *Aleksovski* Appeal Judgement,[1226] the test that should be applied is the "discernible error test." That is, before the Appeals Chamber may intervene, "there must be a discernible error in the exercise of the Trial Chamber's discretion in sentencing."[1227] Once this discernible error has been identified, the

---

the decision; or (b) An error of fact which has occasioned a miscarriage of justice. 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

[1222] Land'o Brief, p149, Appeal Transctipt, pp 756-7: "Mr Land'o requests this Trial Chamber now just to reconsider the evidence that we submitted in sentencing, reconsider the fragile mental condition of Mr Land'o before the outbreak of the aggression, his lack of ability to exercise his own free will, and also in light of Tadic, to revisit all of the evidence presented."

[1223] In the Delic Brief (paras 249-265) and Delic Reply (paras 3-12), Delic makes submissions on the standard of review on appeal in general. However, he does not clarify his submissions in relation to the standard of review to be applied on sentence. Mucic makes no submissions on the standard of review to be applied on appeal against either conviction or sentence, nor does he reply to the Prosecution submissions in this regard (Prosecution Response, paras 2.1-2.23). However, given the nature of his arguments (to be discussed *infra*), it also appears that he is requesting that the Appeals Chamber carry out a *de novo* review of sentence.

[1224] For example, Mucic submits that "taking all matters raised [...] the sentence of 7 years imposed upon him should be reduced to one that more properly and justly reflects any findings that remain unsubstantiated following the determination of his appeal against conviction, and the merits of his appeal against sentence." Mucic Brief, Appeal Against Sentence, pp. 7-8.

[1225] *Tadic* Sentencing Appeal Judgement, paras 20-22 and para 73.

[1226] *Aleksovski* Appeal Judgement, para 187.

[1227] Appeal Transcript, pp 729-730.

Prosecution submits that "the Appeals Chamber can revise the Trial Chamber's sentence and substitute a new sentence."[1228]

724. The Appeals Chamber reiterates that '[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing."[1229] Appeal proceedings are rather of a "corrective nature" and, contrary to *Land'o's* submissions, they do not amount to a trial *de novo.*[1230] Therefore, to the extent that the parties simply resubmit arguments presented at trial without pointing to a particular error, this misconceives the purpose of appellate review on sentence.

725. The test to be applied in relation to the issue as to whether a sentence should be revised is that most recently confirmed in the *Furund'ija* Appeal Judgement.[1231] Accordingly, as a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[1232] The Appeals Chamber will only intervene if it finds that the error was "discernible".[1233] As long as a Trial Chamber does not venture outside its "discretionary framework" in imposing sentence,[1234] the Appeals Chamber will not intervene. It therefore falls on each appellant, including the Prosecution in its appeal against Mucic's sentence, to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did.

B. Prosecution's Appeal Against Mucic's Sentence

726. The Prosecution's fourth ground of appeal is that the Trial Chamber erred when it sentenced Zdravko Mucic to seven years' imprisonment, as this sentence was "manifestly inadequate".[1235]

[1228] Appeal Transcript, p 743. *See* also *Aleksovski* Appeal Judgement, paras 186 and 191. Although the Prosecution did make further submissions in the Prosecution Brief (paras 5.5-5.6) and in the Prosecution Response (paras 2.1-2.23), these are subsumed by the submissions made during the oral hearing on appeal, following the two decisions of the Appeals Chamber (referred to above).

[1229] *Prosecutor v Dra'en Erdemovic,* Case No IT-96-22-A, Judgement, 7 Oct 1997, para 15.

[1230] *Prosecutor v Duško Tadic,* Case No IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 Oct 1998, paras 41 - 42.

[1231] *Furund'jia* Appeal Judgement, para 239.

[1232] *Serushago* Sentencing Appeal Judgement, para 32. *See* also *Aleksovski* Appeal Judgement, para 187 and *Tadic* Sentencing Appeal Judgement, paras 20-22.

[1233] *Tadic* Sentencing Appeal Judgement, para. 22. *Aleksovski* Appeal Judgement, para 187.

[1234] *Tadic* Sentencing Appeal Judgement, para. 20.

[1235] Prosecution Brief, para 5.4.

727. Mucic was found by the Trial Chamber to have been directly responsible under Article 7(1) for the crimes of cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp, and of unlawful confinement of civilians (Counts 46, 47 and 48). He was also found guilty as a superior under Article 7(3) of the Statute, in relation to the following counts:[1236]

> Counts 13 and 14: the wilful killing and murder of nine people – Zeljko Cecez, Petko Gligorevic, Gojko Miljanic, Miroslav Vujicic and Pero Mrkajic, Scepo Gotovac, Zeljko Miloševic, Simo Jovanovic and Boško Samoukovic – and cruel treatment and wilfully causing great suffering or serious injury to Slavko Šušic;
>
> Counts 33 and 34: the torture of six people – Milovan Kuljanin, Momir Kuljanin, Grozdana Cecez, Milojka Antic, Spasoje Miljevic and Mirko Đordic;
>
> Counts 38 and 39: the cruel treatment and wilfully causing great suffering or serious injury to three people – Dragan Kuljanin, Vukašin Mrkajic and Nedeljko Draganic – and the inhuman treatment and cruel treatment of Mirko Kuljanin; and
>
> Counts 44 and 45: the inhuman treatment and cruel treatment of six people – Milenko Kuljanin, Novica Đordic, Vaso Đordic, Veseljko Đordic, Danilo Kuljanin and Miso Kuljanin.
>
> Counts 46 and 47: the cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp (this finding being in addition to the finding of guilty on these counts pursuant to Article 7(1) of the Statute.)

728. The Trial Chamber sentenced Mucic to seven years imprisonment in respect of each count for which he was found guilty, and ordered that those sentences be served

[1236] The Appeals Chamber has found that one of the two convictions which were entered cumulatively in respect of charges arising from the same facts should be vacated. However, for the purposes of determining whether the Trial Chamber erred as alleged by the Prosecution in relation to the determination of Mucic's sentence, the Appeals Chamber must proceed on the basis of the convictions which the Trial Chamber had entered. The effect of the quashing of particular grounds on the basis of cumulative convictions considerations is discussed further below.

concurrently.[1237] As a result, the overall sentence imposed was a period of not more than seven years.

729. The Prosecution contends that the Trial Chamber's approach in sentencing Mucic "involved errors of basic principle, and that the sentence it imposed on Mucic was so low that it fell outside the proper limits of the Trial Chamber's discretion".[1238] The errors alleged by the Prosecution were identified separately in relation to those convictions based solely on Article 7(3), the conviction based on Article 7(1) alone, and the convictions based on both Article 7(1) and Article 7(3) liability. The primary argument relates to the Trial Chamber's alleged failure to take into account the gravity of the crimes for which Mucic was convicted. It is also alleged that the Trial Chamber should have taken into account crimes not specifically alleged in the indictment in sentencing Mucic.[1239] Finally, the Prosecution argues that the Trial Chamber erred in determining that all of the sentences imposed on Mucic should be served concurrently.[1240] Mucic argued in relation to his own ground of appeal against sentence that his sentence was too high and did not take into account certain matters in mitigation, including the absence of his direct participation in acts of violence.[1241]

1. Failure to take into account the gravity of the offences

730. Article 24(2) of the Statute of the Tribunal provides:

> In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

731. The Trial Chamber found, in its general considerations before addressing the factors relevant to each individual accused, that "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[1242] In the subsequent *Aleksovski* Appeal Judgement, the Appeals Chamber expressly endorsed this statement of the *Celebici* Trial Chamber, and also expressed its agreement with the following statement of the Trial Chamber in the *Kupreškic* proceedings:

[1237] Trial Judgement, para 1286.
[1238] Prosecution Brief, para 5.6.
[1239] Prosecution Brief, paras 5.34-5.43.
[1240] Prosecution Brief, paras 5.54-5.75.
[1241] Mucic Brief, Appeal Against Sentence, pp 1-2. This submission in respect of the absence of findings as to his direct participation is effectively incorporated in the Appeals Chambers' consideration of the Prosecution ground

> The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[1243]

The Appeals Chamber reiterates this endorsement of those statements and confirms its acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence. It is therefore necessary to consider whether the Trial Chamber in fact gave due weight to the gravity of the offences for which Mucic was convicted in the sentence it imposed.

(a) Convictions under Article 7(3) alone

732. The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute:

> (1) the gravity of the underlying crime committed by the convicted person's subordinate; and
>
> (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[1244]

The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.[1245]

733. The Prosecution submits that the Trial Chamber failed to make the gravity of Mucic's offences the starting point in its determination of his sentence. It suggests first that this is demonstrated by the point at which the Trial Chamber referred to "gravity" in its

---

of appeal but in relation to other matters in mitigation is considered further below in relation to Mucic's ground of appeal.

[1242] Trial Judgement, para 1225.

[1243] *Kupreškic* Judgement, para 852, cited in the *Aleksovski* Appeal Judgement at para 182.

[1244] Prosecution Brief, para 5.13.

[1245] Mucic contends that the Prosecution's approach indicates that it mischaracterises the offences of a superior as being the "same crime" as that of the subordinate upon which the superior's offence is based: Mucic Response, para 10. The Prosecution Brief does contain some references which could be understood in this way: *e.g.*, para 5.24. The Appeals Chamber's conclusion, however, is not based on any such reasoning but simply recognises the inevitable relationship between the gravity of the superior's failure to prevent or punish criminal conduct and the criminal conduct to which that failure relates.

discussion of the factors relevant to sentencing Mucic. It notes that, after referring to the crimes of which Mucic was found guilty, the Trial Chamber referred to a "wide range of matters relevant to sentencing" and then "almost as an afterthought" stated that it "had 'also' considered the gravity of the offences".[1246] The fact that as a matter of form the Trial Chamber's referred last to its consideration of the gravity of the offences is of no significance of itself, and it certainly does not demonstrate independently that the Trial Chamber did not in fact give appropriate consideration to that matter. It is necessary, in order to determine that question, to focus on matters relating to the substance of the Trial Chamber's Judgement.

734. In relation to those offences for which Mucic was convicted under Article 7(3) of the Statute, the Prosecution alleges that the Trial Chamber erred in law by proceeding on the basis that Article 7(3) liability is less serious than that under Article 7(1). The Prosecution stated in its written submissions:

> [...] it is evident that the Trial Chamber's sentence was premised on a view that the conduct of a superior convicted under Article 7(3) is *inherently less grave* than the conduct of the individual subordinates who committed the relevant offences.[1247]

It supports this interpretation of the Trial Chamber's judgement with a comparison between the sentences received by Mucic and Delic in respect of counts 13 and 14.

735. It would be incorrect to state that, as a matter of law, responsibility for criminal conduct as a superior is less grave than responsibility as the subordinate perpetrator. However, in the Appeals Chamber's view, and contrary to the Prosecution's submission, nothing in the Trial Chamber's judgement indicates that it believed that responsibility for criminal conduct as a superior is *inherently* less grave than responsibility as the subordinate perpetrator. It appears from the Trial Chamber's Judgement that it considered that, *in the circumstances established by the evidence*, the conduct of *Mucic* in respect of the relevant counts was of a lesser gravity and therefore deserved a lesser sentence than that imposed on the subordinates. The Trial Chamber referred to these circumstances in noting that, in relation to the counts for which Mucic had been guilty under Article 7(3) alone, he was not found to have actively participated in the conduct underlying the offences.[1248]

[1246] Prosecution Brief, para 5.11.
[1247] Prosecution Brief, para 5.23 (emphasis added).
[1248] Trial Judgement, para 1239.

736. In the opinion of the Appeals Chamber, proof of active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and may therefore aggravate the sentence.[1249] The Trial Chamber explicitly acknowledged in its observations as to general sentencing principles that active abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority:

> The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance or in mitigation of his guilt. There is no doubt that abuse of positions of authority or trust will be regarded as aggravating.[1250]

737. It must also be recognised, however, that absence of such active participation is not a mitigating circumstance. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability.

738. In assessing the degree of Mucic's responsibility, the Trial Chamber evidently concluded that there was no reason for aggravation of Mucic's sentence on the basis of abuse of authority, apparently because of its finding that Mucic had not actively participated in the underlying offences.[1251] However, the Trial Chamber had also made findings that Mucic was camp commander, with overall authority over the officers, guards and detainees in the camp; that he was responsible for conditions in the camp; that he made "*no* effort to prevent or punish those who mistreated the prisoners or even to investigate specific incidents of mistreatment including the death of detainees"; and that he was regularly absent from the camp for days "in obvious neglect of his duty as commander and the fate of the vulnerable detainees".[1252] Importantly, the Trial Chamber found that Mucic's failures to prevent or punish the unlawful conduct in the camp were ongoing:

> In apparent encouragement, he tolerated these conditions over the entire period he was commander of the prison camp.[1253]

739. The Prosecution submits that a superior's failure over an extended period of time to prevent or punish crimes committed on an ongoing basis may be regarded as encouraging the commission of crimes, as the first failures to prevent or punish encourage the

---

[1249] *Aleksovski* Appeal Judgement, para 183.
[1250] Trial Judgement, para 1220.
[1251] Trial Judgement para 1240.
[1252] Trial Judgement, para 1243. (Emphasis added).
[1253] Trial Judgement, para 1243.

commission of subsequent crimes, and that such a failure should therefore be regarded as more serious than a single failure to prevent an isolated crime by a subordinate.[1254] The Appeals Chamber agrees that such an ongoing failure to exercise the duties to prevent or punish, with its implicit effect of encouraging subordinates to believe that they can commit further crimes with impunity, must be regarded as being of significantly greater gravity than isolated incidents of such a failure. The Appeals Chamber is of the view that, from the facts found by the Trial Chamber, Mucic's consistent failure to act in relation to the conditions and unlawful conduct within the camp must have had such an encouraging effect.

740. Although the Trial Chamber referred to the fact that Mucic's toleration of the unlawful conditions within the camp constituted apparent encouragement, the Appeals Chamber is not satisfied that the Trial Chamber took this factor adequately into account in its consideration of Mucic's sentence. This is suggested by the Trial Chamber's comments, made in relation to factors going to the mitigation of sentence, that:

> The scenario thus described would suggest the recognition of individual failing as an aspect of human frailty, rather than one of individual malice. The criminal liability of Mr. Mucic has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Celebici prison-camp.[1255]

This description of Mucic's position – which suggests a purely "negative" liability by omission on Mucic's part - indicates no acknowledgement of the more influential effect of encouraging or promoting crimes and an atmosphere of lawlessness within the camp created by Mucic's ongoing failure to exercise his duties of supervision. The Trial Chamber later stated that:

> In this particular case, the reason for staying away from the prison-camp at nights without making provision for discipline during these periods, which was to save himself from the excesses of the guards, is rather an aggravating factor.[1256]

This does not satisfy the Appeals Chamber that the degree of encouragement and reinforcement of the criminal conduct of his subordinates that arose from Mucic's ongoing failure to supervise was correctly taken into account. The statement quoted indicates rather that his efforts to save himself from further knowledge of the crimes, as a self-interested attempt at avoiding unpleasantness, was a matter independent of the fact that these absences also had the effect of reinforcing the atmosphere of lawlessness in the camp. It was

[1254] Prosecution Brief, paras 5.16-5.17.
[1255] Trial Judgement, para 1248.
[1256] Trial Judgement, para 1250.

certainly appropriate to characterise Mucic's absences from the camp in the way the Trial Chamber did, but this did not absolve the Trial Chamber of the need also to consider the serious effect of encouragement of the commission of crimes that was caused by Mucic's failure of supervision.

741. As noted above, a consideration of the gravity of offences committed under Article 7(3) of the Statute involves, in addition to a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes. The fact that the Trial Chamber did not take adequate account of the gravity of Mucic's offences, and specifically of the underlying crimes, is also demonstrated by the fact that the sentences imposed in respect of each count were identical: seven years for each count. The Trial Chamber imposed individual sentences in relation to each count rather than a single global sentence, as appears to have been contemplated by the Rules at that time.[1257] The process of determining the individual sentences for those counts requires a consideration of the particular offence in respect of which that count was charged and the evidence of the circumstances in which that offence was committed to enable a determination of the gravity of the offence. The imposition of exactly the same penalty for each count, whether in respect of the failure to prevent or punish the murders of nine people (counts 13 and 14) or the failure to prevent or punish the cruel treatment of four people (counts 38 and 39), and the order that they be served concurrently, demonstrates that the Trial Chamber made no attempt to distinguish between the gravity of each of the offences. It effectively simply imposed a global sentence of seven years to cover every offence, which was a manifestly erroneous assessment of the totality of Mucic's conduct. An alternative implication is that the Trial Chamber considered that the criminal conduct of Mucic was effectively the same under each count – a failure to prevent or punish. However, as the Appeals Chamber has made clear, such an approach fails to take account of the essential consideration that the gravity of the failure to prevent or punish is in part dependent on the gravity of the underlying subordinate crimes.

[1257] Rule 87 (C) provided at the relevant time "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt." It has since been amended (Revision 19, effective from 19 Jan 2001) to read "If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

742. The Appeals Chamber is satisfied that the Trial Chamber did not take adequate account of the gravity of Mucic's offences under Article 7(3) in determining his sentence, and has therefore failed to have regard to a consideration it must have regard to, in imposing his sentence.

(b) Convictions on the basis of both direct and superior responsibility (Counts 46 and 47)

743. In relation to the offences for which Mucic was convicted pursuant to both Article 7(1) and Article 7(3) – wilfully causing great suffering or serious injury to body or health (Count 46) and cruel treatment, in respect of the inhumane conditions in the camp (Count 47) – the Prosecution contends that the Trial Chamber also failed to take into account the gravity of the crimes for the additional reason that his liability as a direct participant as well as a superior should have been taken into account as an aggravating factor.[1258]

744. The Trial Chamber found that:

> By omitting to provide the detainees with adequate food, water, health care and toilet [facilities] Zdravko Mucic participated in the maintenance of the inhumane conditions that prevailed in the Celebici prison-camp. Accordingly, he is directly liable for these conditions, pursuant to Article 7(1) of the Statute. Furthermore, in his position of superior authority Zdravko Mucic knew, or had reason to know, how the detainees, by the violent acts of his subordinates, were subjected to an atmosphere of terror, but failed to prevent these acts or to punish the perpetrators thereof. Accordingly, the Trial Chamber finds that Zdravko Mucic is responsible pursuant to Article 7(3) of the Statute for the atmosphere of terror prevailing in the Celebici prison-camp.[1259]

The Trial Chamber entered convictions against counts 46 and 47, each count encompassing both the Article 7(1) liability and the Article 7(3) liability. In sentencing, the Trial Chamber referred to the fact of Mucic's dual liability under each of counts 46 and 47,[1260] but did not refer to this matter in its consideration of the relevant aggravating factors in relation to Mucic's sentence.

745. Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be

[1258] Prosecution Brief paras 5.45-5.46.
[1259] Trial Judgement, para 1123.
[1260] Trial Judgement, paras 1237 and 1240.

considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[1261] The *Aleksovski* Appeal Judgement has recognised both such matters as being factors which should result in an increased or aggravated sentence. The accused in that case, also a prison commander, had been found guilty of certain crimes on the basis of Article 7(1) of the Statute, for others on the basis of Article 7(3), and for others under both Articles. In relation to those offences of which he was convicted for his direct participation, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences."[1262] It proceeded to state:

> The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.[1263]

746. Here, the Trial Chamber found Mucic guilty under each of counts 46 and 47 both for his direct responsibility for the inhuman conditions prevailing in the camp, and also for his superior responsibility for the atmosphere of terror created in the camp by the guards over whom he held authority. Although the absence of any specific reference in the Trial Judgement to the dual responsibility of Mucic for the offences encompassed by counts 46 and 47 is not determinative of the question as to whether the Trial Chamber actually took it into account in sentencing Mucic, the Appeals Chamber is not satisfied that, in determining a sentence of seven years for this count, it did so. Although the Trial Chamber clearly considered the severity of the conditions which Mucic directly participated in creating, and the violence and humiliation meted out to detainees by the guards,[1264] it is not apparent that the Trial Chamber fully recognised in its sentence that this conduct encompassed two types

[1261] This observation applies only if the two types of responsibility are not independently charged under different counts, with separate sentences imposed on each. A different situation may arise of two separate counts against an accused, one alleging Article 7(1) responsibility for direct or accessory participation in a particular criminal incident, and another alleging Article 7(3) responsibility for failure to prevent or punish subordinates for their role in the same incident. If convictions and sentences are entered on both counts, it would not be open to aggravate the sentence on the Article 7(3) charge on the basis of the additional direct participation, nor the sentence on the Article 7(1) charge on the basis of the accused's position of authority, as to do so would impermissibly duplicate the penalty imposed on the basis of the same conduct.

[1262] *Aleksovski* Appeal Judgement, para 183.

[1263] *Aleksovski* Appeal Judgement, para 183.

[1264] Trial Judgement, para 1242.

of criminal responsibility which were both individually of considerable gravity. The length of the sentence imposed strongly suggests that it did not do so.

(c) Gravity of the offence of unlawful confinement (Count 48).

747. Mucic was convicted of unlawful confinement of civilians (Count 48) pursuant to Article 7(1) alone, and was sentenced to seven years imprisonment on that count. The Prosecution submits that "the Trial Chamber gave virtually no consideration to the appropriate sentence in relation to this count".[1265] It points to the Trial Chamber's statement, made after its discussion of various aggravating and mitigating factors in relation to Mucic, that:

> The criminal liability of Mr Mucic has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Celebici prison-camp.[1266]

The Prosecution says that this demonstrates that the Trial Chamber failed to take account, in sentencing Mucic, of his own conduct which directly resulted in the unlawful confinement of civilians.[1267]

748. The Trial Chamber's statement that Mucic's criminal liability arose "*entirely* from his failure to exercise his superior authority for the beneficial purpose of the detainees", if understood to refer to "superior authority" in the sense of responsibility pursuant to Article 7(3) of the Statute (the most natural understanding of the phrase in this context), is clearly wrong. It fails to take into account the Trial Chamber's findings that Mucic's liability in relation to Count 48 was founded solely on his *direct* responsibility under Article 7(1), and that he was responsible for cruel treatment and wilfully causing great suffering or serious injury to body or health under counts 46 and 47 on the basis of Article 7(1), in addition to as a superior under Article 7(3). It is possible that the Trial Chamber was simply intending to refer to the fact that Mucic's criminal liability arose entirely from his conduct in his role as camp commander, or as counsel for Mucic contends, his "authority" in a general sense.[1268] That would not misstate the position, since Mucic's direct liability for unlawful confinement arose from his failures to exercise his power as camp commander to release detainees he was aware were unlawfully detained, and his Article 7(1) responsibility for the

[1265] Prosecution Brief, para 5.48.
[1266] Trial Judgement, para 1248.
[1267] Prosecution Brief, para 5.50.

inhumane conditions in the camp arose from his failure as camp commander to provide adequate facilities for the detainees. Given the Trial Chamber's acknowledgement earlier in the section on the sentencing of Mucic that he was not found guilty of actively participating in the offences, "*with the exception of* counts 46 and 47 (inhumane conditions) and count 48 (unlawful confinement of civilians)", the Appeals Chamber is not satisfied that the reasoning in the Trial Judgement demonstrates that the Trial Chamber gave *no* consideration to the appropriate sentence on this count.

749. The Prosecution contends more generally, however, that, in light of the seriousness of the offence of unlawful confinement, a sentence of seven years was manifestly inadequate. It first argues in support of this submission that:

> [...] it is evident that all of the other crimes which were inflicted on the victims during their detention in the camp would not have occurred if they had not been unlawfully confined there. In imposing sentence in respect of Count 48, the fact that victims of the unlawful detention became the victims of other crimes while detained is a matter to be taken into account.[1269]

750. This submission overlooks the fact that those crimes against the detainees in the Celebici camp which the Prosecution determined could be proved beyond reasonable doubt had been independently charged in the Indictment. Mucic was charged with superior responsibility and, in the case of inhuman conditions under Counts 46 and 47, personal responsibility for many of those crimes. In this situation, there would be a danger of impermissibly penalising the accused more than once for the same conduct if the sentence in respect of the unlawful confinement count was to be aggravated by reference to the fact that these other crimes had been committed upon the detainees. In the circumstances of this case, the Appeals Chamber is not satisfied that there was any error in not taking the fact that crimes were committed on the detainees to be a matter in aggravation of sentence.

751. The Prosecution also supported its submission in relation to Count 48 by reference to the penalties for the offences of unlawful detention, unlawful confinement or false imprisonment in certain national jurisdictions. The domestic legal provisions identified provide sentencing ranges from three months to life with hard labour (depending on the presence of various aggravating circumstances such as torture or torture resulting in death)

[1268] Mucic Response, para 14.
[1269] Prosecution Brief, para 5.50.

in Belgium,[1270] up to twenty years for a single victim or up to thirty in the case of multiple victims in France,[1271] and from five to twenty years in Rwanda, with the death penalty if the detained victim is tortured to death.[1272] The Prosecution also acknowledges, however, that other national systems do not impose such severe penalties, with ranges covering from one to twelve years.[1273]

752. Mucic submits that references to such sentencing ranges in the absence of examples of specific sentences given in relation to "virtually identical facts with the offender having virtually identical circumstances and mitigation [...] the value of such examples, although of some academic interest, is in practice very limited".[1274] The Appeals Chamber agrees that reference to these national provisions in the abstract is of very limited value.

753. The Prosecution's reference to the most severe penalties applicable to unlawful detention combined with aggravating factors such as torture or the death of the victim again overlooks the fact that, in this case, those crimes have been independently charged and are therefore not an appropriate reference point in seeking guidance on what may be a suitable range of sentences for the offence of unlawful confinement alone. Secondly, the provisions referred to by the Prosecution demonstrate in any event a very wide sentencing range within which the seven year sentence actually imposed on Mucic in respect of this offence (if otherwise appropriate) easily falls.

754. The Appeals Chamber is not satisfied that the sentence imposed on Mucic in respect of Count 48 falls outside of the sentencing range which is open to the Trial Chamber in the exercise of its discretion or that any other error in the exercise of the Trial Chamber's discretion has been demonstrated in relation to this particular count.

(d) Conclusion in relation to the gravity of the offences

755. For the reasons identified above, the Appeals Chamber has found that the Trial Chamber did not have sufficient regard to the gravity of the offences committed by Mucic in exercising its sentencing discretion, and that as a result the seven year sentence imposed

---

[1270] *Code Pénal* Articles 434-438.
[1271] *Code Pénal*, Articles 224-1 and 224-3.
[1272] *Code Pénal*, Article 388.
[1273] Prosecution Brief para 5.52, citing the relevant provisions of the law in Austria, Canada, Denmark, Finland and Zambia.
[1274] Mucic Response, para 15.

on him did not adequately reflect the totality of his criminal conduct. The Appeals Chamber's conclusion is reinforced by reference to the *Aleksovski* Appeal Judgement. It is appropriate to explain why this is so.

756. Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions which are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.

757. This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to *consider* that range or pattern of sentences, without being *bound* by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal's administration of criminal justice.

758. At the present time, there does not exist such a range or pattern of sentences imposed by the Tribunal. The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal's Statute. At the present time, therefore, in order to avoid any unjustified disparity, it is possible for the Tribunal to have regard only to those sentences which have been imposed by it in generally similar circumstances as to both the offences and the offenders. It nevertheless must do so with considerable caution. As the Appeals Chamber

discusses further below[1275] comparisons with sentences imposed in other cases will be of little assistance unless the circumstances of the cases are substantially similar. However, in cases involving similar factual circumstances and similar convictions, particularly where the sentences imposed in those other cases have been the subject of consideration in the Appeals Chamber, there should be no substantial disparity in sentence unless justified by the circumstances of particular accused.

759. Aleksovski, a commander of a prison in which detainees were mistreated, was convicted for one count of outrages against personal dignity under Article 3 of the Statute,[1276] encompassing liability under both Articles 7(1) and 7(3) for a number of crimes of violence, for aiding and abetting the creation of an atmosphere of psychological terror and for not preventing the use of detainees as human shields and for trench digging. He was not convicted of the more serious crimes of murder and torture, or the additional and distinct crime of unlawful detention of civilians, as Mucic was. The Trial Chamber's sentence of two and half years imprisonment[1277] was revised on appeal on the basis that it was "manifestly inadequate".[1278] The Appeals Chamber imposed a "revised sentence" of seven years, which took into account the "element of double jeopardy" in the process in that Aleksovski had been required to appear for sentence twice for the same conduct, "suffering the consequent anxiety and distress" after having been released.[1279] According to the Appeals Chamber, if it were not for these considerations, "the [revised]sentence would have been considerably longer". If Aleksovski would, but for the double jeopardy factor, have been sentenced to considerably more than seven years imprisonment, there is a serious disparity in Mucic also being sentenced to only seven years imprisonment in respect of more numerous crimes committed in similar circumstances, including crimes of undoubtedly greater gravity than those for which Aleksovski was convicted.

2. Failure to have regard to crimes not alleged in the Indictment

760. In relation to the crimes of which Mucic was convicted under Article 7(3) of the Statute, the Prosecution submits that, although those counts specified certain crimes against certain identified victims, "the wording of those paragraphs made clear that these lists of

[1275] *Infra*, at para 798.
[1276] *Prosecutor v Aleksovski*, Case No IT- 95-14/1-T, Judgement, 25 June 1999, paras 228-230.
[1277] *Prosecutor v Aleksovski*, Case No IT- 95-14/1-T, Judgement, 25 June 1999, para 244.
[1278] *Aleksovski* Appeal Judgement, para 187.
[1279] *Aleksovski* Appeal Judgement, para 190.

crimes and victims were non-exhaustive".[1280] It contends that, in sentencing Mucic on these counts, the Trial Chamber "erred in failing to have regard to the fact that those crimes specifically alleged in the relevant paragraphs of the Indictment for which Mucic was found responsible did not represent the totality of the relevant criminal acts committed against the detainees in the Celebici prison-camp".[1281]

761. The counts referred to by the Prosecution charged crimes against specific individuals but introduced these charges with the phraseology of "including". For example, the introductory paragraph to Counts 33 and 34 commences with the words:

> With respect to the murders committed in the Celebici camp, including: [...]

The Trial Chamber acknowledged that this language was intended to encompass "references to unspecified criminal acts alleged to have occurred in the Celebici prison-camp".[1282] It continued:

> In consideration of the rights enshrined in Article 21 of the Statute, and in fairness to the accused, the Trial Chamber does not regard the unspecified acts referred to in the above-mentioned counts as constituting any part of the charges against the accused. Accordingly, in its findings in relation to those counts, the Trial Chamber will limit itself to a consideration of those criminal acts specifically enumerated in the Indictment.[1283]

762. The Prosecution submits generally that, when a superior is charged with responsibility under Article 7(3) of the Statute with unspecified criminal acts, "there is nothing to prevent the Trial Chamber from having regard to those acts, if proved at trial, when sentencing the superior".[1284] It refers to the statement of the Trial Chamber quoted above as a demonstration that the Trial Chamber must have had no reference to these unspecified acts in sentencing Mucic, even though "it was made clear in the Trial Chamber's Judgement that criminal acts apart from those individual acts specified in the Indictment were indeed committed in the camp during the relevant period".[1285] The Prosecution then refers to certain passages from the Trial Judgement which demonstrate the Trial Chamber's recognition that the crimes specified in the Indictment did not represent the totality of the criminal acts to which the detainees were subjected in the Celebici camp.[1286]

[1280] Prosecution Brief, para 5.34.
[1281] Prosecution Brief, para 5.43.
[1282] Trial Judgement, para 812.
[1283] Trial Judgement, para 812.
[1284] Prosecution Brief, para 5.38.
[1285] Prosecution Brief, para 5.37.
[1286] Prosecution Brief, para 5.37.

The Prosecution does not, however, identify any passages which contain any findings that Mucic specifically was responsible for such unspecified acts. The Appeals Chamber cannot find any indication from the Trial Judgement that the Trial Chamber had found beyond reasonable doubt that Mucic had committed any criminal acts additional to those specifically identified in the Indictment.

763. Mucic submits that the Prosecution's argument is in effect an appeal against acquittal under the mantle of an appeal against sentence because, if the Trial Chamber had not found the relevant matters proved beyond reasonable doubt against Mucic, there was no basis on which it could take those matters into account in sentencing.[1287] The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence. As was made clear during the hearing of oral submissions on appeal,[1288] the issue is primarily one of whether the Prosecution actually sought findings in relation to the other acts referred to in the Indictment. The Trial Chamber could not be expected to make findings in respect of matters which had not been specifically put before it, whether in the Indictment or during the trial. Another issue is whether the accused, in view of the very general wording used in the Indictment, had been sufficiently put on notice during the proceedings that such additional offences were alleged and of the nature of those offences so that he could meet the allegations in his own defence case.[1289]

764. As to the first issue, the Prosecution in its submissions on appeal was not able to direct the Appeals Chamber to any record of the Prosecution having sought, at trial, findings by the Trial Chamber in relation to other offences by Mucic not specifically alleged in the Indictment. The Appeals Chamber notes that, in its final written submission before the Trial Chamber, the Prosecution submitted that

> [...] the specific incidents referred to in the Indictment are not exhaustive but rather illustrative [...]. Thus for the purposes of superior responsibility, the Judges may consider other incidents not specifically described in the indictment but proved at trial.[1290]

[1287] Mucic Response, p 12.
[1288] Appeal Transcript, pp 737-738
[1289] Statute of the Tribunal, Article 21(4)(a) refers to the right of an accused "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".
[1290] Closing Statement of the Prosecution, filed 25 August 1998, para 3.71.

No such "other incidents" were specified. The Prosecution also failed to identify any such acts during its closing oral arguments, submitting generally only that the Trial Chamber should convict the accused for violations of law proved beyond reasonable doubt.[1291] There is no indication that the Prosecution directed the Trial Chamber at any point during the proceedings towards any other specific criminal incidents upon which it sought findings as to Mucic's responsibility.

765. The Appeals Chamber considers that, in such circumstances, there was no error made by the Trial Chamber in failing to make findings in relation to matters not specifically alleged in the Indictment. Given the generality with which those other incidents were alleged in the Indictment, the Indictment itself did not impose an obligation on the Trial Chamber to make findings on those incidents. It was incumbent upon the Prosecution, if it did in fact seek findings as to those matters, to identify them clearly to the Trial Chamber and to request it to make findings upon them. For this reason, this argument of the Prosecution is not accepted.

766. Given this conclusion, it is unnecessary to consider whether the requirement, referred to above, that the accused was sufficiently on notice of the other criminal incidents which were alleged had been satisfied by the Prosecution. In any case, no material was put before the Appeals Chamber by the Prosecution to enable it to be satisfied that this requirement had been met.

3. The determination that all sentences should be served concurrently

767. The Prosecution finally submitted in relation to this ground of appeal that the Trial Chamber erred in ordering the Mucic's sentences all be served concurrently.[1292] The Trial Chamber stated, in relation to whether the sentences imposed should be served concurrently or consecutively, that:

> During the pre-trial stage of these proceedings, the Trial Chamber issued a decision on the motion by the Defence for Zejnil Delalic challenging the form of the Indictment. The decision considered, *inter alia*, the issue of whether it is permitted to charge an accused under several legal qualifications for the same act, that is, the issue of whether cumulative charging is permitted. The Trial Chamber agreed with a previous decision issued in the case of *Prosecutor v Duško Tadic*, and thus declined to evaluate this

[1291] Trial Transcript, pp 15525-15526. The Prosecution arguments seem to be directed (although not specifically described as such) solely towards the testimony relating to the specifically identified crimes and victims alleged in the Indictment. Trial Transcript, pp 15530-15534.
[1292] Prosecution Brief, para 5.55-5.56.

> argument on the basis that the matter is only relevant to penalty considerations if the accused is ultimately found guilty of the charges in question. Accordingly, this challenge to the Indictment was denied. It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence imposed shall not be consecutive.[1293]

768. The Prosecution submits that this reasoning could not justify the Trial Chamber's conclusion that *all* of the sentences imposed on Mucic should be served concurrently.[1294] It identifies two matters in support of this argument. The first is that many of the sentences imposed on Mucic related to crimes arising from *different* conduct, rather than from the same act as is suggested by the statement of the Trial Chamber quoted above. Secondly, it submits that:

> Even where two different crimes of which an accused has been convicted arise out of the *same* conduct, this should be *reflected* in sentencing, but this does not mean that the sentences imposed in respect of the different crimes arising out of the same conduct must always necessarily be made completely concurrent.[1295]

The Prosecution contends that "conduct which simultaneously constitutes more than one crime is more serious than conduct which constitutes one of those crimes only, and this is a matter which can appropriately be reflected in sentencing".[1296]

769. The Appeals Chamber has already found that, in relation to the crimes for which Mucic was convicted under both Articles 2 and 3 in relation to the same conduct, the charges under Article 3 must be dismissed. This requires that the sentencing consequences be considered by a reconstituted Trial Chamber, which will no doubt consider whether the remarks of the original Trial Chamber indicate that there should be no adjustment downwards in the sentences imposed. For that reason, it is unnecessary to consider further the submission insofar as it relates to convictions for the same conduct. It suffices for the Appeals Chamber to reiterate that the governing criterion of sentencing is that it must accurately recognise the gravity of the offences and must reflect the totality of the accused's criminal conduct.[1297] The fact that an accused's conduct may legitimately be legally characterised as constituting different crimes would not overcome the fundamental principle that he should not be punished more than once in respect of the same conduct. In the case of two legally distinct crimes arising from the same incident, care would have to be taken

---

[1293] Trial Judgement, para 1286 (Footnote omitted).
[1294] Prosecution Brief, para 5.56.
[1295] Prosecution Brief, para 5.56(2).
[1296] Prosecution Brief, para 5.72.
[1297] *See* above, paras 429-430.

that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on only to satisfy the *distinct* elements of the relevant crimes.

770. In relation to those offences for which Mucic was convicted which relate to different conduct, the Prosecution submits that, where an accused has committed multiple crimes, the Trial Chamber must take into account "the higher degree of wrongdoing and the fact that a number of different protected values have been harmed".[1298] It summarises its position by saying that "a person who is convicted of many crimes should generally receive a higher sentence than a person committing only one of those crimes".[1299]

771. Rule 101(C) of the Rules of Procedure and Evidence provided at the time relevant to the Trial proceedings in this case that:

> The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

The choice as to concurrent or consecutive sentencing is therefore a matter within the Trial Chamber's discretion. Rule 101(C) has now been removed from the Rules but the discretion of the Trial Chamber in relation to concurrent or consecutive sentencing is preserved in the amended Rule 87(C), which provides that the Trial Chamber will indicate whether separate sentences imposed in respect of multiple convictions shall be served consecutively or concurrently.[1300] However, it is clear that this discretion must be exercised by reference to the fundamental consideration, referred to above, that the sentence to be served by an accused must reflect the totality of the accused's criminal conduct. In this respect, the Appeals Chamber agrees with the Prosecution submission that a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes.

772. The Appeals Chamber has already found that the Trial Chamber erred in not adequately taking into account the gravity of certain of the offences for which Mucic was convicted, and that a sentence of seven years did not adequately reflect the totality of Mucic's criminal conduct. It is possible that, had the Trial Chamber taken adequate account of the gravity of the crimes in determining the individual sentences for those crimes, the

[1298] Prosecution Brief, para 5.59.
[1299] Prosecution Brief, para 5.59.
[1300] These amendments to the Rules derive from Revision 19, effective 19 January 2001.

choice of a concurrent rather than consecutive sentence would have been entirely appropriate. However, in light of the Appeals Chamber's general conclusion that the overall sentence did not adequately reflect the totality of Mucic's criminal conduct, it is unnecessary to determine whether the choice of concurrent rather than consecutive sentences was an additional cause of the Trial Chamber's error. The Appeals Chamber's view as to what would have been a more appropriate sentence is expressed below.[1301]

C. Mucic's Appeal Against Sentence

773. Mucic submits generally that the sentence of seven years was too long "in all the circumstances of the case."[1302] Mucic's primary argument is that the Trial Chamber erred in its consideration of both aggravating and mitigating factors, in that it failed to give due weight to the "strong [...] arguably unique, mitigating features" of his case,[1303] while taking into account certain aggravating matters which it should not. He also submits that the Trial Chamber erred in its dismissal of the *Wilhelm Von Leeb* case as an appropriate precedent in its determination of sentence and that it erred in the weight which it found should be accorded to the element of deterrence. While it is evident from the above that the Appeals Chamber consider that Mucic's sentence of seven years was in fact inadequate, it is appropriate to address these arguments since they contend specific legal errors made by the Trial Chamber.

1. Consideration of aggravating and mitigating factors

(a) Mitigating Factors

774. Mucic specifically alleges that his sentence did not properly reflect the mitigating effect of the Trial Chamber's finding that there was no evidence that Mucic had directly and actively participated in any acts, and that on the contrary he had prevented acts of violence.[1304] The first matter has been considered above when addressing the Prosecution arguments as to the Trial Chamber's consideration of the gravity of the offences. As to the

[1301] *See* below, para 853.
[1302] Mucic Brief, Appeal Against Sentence, p 1.
[1303] Mucic Brief, Appeal Against Sentence, p 2.
[1304] Mucic Brief, Appeal Against Sentence, pp 1-2.

second argument, Mucic submits that the Trial Chamber failed to take adequate account of the fact that he took steps to alleviate suffering and prevent acts of violence.[1305]

775. Mucic was convicted *inter alia,* under Article 7(3) of the Statute and hence as a commander. If a commander in charge of, as in this case, a prison-camp or detention facility, takes steps to alleviate the suffering of those detained, depending on the degree and level of this action, it may be that the seriousness of the overall offences can be mitigated. This would, however, depend on the circumstances of the case and the degree of assistance given. As seen above, a decision as to the weight to be accorded to such acts in mitigation of sentence lies within the discretion of the Trial Chamber. In the absence of a finding that the Trial Chamber abused its discretion in imposing a sentence outside its discretionary framework as provided by the Statute and Rules, this argument must fail.[1306]

776. The Appeals Chamber has already noted that the Trial Chamber expressly considered Mucic's submissions regarding "evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of [...] Mucic towards the detainees".[1307] Further, it considered that there was "[...] a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances".[1308] Although it does not appear to be disputed that Mucic may have carried out several benevolent acts during his command at the Celebici camp,[1309] the Appeals Chamber considers that, in the circumstances of this case, it was within the Trial Chamber's discretion to conclude that these acts could not constitute significant mitigation.[1310] This is particularly so because of the fact that he was a commander who was in a position to take steps to control and prevent *all* acts of violence but who rather frequently absented himself "in obvious neglect of his duty as commander

[1305] Trial Judgement, para 1247.
[1306] *Kambanda* Appeal Judgement, para. 124.
[1307] Trial Judgement, para 1247; Muci} Brief, Appeal Against Sentence, p 2.
[1308] Trial Judgment, para 1248.
[1309] Prosecution Brief, paras. 5.28 – 5.29.
[1310] It is the case that war crimes tribunals have taken into account efforts by an accused to reduce the suffering of the victims. However, the efforts taken in those cases and considered in mitigation, were considerably more substantial and noticeable than in the instant case and therefore were found to merit credit. *See* for example, the findings with regard to: Waldermar Von Radetzkty in *United States v Ohlendorf et al.* 4 T.W.C. 1, 558 (1948) at 578; Ernst Dehner in *United States v Wilhelm List et al., ("Hostage Trial"),* 11 T.W.C. 757, (1948) at pp 1299-1300; Flick and Steinbrinck in *United States v Friedrich Flick et al.,* 9 L.R.T.W.C. 1 (1949), at pp 29-30; and Albert Speer in *22 Trial of the Major War Criminals Before the Int'l Mil. Tribunal* 524 (1946), at p 579; Von Neurath in *22 Trial of the Major War Criminals Before the Int'l Mil. Tribunal* 524 (1946), at p 582. However, note also the finding regarding Karl Mummenthey, in the *Pohl* case, 5 T.W.C, p 1054: "It is not an unusual phenomenon in life to find an isolated good deed emerging from an evil man."

and the fate of the vulnerable detainees".[1311] As recently observed by Trial Chamber I, such acts "are all the less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes".[1312]

777. As a matter of law, a Trial Chamber is obliged to take account of mitigating circumstances in imposing sentence.[1313] However, the weight to be attached is a matter within its discretion. The Appeals Chamber is satisfied that the Trial Chamber clearly considered the mitigating factors presented on Mucic's behalf.[1314] The Trial Chamber was entitled to attach limited weight to such mitigation, and the Appeals Chamber accordingly finds that Mucic has failed to demonstrate any error by the Trial Chamber in this regard.

(b) Aggravating Factors

778. Mucic submits that the Trial Chamber erred in making the findings it did in relation to his conduct during the trial, including the references it made to allegations of fabrication of evidence and threats to a witness. He submits that this conduct could only be taken into account following a finding of guilt, and that such allegations could rather have been dealt with separately by the Trial Chamber under, for example, Rule 77 of the Rules.[1315] He submits that the Trial Chamber erred in considering his general attitude during the trial and the fact that he did not give oral evidence. He submits that the reference by the Trial Chamber to the latter, in its consideration of sentence, was "tantamount to a reversal of the burden of proof."[1316]

779. With regard to these specific allegations, the Trial Chamber found:

> The conduct of Mr. Mucic before the Trial Chamber during the course of the trial raises separately the issue of aggravation. The Trial Chamber has watched and observed the behaviour and demeanour of Mr. Mucic throughout the trial. The accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process. The Presiding Judge, has, on occasions, had to issue stern warnings reminding him that he was standing trial for grave offences. The Prosecution has also presented evidence of an exchange of notes between Zejnil Delalic and Zdravko Mucic conspiring about the

[1311] Trial Judgement, para 1243.
[1312] *Blaškic* Judgement, para 781.
[1313] Article 24 of the Statute and Rule 101 of the Rules. Rule 101 (B) provides *inter alia*: "In determining sentence, the Trial Chamber shall take into account...(ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction."
[1314] Trial Judgement, paras 1238-1239, 1245, 1247, 1248.
[1315] Mucic Brief, Appeal Against Sentence, pp 3-6. Rule 77 of the Rules relates to proceedings for "Contempt of the Tribunal."
[1316] Mucic Brief, Appeal Against Sentence, p 6.

> fabrication of evidence to be given at the trial. There have also been allegations that Mr. Mucic participated in the threatening of a witness in the courtroom. Such efforts to influence and/or intimidate witnesses are particularly relevant aggravating conduct, which the Trial Chamber is entitled to take into account in the determination of the appropriate sentence.[1317]

It also found:

> The general attitude of Mr. Mucic during the trial proceedings in and outside the courtroom would seem to be a repetition of his casual and perfunctory attitude to his duties in the Celebici prison-camp. He made concerted and sustained efforts where he could to intimidate witnesses and to suborn favourable evidence from them. His demeanour throughout the proceedings suggests that he appears to have regarded this trial as a farce and an expensive joke. Zdravko Mucic has declined to give any oral evidence, notwithstanding the dominant position he played in the facts giving rise to the prosecution of the accused persons.[1318]

780. It has already been stated that the Statute and the Rules do not define exhaustively the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of sentence, and Trial Chambers are therefore endowed with a considerable degree of discretion in deciding on the factors which may be taken into account. Nevertheless, it must be queried whether the Trial Chamber erred in taking these particular factors into account. A Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.

781. It is alleged that the Trial Chamber erred in taking into account in aggravation of sentence the fact that Mucic failed to give oral testimony. In accordance with the position in many national jurisdictions, an accused before the Tribunal is not obliged to give oral testimony during the trial on his or her own behalf. Rule 85(C) of the Rules provides

> *If the accused so desires,* the accused may appear as a witness in his or her own defence.[1319]

Article 21(4)(g) of the Statute provides further guidance and provides that an accused shall be entitled to the right "not to be compelled to testify against himself or to confess guilt".[1320] This, however, does not explicitly identify the consequences of failure to testify at

---

[1317] Trial Judgement, para 1244.
[1318] Trial Judgement, para 1251.
[1319] (Emphasis added).
[1320] *See* also the International Covenant on Civil and Political Rights (1966) ("the ICCPR"), Article 14 (3)(g) which provides that in the determination of a criminal charge, everyone shall be entitled to the right "not to be compelled to testify against himself or to confess guilt."

all, unlike the corresponding provision in the Rome Statute of the International Criminal Court. Article 67(1)(g) of the Rome Statute expressly provides that an accused has the right to refuse to testify, in which case no inference adverse to him or her may be drawn.[1321] The question remains whether failure to testify before the Tribunal can be held against an accused in either consideration of the merits of a case, or, as here, in aggravation of sentence.

782. Between national jurisdictions, there is no consensus as to an absolute right for an accused to remain silent at trial at no risk of adverse inferences being drawn, and in fact certain jurisdictions have taken steps to limit such right.[1322] This limitation has been considered by the European Court of Human Rights, which has found in principle that the fair hearing requirement in Article 6 of the European Convention[1323] implies that an accused has the right to remain silent and not contribute to incriminating himself or herself.[1324] However, it has also recognised that this right is not absolute, and that the drawing of an adverse inference from an accused's silence regulated by law is not contrary to Article 6 as long as there are other safeguards in place.[1325] In its view, therefore, particular caution is required before a domestic court can invoke an accused's silence against him or her.

[1321] Article 67(1)(g) of the ICC Statute provides that that an accused shall have the right: "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt of innocence."

[1322] For example, in the United Kingdom, although an accused still has the right to refuse to give evidence at trial, Criminal Justice and Public Order Act 1994, s 35 now provides that unless an accused shows good cause for the refusal to answer questions, a Judge may direct a jury that it can draw such inferences as appear proper from the failure or refusal to answer questions (s 38(3) provides that a conviction may not rest solely on such an inference). This was interpreted in *R v Cowan* [1996] 1 Cr App R 1 as not removing the right to remain silent. Lord Taylor CJ held that such inferences can only be drawn if the jury is satisfied that the Prosecution has proved its case, and that the jury is told that, a) the burden of proof rests on the Prosecution throughout, b) the defendant has a right to remain silent and that an inference alone cannot prove guilt. *See* also Article 4 Criminal Evidence (Northern Ireland) Order 1988, *R v Murray*, [1993] 97 Cr App R 151. The right to remain silent with no adverse inferences drawn is still preserved in, for example, the United States. The self-incrimination clause of the *Fifth Amendment*, incorporated through the *Fourteenth Amendment* due process clause, provides that no person "shall be compelled in any criminal case to be a witness against himself." This has been interpreted to mean that a defendant is also not obliged to appear as a witness. *See Griffen v California*, 380 US 609, where it was held that comment on the failure to give evidence was impermissible as it was "a penalty imposed by courts for exercising a constitutional privilege" as it "cuts down on the privilege by making its assertion costly." In Australia, see *Woon v The Queen* (1964) 109 CLR 529, *Petty and Maiden v R*, (1991) 173 CLR 95.

[1323] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention") provides for the right to a fair and public hearing.

[1324] *Funke v France*, Eur Ct H R, Judgement of 25 Feb 1993, A.256-A, para 44.

[1325] *John Murray v The United Kingdom*, Judgement of 8 Feb 1996, Reports 1996-I, Vol 1, paras 44-58. The decision was confirmed in the recent case of *Condron v The United Kingdom*, Eur Ct H R, Judgement of 2 May 2000, Application no 35718/97. In its reasoning the Court took into account safeguards designed to respect the rights of the defence, for example the warning that adverse inferences could be drawn, that it could only be drawn if a failure to express oneself might as a matter of common sense lead to the conclusion that the accused had been guilty and if there existed other very strong evidence against the accused.

783. Neither the Statute nor the Rules of this Tribunal expressly provide that an inference can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not "be a consideration in the determination of guilt or innocence".[1326] Should it have been intended that such adverse consequences could result, the Appeals Chamber concludes that an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore, it finds that an absolute prohibition *against* consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute. Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence. Accordingly, it is the case that the Trial Chamber would have committed an error should it be shown that it relied on Mucic's failure to give oral testimony as an aggravating factor in determining his sentence.[1327]

784. The Prosecution submits that the Trial Chamber's remark was no more than an indication by the Trial Chamber that, as Mucic did not plead guilty or co-operate with the Prosecution, there was no mitigating factor of the kind referred to in Rule 101(B)(ii) of the Rules.[1328]

785. It is difficult to accept such an explanation of the Trial Chamber's remark. It was made by the Trial Chamber when describing Mucic's conduct during the trial in its discussion of aggravating and mitigating factors. The Trial Chamber found that his general attitude during the proceedings reflected "his casual and perfunctory attitude to his duties in the Celebici prison-camp", and it described his whole demeanour as suggesting that he regarded the trial as "a farce and an expensive joke".[1329] The Trial Chamber's reference to his failure to give evidence in that context indicates that it regarded the failure in an adverse light. Although it is not clear that the Trial Chamber treated Mucic's failure to testify as an aggravating circumstance, the Trial Chamber's remark leaves open the real possibility that it did so, and the Appeals Chamber accordingly finds that the Trial Chamber erred.

[1326] Article 67(1)(g) of the ICC Statute.

[1327] *See Carolina v Pearce* 395 US 711, where it was found that due process is violated where the sentencing court punishes' a convicted person for his exercise of a procedural right in the criminal justice process. However a defendant must be able to show that by reference to the sentencing record, the judge in fact sentenced vindictively seeking to punish for the exercise of a procedural right.

[1328] Rule 101(B)(ii) provides that a Trial Chamber shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction."

[1329] Trial Judgement, para 1251.

786. With regard to Mucic's conduct during the trial in terms of his attitude and demeanour, the Appeals Chamber can find no error in the fact that the Trial Chamber considered these as aggravating factors. As pointed out in the Trial Judgement, "[t]he nature of the relevant information required by the Statute is unambiguously provided in sub-Rule 85(A)(vi) [of the Rules]. It is 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment'".[1330]

787. Reference to the jurisprudence of the Tribunal and ICTR,[1331] and to guidelines and practice of national jurisdictions,[1332] illustrates that it is established practice that trial courts exercise a broad discretion in the factors they may consider on sentence. This indicates that all information relevant to an accused's character may be considered. As accepted by the Supreme Court of the United States, "modern concepts individualising punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial".[1333] Therefore there is a relevant distinction in the role of a fact-finder at trial and a sentencing judge, who is not restrained by the same rules.

[1330] Trial Judgement, para 1215.

[1331] *See e.g., Prosecutor v Kambanda*, Judgement and Sentence, Case No ICTR 97-23-S, 4 Sept 1998 at para 30; *Prosecutor v Akayesu*, Sentence, Case No ICTR-96-4-T, 2 Oct 1998, para 21. *Prosecutor v Kayishema and Ruzindana*, Sentence, Case No ICTR-95-1-T, 21 May 1999, para 3: "These enumerated circumstances, [contained in the Statute and the Rules] however, are not necessarily mandatory or exhaustive. It is a matter of individualising the penalty considering the totality of the circumstances."

[1332] *See e.g.*: In the former Yugoslavia, Article 41(1) of the SFRY Penal Code 1990. In the United Kingdom, the Magistrates Association Sentencing Guidelines issued in 1993 guide the Magistrates in setting out aggravating and mitigating factors in relation to specific offences. As in the United Kingdom, sentencing in the United States is assisted by Pre-Sentence Reports prepared by probation officers, who enjoy wide discretion in the information to include and present before the court. In *Williams v. New York*, 337 U.S. 241, (1949) it was noted that "the modern probation report draws on information concerning every aspect of a defendant's life." (p 250). It upheld what is described as "real offence" sentencing or, sentencing that goes beyond the elements of the offence and considers the gravity of the accused's conduct. It found that courts do not violate due process by considering unrelated criminal conduct, even if it did not result in a criminal conviction. *See* also *United States v Grayson*, 438 U.S. 41, where it was found that in a system of discretionary sentencing, it is proper and even necessary to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath. *See* also 18 UCSA, para 3553(1) which provides that the court should consider "the nature and circumstances of the offence and the history and characteristics of the defendant" and para 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offence which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence". In Canada, s 726.1 of the Canadian Criminal Code provides: In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender. In Denmark, *See* ss 80, 84 and 85 of the Danish Criminal Code.

[1333] *Williams v New York*, 337 U.S. 241, (1949), p 247.

Rather, it is essential that the sentencing judge is in "possession of the fullest information possible concerning the defendant's life and characteristics".[1334]

788. The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges' perception of an accused, have also been considered in both mitigation and aggravation of sentence.[1335] The Appeals Chamber finds no error on the part of the Trial Chamber in doing so in this case. This behaviour is relevant to a Trial Chamber's determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.[1336]

789. With regard to the reference by the Trial Chamber to the allegation that Mucic may have threatened witnesses as an aggravating factor, the Appeals Chamber again concludes that the Trial Chamber did not err. The Prosecution notes that evidence of both witness intimidation and the passing of notes were submitted to the Trial Chamber on sentencing and that this evidence was not refuted by the defence for Mucic.[1337]

790. The Appeals Chamber is not the forum for raising matters such as this for the first time.[1338] Should Mucic have been concerned that these matters should not be taken into account on sentence, then the appropriate forum to raise the concern was before the Trial Chamber.[1339] The Appeals Chamber finds no error in the fact that the Trial Chamber did consider these matters. Although it is possible (without finding as such) that these matters could have been dealt with under Rule 77 of the Rules as separate and independent offences, as pointed out by the Trial Chamber, these factors were equally pertinent to its

---

[1334] *William New York*, 337 U.S. 241, (1949), p 247.

[1335] For example, in the *Blaškic* Judgement, para 780: "...the Trial Chamber must take note of the exemplary behaviour of the accused throughout the trial, whatever the judgement as to his statements as a witness." In *Prosecutor v Kayishema and Ruzindana*, Sentence, Case No ICTR-95-1-T, 21 May 1999, para 17, the Trial Chamber noted: "The Prosecution cited one aggravating factor, Ruzindana's behaviour after the criminal act, and notably the fact that Ruzindana smiled or laughed as survivors testified during trial."

[1336] In the Second *Erdemovic* Sentencing Judgement, para 16, the Trial Chamber considered remorse and compassion as mitigating factors.

[1337] Prosecution Response, para 20.26.

[1338] In his Brief, Mucic submits that "?ags to the "*exchange of notes*" it was never proved that the notes alleged to have been written by the Appellant were in fact written by him. An attempt by the OTP to have a handwriting sample taken from the appellant was rejected upon the basis that he could not be forced to assist in the collation of evidence against himself. *See the decision...Jan 19th 1998).* Thus, the exchange of notes remains an allegation only and cannot be a matter that the Trial Chamber should have taken into consideration in assessing sentence." Mucic Brief, Appeal Against Sentence, p 4.

[1339] As noted above, "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." *Prosecutorv Erdemovic*, Judgement, Case No IT-96-22-A, 7 Oct 1997, para 15. *See* also, *Furund'ija* Appeal Judgement, para 174.

assessment of Mucic's character and of his attitude towards the offences. Accordingly, it was not inappropriate for the Trial Chamber to consider this behaviour as an aggravating factor and in its overall evaluation of the accused's character.[1340]

791. Finally, Mucic submits that there were "stated inconsistencies in the judgement," which raised confusion as to the basis for sentencing. These, he submits "should be resolved in ... ?hisg favour."[1341] As pointed out by the Prosecution, Mucic in fact referred to only one alleged inconsistency in his brief, regarding the testimony of a Prosecution witness.[1342] Mucic essentially questions how the Trial Chamber could find that Mucic had "made no effort to prevent or punish those who mistreated the prisoners, or even to investigate specific incidents of mistreatment including the death of detainees",[1343] when at the same time it noted the positive testimony given by this witness. In his view this was contradictory. During the hearing on appeal, Mucic also submitted that the Trial Chamber failed to take into account properly the testimony of several other witnesses who had testified in similar terms.[1344] Although he does not allege that this raised inconsistencies, the Appeals Chamber considers these submissions in the same context.

792. The Appeals Chamber notes that the Trial Chamber amply considered this so-called positive testimony in the Trial Judgement. In doing so, it referred to the submissions by Mucic regarding the "evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of Mr. Mucic towards the detainees".[1345] It concluded that it "had made very sober reflection on the submissions of the parties. There is a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances".[1346]

793. The Appeals Chamber again states that "[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber".[1347] The Trial Chamber must weigh and evaluate the evidence presented before it and unless it is shown that its conclusion was wholly unreasonable, such that no reasonable trier of fact

---

[1340] Trial Judgement, para 1217, noting the reference to the federal courts of the United States where "obstruction of justice is regarded as an aggravating circumstance, providing for the enhancement of sentence. Included in this category are, *inter alia,* intimidation of witnesses or otherwise unlawfully influencing a co-defendant or witness, perjury or suborning perjury."
[1341] Mucic Brief, Appeal Against Sentence, p 3.
[1342] Appeal Transcript, pp 744-745, regarding the testimony of the Prosecution witness, Mr Golubovic.
[1343] Trial Judgement, para 1243.
[1344] Appeal Transcript, pp 745-747.
[1345] Trial Judgement, para 1247.
[1346] Trial Judgement, para 1248.
[1347] *Tadic* Appeal Judgement, para 64.

could have arrived at the same conclusion, the Appeals Chamber will not intervene. The Appeals Chamber concludes that Mucic has failed to establish that the Trial Chamber erred in its assessment of this evidence by according it insubstantial weight. The Trial Chamber properly took the relevant testimony into account when considering mitigating factors. The decision as to what weight should be attached to this evidence was within its discretion. It was not obliged to accept this testimony as refuting its overall findings as to Mucic's culpability.[1348]

794. Mucic has failed to demonstrate any error in the Trial Chamber's exercise of discretion in weighing the mitigating factors in his case.

2. Comparison to the case of *Wilhelm Von Leeb*

795. Mucic submits that the Trial Chamber erred in dismissing, on the facts, the precedent set by the case of *Wilhelm Von Leeb,*[1349] when it should rather have had regard to the "relevant doctrinal principles" which can be drawn from that case.[1350] The Prosecution submits that this case was not a precedent binding on the Tribunal and constituted persuasive authority only, which the Trial Chamber was entitled to distinguish, if appropriate, as not being relevant.[1351]

796. The basis of Mucic's argument is that the Trial Chamber erred in failing to have regard to "relevant doctrinal principles." However, he fails to identify what these so-called principles are. He submits that he "does not presume to suggest that senior professional judges of an International Tribunal require to have basic principles of sentencing doctrine put before them as if they did not well apprehend them as a matter of their professional expertise and long experience."[1352] In the absence of any explanation as to what he perceives these "relevant doctrinal principles" to be, and how and why they should have been applied by the Trial Chamber to his case, Mucic fails to satisfy the burden on him to demonstrate how the Trial Chamber erred.

797. The Appeals Chamber itself finds no error in the Trial Chamber's findings regarding this case. The Trial Chamber found that "[t]he only parallel with the instant case is that

[1348] Trial Judgement, para 1243.
[1349] *United States v Wilhelm Von Leeb et al.*, Vol 11, TWC, pp 553-563 at 563.
[1350] Mucic Brief, Appeal Against Sentence, pp 6-7. *See* also Appeal Transcript, p 748.
[1351] Prosecution Response, para 20.37.
[1352] Mucic Reply, p 17.

both Field Marshall *von Leeb* and Mr. Mucic exercised and enjoyed command authority and superior responsibility over subordinates in respect of whose wrongful acts they were and are criminally responsible".[1353] This being the only similarity (and a very general one in itself), it found that the facts of the two cases were by no means comparable and that "[t]he sentence of three years imprisonment [...] would not constitute an appropriate precedent on the facts of this case".[1354]

798. Although a Trial Chamber is entitled to refer for guidance in sentencing to precedents from the jurisprudence of the Tribunal and the ICTR, together with precedents from other jurisdictions, given the individual circumstances of each case and the varied factors which should be taken into account (as discussed above), such comparisons are frequently of little assistance. Mucic has provided no basis for establishing otherwise, and he has failed to show that the Trial Chamber erred in its interpretation of this case.[1355] Although arguing that principles which can be drawn from the case of *Wilhelm von Leeb* should have been applied in his own and that, if they had been, it would be established that the Trial Chamber had erred, he has failed to identify or elaborate as to how this is the case. The Appeals Chamber finds no reason to conclude that the Trial Chamber's conclusions were incorrect.

3. Weight to be given to the element of deterrence

799. Mucic submits that the Trial Chamber placed too much emphasis on the deterrent element in sentencing him. It is said that the Trial Chamber should have relied more on the rehabilitative element, which in his case would mean that he required no further incarceration than that which he has already served.[1356] He submits that "deterrence in sentencing in reality has little or no value in this case",[1357] and that the "lack of impact of deterrence cannot be more self-evident than to look at the situation in Kosovo".[1358] The Prosecution agrees with the Trial Chamber's finding that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international

[1353] Trial Judgement, para 1249.
[1354] Trial Judgement, para 1250.
[1355] Indeed, the facts of the case and the mitigating circumstances differ to such a degree that the Appeals Chamber finds no basis for comparing the two cases.
[1356] Mucic Brief, Appeal Against Sentence, p 1.
[1357] Mucic Reply, p 14.
[1358] Mucic Reply, p 15.

humanitarian law".[1359] It submits that future deterrence is both suppressive and educative, and that both aspects would be defeated if sentences were lower than those imposed in national jurisdictions for similar conduct.[1360] Similarly, this would defeat the aim of contributing to the peace and security in the former Yugoslavia.[1361]

800. The element of deterrence plays an important role in the functioning of the Tribunal. The Appeals Chamber has already determined that:

> [i]n adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, *thereby deterring future violations* and contributing to the re-establishment of peace and security in the region.[1362]

801. Therefore one of the purposes of the Tribunal, in "bringing to justice" individuals responsible for serious violations of international humanitarian law, is to deter future violations. With regard to the impact of deterrence on punishment, the Appeals Chamber has already accepted "the general importance of deterrence as a consideration in sentencing for international crimes".[1363] However, in accepting this importance, it did so with a proviso, concurring with its previous finding in the *Tadic* Sentencing Appeal Judgement, wherein it was found that:

> ?ign determining the sentence to be imposed on the Appellant, the Trial Chamber took into account, as one of the relevant factors, the principle of deterrence. The Appeals Chamber accepts that this is a consideration that may legitimately be considered in sentencing, a proposition not disputed by the Appellant. Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.[1364]

802. In the case of *Tadic,* the Appeals Chamber was considering a ground of appeal in which the appellant *Tadic* argued that the Trial Chamber had erred in relying on the general statement made by the Trial Chamber in Celebici, that "?dgeterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law".[1365] The Appeals Chamber in that case concluded: "In the circumstances of the present case, the Appeals Chamber is not satisfied that the Trial Chamber gave undue

---

[1359] Prosecution Response, para 20.10, referring to the Trial Judgement, para 1234.
[1360] Prosecution Response, paras 20.13-20.16.
[1361] Prosecution Response, para 20.17.
[1362] *Tadic* Jurisdiction Decision, para 72 (Emphasis added).
[1363] *Aleksovski* Appeal Judgement, para 185.
[1364] *Tadic* Sentencing Appeal Judgement, para 48.
[1365] Trial Judgement, para 1234. In fact, the Trial Chamber in the case of *Tadic* relied on this precise finding in Celebici. It was this finding which was appealed.

weight to deterrence as a factor in the determination of the appropriate sentence to be imposed on the Appellant."[1366]

803. Equally, in this case, although the Appeals Chamber is satisfied that this overall determination made by the Trial Chamber (that deterrence is the most important factor to consider in sentencing cases of this nature) was in fact in error because the importance of deterrence is subject to the above proviso, it is nevertheless not satisfied that the Trial Chamber erred by giving *undue* prominence to deterrence in this case. Although the Trial Chamber did not refer specifically to deterrence when considering the factors it took into account in sentencing Mucic, having referred to deterrence in general terms earlier, it may be assumed that it was taken into account to some extent. However, without more than a simple assertion of error put forward by Mucic, the Appeals Chamber is not persuaded that the Trial Chamber gave this factor *undue* weight in sentencing him.

804. Mucic also submits that the Trial Chamber should have placed more reliance on the rehabilitative element in sentencing. In his case he submits that this would have meant that he required no further incarceration than that which he had already served.[1367] Other than making this blunt assertion, Mucic fails to explain how this could be so.

805. The Appeals Chamber notes that the Trial Chamber referred to rehabilitation in a general way and found:

> The factor of rehabilitation considers the circumstances of reintegrating the guilty accused into society. This is usually the case when younger, or less educated, members of society are found guilty of offences. It therefore becomes necessary to re-integrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this regard.[1368]

806. The cases which come before the Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted, that is "serious violations of international humanitarian law".[1369] Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in

---

[1366] *Tadic* Sentencing Appeal Judgement, para 48.
[1367] Mucic Brief, Appeal Against Sentence, p 1.
[1368] Trial Judgement, para 1233.
[1369] Article 1 of the Statute. *See* also Resolution 808 (1993) S/RES/808 (1993) and Resolution 827 (1993) S/RES/827 (1993).

sentencing,[1370] this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal.[1371] On the contrary, the Appeals Chamber[1372] (and Trial Chambers of both the Tribunal[1373] and the ICTR[1374]) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight. Given the findings which were made as to Mucic's culpability, the Appeals Chamber finds no error in the fact that the Trial Chamber does not specifically refer to rehabilitation in sentencing Mucic nor in its general statement cited above.

D. Delic's Appeal Against Sentence

807. Although Delic was charged with responsibility for crimes as both a direct participant and as a superior, he was convicted solely under Article 7(1) of the Statute as a direct participant, on fourteen counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, under Article 7(1) of the Statute.[1375] The convictions entered by the Trial Chamber were as follows:

Counts 1 and 2: the wilful killing and murder of Ščepo Gotovac;[1376]

Counts 3 and 4: the wilful killing and murder of Željko Miloševic;

[1370] *See, e.g.*: Article 10(3) ICCPR: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"; *General Comment* 21/44. U.N.GAOR, Human Rights Committee, 47th Sess, para 10, UN Doc. CCPR/C/21/Rev.1/Add.3(1992); Article 5(6) American Convention on Human Rights.

[1371] The Appeals Chamber notes that in *Prosecutor v Furund'ija*, Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 291, the Trial Chamber pointed out its "support for rehabilitative programmes in which the accused may participate while serving his sentence; the Trial Chamber is especially mindful of the age of the accused in this case." *See* also Second *Erdemovic* Sentencing Judgement, para 16 and *Kupreškic* Judgement, para 849.

[1372] *Aleksovski* Appeal Judgement, para 185.

[1373] *Prosecutor v Anto Furund'ija*, Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 288; *Prosecutor v Duško Tadic*, Sentencing Judgement, Case No IT-94-1-T*bis*-R117, 11 Nov 1999, paras 7-9; *Kupreškic* Judgement, para 848.

[1374] *Prosecutor v Kambanda*, Judgement and Sentence, Case No ICTR-97-23-S, 4 Sept 1998, para 28; *The Prosecutor v Akayesu*, Sentence, Case No ICTR-96-4-S, 2 Oct 1998, para 19; and *The Prosecutor v Rutaganda*, Case No ICTR-96-3-T, 6 Dec 1999, para 456.

[1375] Trial Judgement, para 810: "...the Trial Chamber finds that the Prosecution has failed to establish beyond reasonable doubt, that Hazim Delic lay within the chain of command in the Celebici prison-camp, with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates. Accordingly, he cannot be found to have been a "superior" for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute."

[1376] As noted above, these convictions will be quashed by the Appeals Chamber and a judgement of acquittal entered on both counts.

Counts 11 and 12: the cruel treatment and wilfully causing great suffering or serious injury to body or health of Slavko Šušic;

Counts 18 and 19: the torture by way of rape of Grozdana Cecez;

Counts 21 and 22: the torture by way of rape of Witness A;

Counts 42 and 43: the inhuman treatment and the cruel treatment of detainees, including Milenko Kuljanin and Novica Đordic;

Counts 46 and 47: the cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp.

808. The Appeals Chamber notes that, in sentencing Delic, the Trial Chamber observed that "[t]he touchstone of sentencing is the gravity of the offence for which an accused has been found guilty, which includes considering the impact of the crime upon the victim". It referred to Delic's actions as, *inter alia,* "brutal and merciless", or "deplorable." It noted his "cruel" and "cold" premeditation and the "depravity" of his actions.[1377] It described the severe impact his behavior had on the victims,[1378] and his contribution to the atmosphere of terror that prevailed in the Celebici camp due to both his acts and threats to detainees.[1379] It found that:

> [a]n examination of the [...] crimes and their underlying motivations, where relevant, demonstrates that they cannot be characterised as anything other than some of the most serious offences that a perpetrator can commit during wartime. The manner in which these crimes were committed are indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity.[1380]

809. Delic was convicted of fourteen offences and for each received a sentence of imprisonment, the maximum term being twenty years for wilful killing and murder under counts 1, 2, 3 and 4. Each sentence was ordered to be served concurrently.[1381] Delic submits that the Trial Chamber erred in violating the principle of *nulla poena sine lege* and failing to properly consider the sentencing practice of the courts of the former Yugoslavia.

[1377] Trial Judgement, paras 1261–1268.
[1378] For example, the Trial Judgement refers to the testimony of Grozdana Cecez describing the effect of the rape she suffered: "...he trampled on my pride and I will never be able to be the woman that I was." (Trial Judgement, para 1262).
[1379] Trial Judgement, para 1266.

1. Violation of the Principle *Nulla Poena Sine Lege* and failure to properly consider the sentencing practice of the courts of the former Yugoslavia

810. The first issue raises the question of whether or not a Trial Chamber is bound by the law of the former Yugoslavia in matters of sentencing and whether, in considering the practice of these courts, this Trial Chamber gave them due weight. Delic simply submits that, by application of the principles of legality and *nulla poena sine lege,*[1382] he could not be sentenced to a term greater than fifteen years. He submits that this was the maximum term which could be imposed in the former Yugoslavia, other than a term of twenty years which could be imposed in substitution for the death penalty.[1383] "To increase the punishment for an offence after it has been committed is a [...] basic violation of human rights."[1384]

811. Delic acknowledges that the Tribunal has stated that it is not bound by this law on punishment, but submits that nevertheless, until the sentence passed in his case, "the Trial Chambers ha[d] scrupulously avoided assessing penalties greater than that imposed under SFRY law for offences committed before the establishment of the Tribunal ...".[1385]

[1380] Trial Judgement, para 1268.
[1381] Trial Judgement, para 1286.
[1382] These principles are reflected in Article 15 of the ICCPR which provides:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.
See also Article 7 of the European Convention on Human Rights.
[1383] The relevant provisions in the former Yugoslavia are contained in Chapter XVI of the SFRY Penal Code entitled "Crimes Against Peace and International Law." Article 142 prescribes in relation to certain crimes that they "shall be punished by no less than five years strict imprisonment or by the death penalty." In terms of imprisonment in general, Article 38 of the SFRY Penal Code provides that a punishment of imprisonment may not be longer than fifteen years, although the court may impose a sentence of twenty years in substitution for acts eligible for the death penalty, or if provided by statute for criminal acts committed with intent for which fifteen years may be imposed under statute and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences.
[1384] Delic Brief, para 356. *See* also Delic Reply, paras 156-163.
[1385] Delic Brief, para 357.

812. The Prosecution summarises its submissions by relying on the *Tadic* Sentencing Appeal Judgement and its finding that the Tribunal is not bound by the maximum sentences which could be imposed under the law of the former Yugoslavia.[1386]

813. Article 24(1) of the Statute provides that, in determining sentence, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[1387] The question of whether or not this "recourse" should be of a binding nature has been consistently and uniformly interpreted by the Tribunal. It is now settled practice that, although a Trial Chamber should "have recourse to"[1388] and should "take into account"[1389] this general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[1390]

814. The Trial Chamber correctly followed this precedent and in doing so carried out a detailed analysis of the relevant provisions in the SFRY Penal Code, while also hearing testimony from an expert witness for the defence.[1391] It recognised the importance of the principle as being one of the "solid pillars on which the principle of legality stands",[1392] and found that the view that a higher penalty than that available under the SFRY would violate the principle of legality and *nulla poena sine lege* was "erroneous and overly restrictive".[1393] It concluded that '[t]here is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia".[1394] The Appeals Chamber finds no error in this approach.

815. Nevertheless, Delic submits that Trial Chambers have avoided imposing greater penalties than those imposed under SFRY law for offences committed before the establishment of the Tribunal, until it imposed the sentence on him.[1395] Although the Tribunal has the authority to impose a life sentence for offences committed after its

[1386] Appeal Transcript, pp 758-759.
[1387] *See* also Secretary-General's Report, para 111.
[1388] Article 24 of the Statute.
[1389] Rule 101(B)(iii) of the Rules.
[1390] *Serushago* Sentencing Appeal Judgement, para 30. *See* also *Tadic* Sentencing Appeal Judgement, para 21.
[1391] Trial Judgement, paras 1192-1212.
[1392] Trial Judgement, para. 402.
[1393] Trial Judgement, para 1210.
[1394] Trial Judgement, para 1212.
[1395] Delic Brief, para 357.

establishment, he submits that those committed before its establishment (as in his case) are subject to the maximum under the law in the former Yugoslavia.[1396]

816. The Appeals Chamber disagrees. Trial Chambers are not *bound* by the practice of courts in the former Yugoslavia in reaching their determination of the appropriate sentence for a convicted person. This principle applies to offences committed both before and after the Tribunal's establishment. The Appeals Chamber can therefore see no reason why it should constitute a retrospective increase in sentence to impose a sentence greater than what may have been the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed.

817. All of this is, however, subject to the proviso that any sentence imposed must always be, as stated by the Trial Chamber, "founded on the existence of applicable law".[1397] "[T]he governing consideration for the operation of the *nullem crimen sine lege* principle is the existence of a punishment with respect to the offence."[1398] There can be no doubt that the maximum sentence permissible under the Rules ("imprisonment for [...] the remainder of a convicted person's life"[1399]) for crimes prosecuted before the Tribunal, and any sentence up to this, does not violate the principle of *nulla poena sine lege*.[1400] There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties.[1401]

818. The Appeals Chamber finds that Delic has failed to show any error on the part of the Trial Chamber in concluding that it was not bound by the practice of the courts of the

---

[1396] Delic Reply, paras 159-163.
[1397] Trial Judgement, para 1210.
[1398] Trial Judgement, para 1212. *See* also the Nuremberg Judgement which found that it is "a principle of justice above all; where there can be do doubt that the defendants knew that they were committing a wrong condemned by the international community, it is not unjust to punish them despite the lack of highly specified international law." *1 Trial of the Major War Criminals Before the International Military Tribunal*, 218-223 (1947). *See Nuremberg Judgement*, at 49. Affirmed in Report of the Sixth Committee, UN GAOR, 1st Sess, pt. 2, 55th Plen mtg at 1144, U.N.Doc. A/236 (1946), GA Res. 95, UN Doc A/64/Add.1 (1946).
[1399] Rule 101(A) of the Rules.
[1400] The European Court of Human Rights has held that as long as the punishment is accessible and foreseeable, then the principle cannot be breached: *SW v The United Kingdom* and *CR v The United Kingdom*, Judgement of 22 November 1995, Series A, Vol 335-B, paras 34-36 and 43.
[1401] For example, it is noteworthy that the judgements rendered at Nuremberg and Tokyo and the other successor tribunals provide clear authority for custodial sentences up to and including life imprisonment (Nineteen defendants were convicted before the Nuremberg Tribunal, out of which seven received sentences of imprisonment ranging from ten years to life imprisonment). Similarly, sentences in national jurisdictions of up to life imprisonment for crimes of the nature being prosecuted before the Tribunal are clearly recognised as being available.

former Yugoslavia and, further, that there was no violation of the principle of *nulla poena sine lege.*

2. The sentence imposed was excessive

819. Delic asserts that the sentence imposed was excessive compared to the practice of the courts in the former Yugoslavia, which regularly gave sentences near the minimum prescribed by law. In addition, it was disproportionate in comparison to those imposed in the cases of *Tadic* and *Erdemovic.*[1402]

820. As confirmed above, the Tribunal is not bound by the practice of the courts of the former Yugoslavia, but it may simply turn to them for guidance. Therefore, even if it had been shown by Delic (which it has not) that sentences were regularly imposed by the courts in the former Yugoslavia which were close to the minimum, the Trial Chamber would not have been *bound* to follow that practice. Delic has failed to point to any error committed by the Trial Chamber.

821. With regard to assistance from previous cases decided by the Tribunal, although a Trial Chamber may draw guidance from such jurisprudence in imposing sentence, the Appeals Chamber reiterates, in agreement with the Prosecution, that "every sentence imposed by a Trial Chamber must be individualised [...] and there are many factors to which the Trial Chamber may appropriately have regard in exercising its discretion in each individual case".[1403] The guidance which may be drawn from previously decided cases, in terms of the final sentence imposed, is accordingly very limited.

822. Delic compares his case initially to that of *Erdemovic*, and he submits that the accused there was a person responsible for over 700 execution-style killings but nevertheless only received a sentence of five years.[1404] Other than making this statement, he does not develop his argument. Nevertheless, for the reasons set out below with regard to Land'o, and considering the findings of the Trial Chamber in this case, the Appeals Chamber finds that the case of *Erdemovic* is clearly distinguishable and no useful comparison can be made to Delic's case.

[1402] Delic Brief, paras 359-361.
[1403] Prosecution Response, para 19.16.
[1404] Delic Brief, para 361.

823. With regard to *Tadic*, Delic submits that he was convicted of eleven counts of crimes against humanity. "Even considering all aggravating circumstances for all of the counts of inhuman treatment and crue[l] treatment for which Tadic was convicted the most of sentences were placed at six and seven years."[1405]

824. Delic clearly errs in this comparison. The penalties imposed on *Tadic*, as finally confirmed by the Appeals Chamber,[1406] ranged from six years imprisonment to twenty years imprisonment (including those for wilful killing and murder). The sentences imposed on Delic ranged from seven years imprisonment to twenty years imprisonment (also for wilful killing and murder). Both accused were sentenced in relation to the gravity of their crimes and their individual circumstances. Even if one were to attempt to compare these cases as suggested by Delic, the range of sentences clearly falls within that which the Appeals Chamber has already confirmed is permissible.

825. The Appeals Chamber notes that, in sentencing Delic, the Trial Chamber referred to the brutality and premeditated fashion in which he committed the crimes for which he was convicted. It referred in particular to the tendency of Delic to threaten his victims before, during and after the crimes,[1407] and the pleasure he derived from the use of an electric shock device on the detainees.[1408] The Appeals Chamber does not accept that the sentences imposed by the Trial Chamber in this case were disproportionate to the severity of the crimes committed, even when taking into account the mitigating factors.[1409] The sentence imposed was within the Trial Chamber's discretionary framework, and Delic has failed to advance any adequate reason to persuade the Appeals Chamber to the contrary.

[1405] Delic Brief, para 361. It is noted that the Delic Brief was filed on 2 July 1999, while the *Tadic* Appeal Judgement (in which the Appeals Chamber reversed the Trial Chamber decision and entered findings of guilt for nine counts on the indictment, including grave breaches (wilful killing), violations of the laws or customs of war (murder) and crimes against humanity (murder)) was issued on 15 July 1999.

[1406] *Tadic* Sentencing Appeal Judgement.

[1407] *See, e.g.*, in relation to the rape of Milojka Antic: "Delic threatened her and told her that, if she did not do whatever he asked, she would be sent to another prison-camp or shot .... [he] threatened her while raping her. The following day he compounded her fear and suffering by stating "...[w]hy are you crying? This will not be your last time.'" (Trial Judgement, para 1263).

[1408] Trial Judgement, para 1264.

[1409] Trial Judgement, para 1270.

E. Esad Land'o

826. The Appeals Chamber has already set out in detail the Trial Chamber's findings with regard to Land'o and his conviction for eighteen offences.[1410] The Appeals Chamber simply notes here the fact that the Trial Chamber found that his crimes were characterised by "substantial pain, suffering and injury" which he inflicted on each of his victims.[1411] The offences were described *inter alia* as having been committed with "savagery",[1412] and being "sustained and ferocious".[1413] It was further noted that he displayed "particularly sadistic tendencies [...] clearly requir[ing] premeditation".[1414]

827. In mitigation, Land'o put forward several circumstances,[1415] some of which the Trial Chamber considered could be taken into account in his favour when deciding on the appropriate sentence. These included his youth, "immature and fragile personality" and the harsh environment of the armed conflict as a whole.[1416] Nevertheless, he received several individual sentences of imprisonment, the maximum of which was fifteen years. As with his co-defendants, it was ordered that each sentence should be served concurrently.

828. Land'o has appealed his sentence as being manifestly excessive when compared to the other sentences imposed by the Tribunal, while also alleging that the Trial Chamber failed to properly take account of the mitigating factors put forward at trial.

1. Comparison with other sentences imposed by the Tribunal

829. Land'o submits that comparison to previous sentences imposed by the Tribunal (in particular the cases of *Tadic* and *Erdemovic*)[1417] illustrate that his sentence was unjust and

---

[1410] See *supra*, paras 565-571.
[1411] Trial Judgement, para 1273.
[1412] Trial Judgement, para 1273 (with regard to beating to death of Ščepo Gotovac).
[1413] Trial Judgement, para 1273 (with regard to his "sudden attack on Boško Somoukovic", also motivated "by vengeful desires.").
[1414] Trial Judgement, para 1274 (with regard to Land'o's "apparent preference for inflicting serious burns upon detainees in the prison-camp.").
[1415] These factors included: his youth; mental state; expressions of remorse; voluntary surrender; the fact that he was only an ordinary soldier and therefore should not be subject to the Tribunal's jurisdiction; his attempts to co-operate with the Prosecution. (Trial Judgement para 1277).
[1416] Trial Judgement, para 1283.
[1417] In his written filings, Land'o also compared his case to that of *Zlatko Aleksovski*, whose sentence was at the time under appeal by the Prosecution (Land'o Brief, p 143). Since then, Aleksovski's sentence has been increased by the Appeals Chamber (*Aleksovski* Appeal Judgement). When comparing his case to others during the Hearing on Appeal, Land'o made no further reference to this case and in these circumstances, the Appeals Chamber assumes that the submissions in relation thereto are not pursued.

manifestly excessive.[1418] He portrays himself as "a young boy sucked up in the invasion of his home",[1419] and a "mere boy with no military experience".[1420]

830. He submits that, although he had certain mitigating factors in his favour, *Dra'en Erdemovic* was an officer with rank, responsible for over 700 execution-style killings.[1421] Similarly, *Duško Tadic*, whose case had many aggravating factors, was convicted of eleven counts of crimes against humanity.[1422] For those charges of cruel and inhumane treatment, the maximum sentence *Tadic* received was ten years (though most were between six and seven years). Land'o submits that he cannot be compared to *Tadic*. "The class of accusations and the class of aggravating circumstances are in no way comparable."[1423]

831. In the case of *Serushago* before the Appeals Chamber for the ICTR, the appellant attempted to rely on the case of *Erdemovic*, and urged the Appeals Chamber to consider the disparity in the sentences imposed.[1424] The Appeals Chamber held that the cases were distinguishable, as "[t]he facts of the two cases are materially different [...]. There was no evidence that Erdemovic had a similar profile".[1425] Similarly, there is no evidence before the Appeals Chamber that Land'o had a similar profile such that any useful comparison may be made.

832. Land'o overlooks the findings of both the Appeals Chamber and the Trial Chamber in its final sentencing judgement in the case of *Erdemovic*, both of which expressly highlight the clear distinguishing factor in that case. That is, the fact that the Appeals Chamber, and then the Trial Chamber, accepted the fact that *Erdemovic* had been subjected to duress and committed the offences in question under real threat of death.[1426] The Trial Chamber found that '[t]he evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have

---

[1418] Land'o Brief, p 141.
[1419] Appeal Transcript, p 754.
[1420] Land'o Brief, p 143. *See* also Appeal Transcript, p 553, where he is referred to by his counsel as a "...boy who was brought into this conflict –he had not military training—he was brought into this conflict because his family, his home, and his very culture were under attack."
[1421] Land'o Brief, p 141.
[1422] Land'o's Brief was also filed before the *Tadic* Appeal Judgement.
[1423] Land'o Brief, pp 141-143.
[1424] *Omar Serushago* pleaded guilty to one count of genocide (Article 2(3)(a) of the Statute of the ICTR) and three counts of crimes against humanity (Articles 3(a), (b) and (c) of the Statute of the ICTR respectively). He was sentenced to fifteen years imprisonment on 5 February 1999 (*Prosecutor v Serushago*, Case No ICTR-98-39-S, 5 Feb 1999). *Dra'en Erdemovic* pleaded guilty to one count of a violation of the laws or customs of war and was sentenced to five years imprisonment (Second *Erdemovic* Sentencing Judgement).
[1425] *Serushago* Sentencing Appeal Judgement, para 27.

been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed".[1427]

833. This case is by no means comparable. The Trial Chamber found that Land'o's actions were premeditated, savage and brutal, and that he derived enjoyment from the infliction of pain on detainees. The case is further distinguishable by the fact that one can note the particular findings by the Trial Chamber in that case, when it referred to firstly the fact that *Erdemovic* displayed "reluctance to participate and [secondly] his reaction to having to perform this gruesome task [...]. It is clear that he took no perverse pleasure from what he did".[1428] On the contrary, the Trial Chamber found with regard to Land'o that, even if it were accepted that he was "on occasion, ordered to kill or mistreat prisoners [...] the evidence does not indicate that he performed these tasks with reluctance [...] the nature of his acts strongly indicates that he took some perverse pleasure in the infliction of great pain and humiliation".[1429] His case is marked by many aggravating factors, limiting the weight which the Trial Chamber found could be attached to the mitigating factors presented.[1430]

834. Similarly, with regard to any comparison to the case of *Tadic,* the Appeals Chamber can find no basis to conclude that the Trial Chamber erred. As noted above, the total sentence imposed on *Tadic* was finally confirmed by the Appeals Chamber at twenty years.[1431] Although this sentence was again decided on the basis of the particular facts and circumstances before that Trial Chamber, it may nevertheless be noted that both Trial Chamber sentencing judgements are marked by findings that the acts committed were brutal, wanton, sadistic and cruel.[1432] As already noted, Landžo's case is marked by similar

---

[1426] Second *Erdemovic* Sentencing Judgement, para 14.
[1427] Second *Erdemovic* Sentencing Judgement, para 16.
[1428] Second *Erdemovic* Sentencing Judgement, para 20.
[1429] Trial Judgement, para 1281. Although Article 7(4) of the Statute provides that the fact an accused person acted pursuant to an order of a superior may be considered in mitigation of punishment, this is only "if the International Tribunal determines that justice so requires". The Trial Chamber therefore retains discretion to reject this as mitigation.
[1430] It can also be reiterated, that as was pointed out in the Trial Judgement, although Land'o may not have been highly placed in terms of rank, in terms of the new Prosecution policy at the time, it involved focusing on those high up in the chains of responsibility or "on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences." *Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused,* Office of the Prosecutor, Doc. CC/PIU/314-E, 8 May 1998.
[1431] *Tadic* Sentencing Appeal Judgement.
[1432] *Prosecutor v Duško Tadic,* Sentencing Judgement, Case No IT-94-1-T, 14 July 1997 and Case No IT-94-1-T*bis*-R117, 11 Nov 1999.

findings and, although the Appeals Chamber does not directly compare these cases, it serves to point this out in light of Landžo's submissions. The Appeals Chamber accordingly finds that the sentence imposed was clearly within the Trial Chamber's discretionary framework.

2. Insufficient weight given to mitigating factors

835. Land'o effectively reiterates the submissions he made at trial with regard to mitigation, and submits that the Trial Chamber attached insufficient weight to the factors presented. He refers in particular to: his family background; good character; voluntary surrender; admission of guilt; the fact that he acted under superior orders; his mental condition; and attempts to co-operate with the Prosecution. Finally, he requests that the Appeals Chamber reconsider all of the evidence submitted in sentencing, in particular that provided by several defence witnesses before the Trial Chamber.[1433]

836. The Prosecution submits that "[t]here is no indication that the Trial Chamber did not consider all of the evidence and arguments placed before it by Land'o at the sentencing hearing."[1434] In any event, it submits that the purpose of appellate proceedings is not to reconsider all of the evidence, and that Land'o has failed to establish any legal principle that the Trial Chamber misapplied in sentencing.[1435]

837. The Appeals Chamber agrees. The purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and factors submitted before the Trial Chamber. In this case, the Appeals Chamber notes that the Trial Chamber did consider the mitigating factors presented by Land'o in determining the appropriate sentence. Further, the Trial Judgement shows amply that the Trial Chamber, having considered these factors and as it was entitled to do, both accepted some and rejected others. It falls on an appellant to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion, and that it failed to take account of or failed to give adequate weight to these factors.[1436] Landžo has failed to discharge this burden.

838. It is clear to the Appeals Chamber that the heinous nature of the crimes committed by Landžo was of overriding concern in the Trial Chamber's decision-making process on

[1433] Land'o Brief, pp 148-150 and Appeal Transcript, pp 756-757.
[1434] Prosecution Response, para 21.13.
[1435] Prosecution Response, paras 21.10-12, Appeal Transcript, p 762.
[1436] *Serushago* Sentencing Appeal Judgement, para 22.

sentence. This has already been noted in greater detail above, and the Appeals Chamber finds that the Trial Chamber did not err.[1437]

839. Land'o specifically raised the issue of diminished responsibility and its impact on his sentence during the hearing on appeal. The Appeals Chamber rejected the argument that a finding of diminished responsibility constitutes a full defence.[1438] However, it has accepted that it may be a matter appropriately considered in mitigation of sentence.[1439] Land'o submits that the Trial Chamber did not "recognise that [his] responsibility was diminished with respect to the sentence. Merely stating that they took into account his mental traits does not recognise diminished mental responsibility even in application to mitigation of punishment".[1440] On the contrary, he submits that the Trial Chamber should have clearly stated that the sentence was reduced by a certain number of years, due to a finding of a state of diminished responsibility.[1441]

840. The Trial Chamber found:

> [...] there are certain features of Mr. Land'o's case that must be taken into account in his favour when deciding upon the measure of sentence to be imposed upon him [...] [including the following] While the special defence of diminished responsibility [...] has been rejected by the Trial Chamber above, the Trial Chamber may nonetheless take note of the evidence presented by the numerous mental health experts, which collectively reveals a picture of Mr. Land'o's personality traits that contributes to our consideration of appropriate sentence.[1442]

841. As has been seen above, although the Trial Chamber accepted evidence that Land'o suffered from a personality disorder, it considered that, despite this, he was able to control his actions, therefore rejecting any "defence" of diminished responsibility. However, it is clear from the above that the Trial Chamber nevertheless did take into account Land'o's "personality traits". In doing so, and in considering specifically those mitigating factors to which the Trial Chamber wished to attach weight, it expressly found that the evidence of "numerous" mental health experts had been taken into account and contributed to the

---

[1437] Similarly, in other cases, Trial Chambers have expressly acknowledged matters submitted by a convicted person in mitigation but found that due to the serious nature of the crimes committed and the fact that often many accused share particular personal factors, their weight is either limited or non-existent in determining sentence. *Blaškic* Judgement, para 782. Also *Prosecutor v Furund'ija*, Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 284. *Prosecutorv Jelisic*, Judgement, Case No IT-95-10-T, 14 Dec 1999, para 124.

[1438] *See supra*, para 590.

[1439] *See supra*, para 590. The limited mental capacity of an accused at the time of the crime and during trial was also recognised as a mitigating factor in the trials conducted after the Second World War. *See e.g., Trial of Wilhelm Gerbsch*, 15 LRTWC at 185.

[1440] Appeal Transcript, pp 754-755.

[1441] Appeal Transcript, pp 755-756.

consideration of an appropriate sentence. The Appeals Chamber can see no error nor ambiguity in such a finding. It is not incumbent on a Trial Chamber, as suggested by Land'o, to specifically indicate the reduction in years which it makes in relation to each mitigating factor put forward. On the contrary, it is for the Trial Chamber to make an overall assessment of the circumstances of the case and impose an appropriate sentence, taking into account all of the relevant factors. The Appeals Chamber accordingly finds that there has been no error demonstrated.

842. Weighed against the many aggravating factors noted above and in full in the Trial Judgement, the Appeals Chamber finds no error in the sentence imposed on Landžo by the Trial Chamber.

F. Significance of Respective Roles in the Broader Context of the Conflict – Ground of Appeal Submitted by Land'o, Delic and Mucic

843. Mucic, Delic and Land'o have each submitted that, in light of the decision in the *Tadic* Sentencing Appeal Judgement, the sentences imposed on each of them respectively were excessive. In the *Tadic* Sentencing Appeal Judgement, the Appeals Chamber found:

> In the opinion of the Appeals Chamber, the Trial Chamber's decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda, fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.
>
> Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.
>
> In the circumstances of the case, the Appeals Chamber considers that a sentence of more than 20 years' imprisonment for any count of the Indictment on which the Appellant stands convicted is excessive and cannot stand.[1443]

844. Each appellant argues that, like *Duško Tadic,* their place in the hierarchy and overall command structure was low and that the sentence imposed on each of them failed to reflect this. Mucic submits that the decision articulated an additional sentencing factor to be considered, in that a Trial Chamber must now determine an individual's significance in the

---

[1442] Trial Judgement, para 1283.
[1443] *Tadic* Sentencing Appeal Judgement, paras 55-57.

broader context of the conflict in the former Yugoslavia.[1444] Although the Trial Chamber found that Mucic was a commander of the Celebici camp, it did not categorise his role in the broader context of the conflict in the former Yugoslavia. Mucic submits that this role was insignificant[1445] and that this works as a mitigating factor in determining sentence.[1446]

845. Similarly, Delic submits that his sentence should be reduced substantially as a result of this decision. He portrays the Celebici camp as a relatively small prison, holding relatively few prisoners.[1447] He submits that the *Tadic* Sentencing Appeal Judgement held that those who organised large-scale atrocities should be punished more harshly than those who, while guilty of some offences, are minor players in a much larger game controlled by others.[1448] The Trial Chamber failed to consider his position in the overall situation and his total lack of policy-making authority and lack of command authority. If they had, he submits that his twenty-year sentence would be reduced substantially.[1449] Finally, Land'o submits that the Trial Chamber failed to consider the significance of his role in the broader context, and that "[t]here is no one who was a more minor player in the conflict in Yugoslavia than Esad Land'o was".[1450]

846. The Prosecution disputes these interpretations, and submits that determination of sentence should reflect the inherent gravity of an accused's conduct. This should not be made by comparison with other persons known or unknown to the Trial Chamber or by reference to the fact that there may have been others who committed many more or graver crimes during the conflict.[1451]

847. The Appeals Chamber is satisfied that the appellants' interpretation of the *Tadic* Sentencing Appeal Judgement is incorrect. That judgement did not purport to require that, in every case before it, an accused's level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused's place was by comparison low, a low sentence should automatically be imposed.

[1444] Delic/Mucic Supplementary Brief, para 41.
[1445] Delic/Mucic Supplementary Brief, para 44. In particular Mucic submits that he had no authority for the conduct of the war, no responsibility for policy decisions, no authority to determine who was arrested, why they were arrested, how they were arrested or what happened to them before their arrival at the Celebici camp. (paras 45-48).
[1446] Delic/Mucic Supplementary Brief, para 47.
[1447] Delic/Mucic Supplementary Brief, para 38.
[1448] Delic/Mucic Supplementary Brief, para 39.
[1449] Delic/Mucic Supplementary Brief, para 40.
[1450] Appeal Transcript, pp 752-754.
[1451] Prosecution Response to Supplementary Brief, para 7.5.

Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime which "requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the accused in the crime."[1452] In certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.

848. This interpretation was recently applied by the Appeals Chamber in the *Aleksovski* Appeal Judgement:

> While, therefore, this Appellant may have had a secondary role, compared with the alleged roles of others against whom charges have been brought, he was nonetheless the commander of the prison and as such the authority who could have prevented the crimes in the prison and certainly should not have involved himself in them. An appropriate sentence should reflect these factors. There are no other mitigating circumstances in this case.[1453]

849. Therefore, while the Appeals Chamber has determined that it is important to establish a gradation in sentencing, this does not detract from the finding that it is as essential that a sentence take into account all the circumstances of an individual case.

850. In this case, noting the circumstances of each appellant (with the exception already referred to of Mucic), the Appeals Chamber finds no error in the exercise of the Trial Chamber's discretion. Although it is not contended that the appellants held a senior role in terms of the command structure in the conflict as a whole, nonetheless the inherent gravity of their respective conduct (which have been considered in greater depth above) was noted repeatedly by the Trial Chamber.[1454] The Appeals Chamber accordingly finds that the sentences imposed on Delic and Landžo were not outside the discretionary framework available to the Trial Chamber.

[1452] *Aleksovski* Appeal Judgement, para 182, citing *Kupreškic* Judgement, para 852.
[1453] *Aleksovski* Appeal Judgement, para 184.
[1454] As a whole the Trial Chamber found that '[a] mere cursory glance over the Indictment...provides a lasting impression of a catalogue of horrific events....To argue that these are not crimes of the most serious nature strains the bounds of credibility." Trial Judgement, para 178.

G. Conclusion

851. For the reasons identified above, the Appeals Chamber has found that the Trial Chamber did not have sufficient regard to the gravity of the offences committed by Mucic in exercising its sentencing discretion, and as a result it imposed a sentence which did not adequately reflect the totality of Mucic's criminal conduct. The fourth Prosecution ground of appeal is therefore allowed to that extent. The Prosecution submits that:

> [...] where the Appeals Chamber upholds an appeal against sentence on the grounds that the sentence imposed was manifestly excessive or manifestly inadequate, it is unnecessary for the case to be remitted to a Trial Chamber for further sentencing proceedings.[1455]

The Prosecution says that it is appropriate for the Appeals Chamber to substitute its own sentence for that of the Trial Chamber. It is clear from the *Aleksovski* Appeal Judgement that, in the case of a successful appeal against sentence on such a ground, it is open to the Appeals Chamber to consider and substitute its own sentence without remitting the matter to the Trial Chamber.[1456] As noted above, however, in the present proceedings, the matter is to be referred back to a reconstituted Trial Chamber for reconsideration of sentence in light of the fact that certain convictions are to be quashed. That Trial Chamber must consider the appropriate sentence for Mucic on the basis of the reduced counts remaining against him and by reference to the Appeals Chamber's conclusion in relation to this ground of appeal that the original sentence did not adequately take into account the gravity of the crimes.

852. It will assist the Trial Chamber to which these sentencing matters are remitted if the Appeals Chamber indicates the revised sentence that it would have considered appropriate for Mucic, had there not been the intervening factor that certain of his convictions are to be quashed. This indication is made on the basis of the sentence which would have been appropriate in relation to the crimes for which Mucic was convicted by the original Trial Chamber.

853. Taking into account the various considerations relating to the gravity of Mucic's offences and the aggravating circumstances already referred to, as well as the mitigating circumstances referred to by the Trial Chamber and the "double jeopardy" element involved

[1455] Prosecution Brief, para 5.76.
[1456] *Aleksovski* Appeal Judgement, paras 186, 187 and 191.

in subjecting Mucic to a revised sentence,[1457] the Appeals Chamber would have imposed on Mucic a heavier sentence of a total of around ten years imprisonment.

854. The Trial Chamber to which the sentencing issues are remitted may have reference to this indication in its own determination, which must be made in relation to the reduced number of counts following the quashing of those counts on the basis of cumulative convictions considerations.[1458] The new Trial Chamber should also consider the effect (if any) upon that indication of the original Trial Chamber's error in referring to the failure of Muci} to give evidence. That Trial Chamber will have the discretion under Rule 87(C) as to whether it will impose individual sentences in relation to each count for which a conviction is entered, in which case it has a further discretion as to whether to order that those sentences be served concurrently or consecutively, or to impose a single sentence reflecting the totality of the accused's criminal conduct.[1459]

[1457] *Aleksovski* Appeal Judgement, para 190.

[1458] Because the convictions on the Article 2 counts based on the same conduct as the quashed Article 3 counts remain, the adjustment required in relation to the quashing of convictions may not necessarily be a substantial one. It is for the Trial Chamber to which the sentencing matters are remitted to consider the totality of Mucic's criminal conduct in light of the convictions now entered against him.

[1459] After the amendment of Rule 87(C) (Revision 19, effective from 19 Jan 2001) the Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

XV. DISPOSITION

For the foregoing reasons:

1. In relation to Counts 1 and 2 of the Indictment, the Appeals Chamber ALLOWS the ninth and tenth grounds of appeal filed by Hazim Delic,[1460] it QUASHES the verdict of the Trial Chamber accordingly, and it enters a verdict that Hazim Delic is NOT GUILTY upon those counts.

2. In relation to the grounds of appeal relating to cumulative convictions, the Appeals Chamber ALLOWS the twenty-first ground of appeal filed by Hazim Delic[1461] and the seventh ground of appeal filed by Zdravko Mucic; it DISMISSES Counts 14, 34, 39, 45 and 47 against Zdravko Mucic; it DISMISSES Counts 4, 12, 19, 22, 43 and 47 against Hazim Delic, and it DISMISSES Counts 2, 6, 8, 12, 16, 25, 31, 37, and 47 against Esad Landžo. It REMITS to a Trial Chamber to be nominated by the President of the Tribunal ("Reconstituted Trial Chamber") the issue of what adjustment, if any, should be made to the original sentences imposed on Hazim Delic, Zdravko Mucic, and Esad Landžo to take account of the dismissal of these counts.

3. In relation to the eleventh ground of appeal filed by Zdravko Mucic, the Appeals Chamber FINDS that the Trial Chamber erred in making adverse reference when imposing sentence to the fact that he had not given oral evidence in the trial, and it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucic.

4. The Appeals Chamber ALLOWS the fourth ground of appeal filed by the Prosecution alleging that the sentence of seven years imposed on Zdravko Mucic was inadequate, and it REMITS the matter of the imposition of an appropriate revised sentence for Zdravko Mucic to the Reconstituted Trial

[1460] Designated "Issue Number Nine" and "Issue Number Ten" in Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000.
[1461] Designated "Issue Number 21 (Additional Issue Number Two)" in Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000.

Chamber, with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the counts referred to in paragraph 2 above, it would have imposed a sentence of around ten years.

5. The Appeals Chamber DISMISSES each of the remaining grounds of appeal filed by each of the appellants.

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

Judge David Hunt, Presiding

Judge Fouad Riad

Judge Rafael Nieto-Navia

Judge Mohamed Bennouna

Judge Fausto Pocar

Dated this twentieth day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

XVI. SEPARATE AND DISSENTING OPINION OF JUDGE DAVID HUNT AND JUDGE MOHAMED BENNOUNA

A. Introduction

1. We append a separate and dissenting opinion in relation to the issue of cumulative convictions not only because we are unable to agree with some of the reasoning and part of the outcome in the majority opinion, but also because, in relation to those conclusions in the majority opinion with which we do agree, we believe it to be desirable to give a fuller explanation for those conclusions.

2. First, we intend to explain more thoroughly why we believe that the various approaches in the previous jurisprudence on this issue within the Tribunal, and the individual approaches of national systems, do not provide of themselves a satisfactory solution for this Tribunal. Secondly, we give our reasons as to *why* cumulative convictions in relation to the same conduct, as well as cumulative penalties in sentencing, are impermissible.

3. There are two matters of substance in relation to which we take a different view to that taken by the majority. The first relates to the application of the test to determine whether two crimes are legally distinct. The second relates to the way in which, when a choice must be made as to which of two or more possible cumulative convictions should be retained, that choice must be made.

B. Background

4. The ground of appeal of Mucic and Delic alleges that they were impermissibly convicted and sentenced under both Article 2 and Article 3 of the Statute in respect of the same acts.[1] The ground was described in the following terms:

[1] Appellants-Cross Appellee's Hazim Delic's and Zdravko "Pavo" Mucic's Motion for Leave to File Supplemental Brief and Supplemental Brief, 17 Feb 2000 ("Delic/Mucic Supplementary Brief"). This was treated as an application for leave to add an additional ground of appeal, which was granted by the Appeals Chamber's Order on Motion of Appellants Hazim Delic and Zdravko Mucic for Leave to File Supplementary Brief, 31 Mar 2000. Although Landžo was also convicted under Article 2 and Article 3 of the Statute in respect

> Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.[2]

5. Mucic and Delic's submissions in support of this ground of appeal are essentially based on the discussion in the *Kupreškic* Judgement of the principles governing cumulative convictions.[3] The appellants interpret the *Kupreškic* Judgement as adopting the standard enunciated in the US Supreme Court decision in *Blockburger v United States, i.e.* that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact that the other does not".[4] The appellants contend that, applying that test to their convictions under Article 2 and those under Article 3 (which rely on common Article 3 of the Geneva Conventions), that standard is violated:

> Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of the grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions [...]. Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.[5]

The relief sought is that, in the cases of duplicative convictions, one of the charges should be dismissed, without specifying which one.

6. The Prosecution responded to this ground of appeal with an extensive analysis of the jurisprudence of the Tribunal and of certain national jurisdictions relating to cumulative charging and cumulative convictions. The Prosecution's key contentions are, first, that the existing practice of this Tribunal and the International Criminal Tribunal for Rwanda permits cumulative convictions under Articles 2 and 3 of the Statute, and that the reasoning expressed in the *Kupreškic* Judgement is inconsistent with that practice. That Judgement's reference to the principles on concurrence of offences in national jurisdictions does not, it is said, support a departure from this practice, as the variations between the jurisdictions on this issue are so extensive that no general principles of international law can be drawn from

---

of the same acts, he did not formally join in this ground of appeal. However, Landžo's convictions under both Article 2 and Article 3 were referred to in the Delic/Mucic Supplementary Brief, para 14 (c).

2 Appellant Zdravko Mucic's Final Designation of his Grounds of Appeal, 31 May 2000, Ground 7; Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000, Issue 21.

3 *Kupreškic* Judgement, paras 637–748.

4 *Blockburger v United States* 284 US 299, 304 (1932).

5 Delic/Mucic Supplementary Brief, p 13.

them. The Prosecution does, however, appear to rely on concepts drawn from continental legal systems in arriving at the principles which it regards as applicable.

7. The Prosecution interprets the jurisprudence of the two Tribunals as disclosing four different tests on the issue. The Prosecution submits that the applicable principles may be arrived at by reconciling two of the tests – the first drawn from the *result* in the *Tadic* Appeal Judgement and the second from the *reasoning* in the *Akayesu* Judgement.[6] The question of cumulative convictions was not discussed by the Appeals Chamber in the *Tadic* Appeal Judgement, and it had not been raised as an issue on appeal. The Prosecution rather seeks to rely on the fact that, as a result of the Appeals Chamber's substitution of a guilty verdict for a not guilty verdict on certain counts, Tadic received multiple convictions under separate Articles of the Statute in respect of the same conduct. The test relied upon from the *Akayesu* Judgement is that cumulative convictions are acceptable where:

(i) the offences have different elements;
(ii) the provisions creating the offences protect different interests; *or*
(iii) it is necessary to record a conviction for more than one offence to fully describe what the accused did.[7]

8. The principles ultimately proposed by the Prosecution are that, in cases of "ideal concurrence", where a single act contravenes more than one provision, the accused can be charged with and convicted of multiple crimes. Their foundation on the same conduct is relevant only to sentencing. To determine whether crimes are in fact in a relationship of ideal concurrence, the test posited in the *Akayesu* judgement is to be used.

9. The question of cumulative *charging* had in fact been raised earlier in the *Celebici* trial proceedings, in preliminary motions filed by Delalic and by Delic. The Trial Chamber dismissed the motion filed by Delalic on the basis that accumulation of offences is a matter which goes only to penalty and that it is not to be considered at the charging stage.[8] The Trial Chamber followed a decision of the Trial Chamber in *Tadic*, where it was held:

> In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made

---

6 *Akayesu* Judgement, paras 461-470.
7 *Akayesu* Judgement, para 468.
8 *Prosecutor v Delalic and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Zejnil Delalic based on Defects on the Form of the Indictment, 2 Oct 1996, para 24.

> to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon the technicalities of pleading.[9]

10. This conclusion was followed by the Trial Chamber in its decision on the Delic motion.[10] Leave to appeal was refused in respect of the decisions on both the Delic and Delalic motions.[11] Other Trial Chambers have reached different conclusions on the issue, both that cumulative charging is permitted only in certain limited circumstances and that cumulative charging is permitted without limitation, the issue only being relevant to the imposition of penalty.[12]

C. Analysis

11. In essence, the only issue to be determined by the Appeals Chamber arising from these grounds of appeal is whether an accused can be convicted of both an Article 2 and an Article 3 violation for the same conduct. However, the determination of this issue raises matters of legal principle which will have consequences in relation to convictions arising under other provisions of the Statute. Although these consequences are difficult to predict, we have attempted to take them into account in identifying the applicable legal principles.

1. Cumulative Charging

12. As a preliminary point, we agree with the majority that the cumulative *charging* should generally be permitted. As a practical matter, it is not reasonable to expect the Prosecution to select between charges until all of the evidence has been presented. It is not possible to know with precision, prior to that time, which offences among those charged the evidence will prove, particularly in relation to the proof of differing jurisdictional pre-requisites – such as, for example, the requirement that an international armed conflict be proved for Article 2 offences but not for those falling under Article 3. Further, as has been

---

9 *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, para 17.

10 *Prosecutor v Delalic and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Hazim Delic ased on Defects in the Form of the Indictment, 15 Nov 1996, para 22.

11 *Prosecutor v Delalic and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), 6 Dec 1996.

12 Compare, *e.g*, *Kupreškic* Judgement; the earlier Decision on Defence Challenges to Form of the Indictment, *Prosecutor v Kupreškic et al*, Case No IT-95-16-PT, 15 May 1998; *Prosecutor v Krnojelac*, Case No IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, paras 5-10; *Prosecutor v Naletilic and Martinovic*, Case No IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000, para 12; *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, paras 15-18.

observed at the Trial Chamber level, the offences in the Statute do not refer to specific categories of well-defined acts, but to broad groups of offences, the elements of which are not always clearly defined and which may remain to be clarified in the Tribunal's jurisprudence.[13] The fundamental consideration raised by this issue is that it is necessary to avoid any prejudice being caused to an accused by being penalised more than once in relation to the same conduct. In general, there is no prejudice to an accused in permitting cumulative *charging* and in determining the issues arising from accumulation of offences after all of the evidence has been presented.[14]

2. Cumulative Convictions

13. We are not convinced that the prior practice of this Tribunal and of the ICTR, as interpreted by the Prosecution, provides the solution to the problem of cumulative *convictions*. We understand the majority opinion to state the same conclusion, but we wish to provide our reasons for that conclusion.

14. The Appeals Chamber has not yet had to pronounce on the issue of accumulation of convictions, and it is disingenuous for the Prosecution to put forward the result in the *Tadic* Appeal – where what appear to be cumulative convictions were imposed, but where the issue was neither raised by the parties nor expressly considered by the Appeals Chamber – as authority for continuing this practice. The refusal of benches of the Appeals Chamber to grant leave to appeal from determinations that an accused can be *charged* with two different crimes arising from the same conduct,[15] raised a different question from the one now in issue.

15. The jurisprudence of the Trial Chambers is far from uniform with respect to this issue. The Prosecution's use of the Tribunal jurisprudence and of certain domestic law concepts in arriving at what are described as the "relevant principles"[16] appears to be a

---

[13] *Prosecutor v Radislav Krstic*, Case No IT-98-33-PT, Decision on the Defence Motion on the Form of the Indictment, Count 7-8, 28 Jan 2000, pp 6-7.

[14] *See Prosecutor v Naletilic and Martinovic*, Decision on Defendant Vinko Martinovic's Objection to the Indictment, Case No IT-98-34-PT, 15 Feb 2000, para 12. We acknowledge that there may be specific examples of obviously duplicative cumulative charging, where there is no reason in the particular circumstances that the Prosecution needs to see how the evidence turns out before selecting the most relevant charge. In those circumstances, it may be oppressive to allow cumulative charging.

[15] *Prosecutor v Delalic and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; *Prosecutor v Delalic and Others*, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)", Case No IT-96-21-AR72.5, 6 Dec 1996.

[16] Prosecution Response to Delic/Mucic Supplementary Brief, para 4.83.

selective exercise directed by a policy of entering the maximum possible convictions against an accused, rather than an analysis of any legal principle which actually dictates that result. Most decisions on the issue – with the exception of the *Kupreškic, Akayesu* and *Kayishema and Ruzindana* judgements[17] – have not been accompanied by reasoned consideration. The numerous Trial Chamber decisions on challenges to the form of the indictment generally concern the permissibility of cumulative *charging*, not cumulative convictions.

16. The one thing which is genuinely common to the cases which have dealt with the issue of cumulative convictions is the view that they are not permissible unless each of the relevant offences has a unique legal element. Since the function of this test is to determine whether two or more charged crimes are in fact *legally distinct offences*, this requirement, in its focus on the legal definition of the crimes, is a logical and appropriate one.

17. We are not convinced that the use of some kind of different values or different interests test, in conjunction with or in addition to a "different elements" test, can be said to be either a general principle of international criminal law or common to the major legal systems of the world. Various decisions of this Tribunal and the ICTR refer to the consideration that different criminal provisions may protect different societal interests or values as being an additional matter which may justify cumulative convictions. However, the consideration of societal interests or protected values is both the rationale for, and inherent in, different acts being labelled different crimes, and it will therefore generally be given effect by the application of the "different elements" test.

18. We have considered the Prosecution submissions that Articles 2 and 3 protect different interests – that Article 2 governs specific types of conduct in order to protect individual members of specific protected groups and that Article 3, as a residual clause, ensures "full observance of all requirements of international humanitarian law" – and that for that reason otherwise identical crimes (such as murder or torture) should lead to convictions under both Articles 2 and 3.[18] However, we do not believe that the interests identified by the Prosecution are so genuinely different that they justify cumulative convictions for otherwise identical criminal conduct. It is not apparent from customary or conventional international humanitarian law that the bodies of law underlying these

[17] *The Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999, paras 625-650.

provisions protect different interests, and the simple fact that they are represented in different Articles of the Statute does not assist the Prosecution's contention. The values protected by Articles 2 and 3 are, at their base, essentially the same – the protection of individuals and certain groups from violations of international humanitarian law in the context of armed conflict.[19]

19. To rely on the practice of certain courts and tribunals that have cumulatively convicted persons accused of having committed crimes during World War II is unsatisfactory in our view. The issue was not directly in issue in the cases referred to by the Prosecution, and the IMT at Nuremberg and the various military courts sitting at Nuremberg no doubt had particular reasons for convicting accused of both war crimes and crimes against humanity which are not relevant at this time.[20]

20. Further, to have resort to national jurisdictions is also highly problematic in light of the lack of a uniform approach to this issue, which is complex even in well developed national jurisdictions, requiring solutions peculiar to a specific national system. No clear, useful, *common* principle can be gleaned from the major legal systems of the world. It is in any case doubtful, given the unique nature of the international crimes over which the Tribunal has jurisdiction, whether any national jurisdiction has had to face a problem similar in scope to the one at hand.

21. Nor is a solution to the issue to be found in the general nature of international humanitarian law, which is not primarily concerned with criminal proceedings against individuals. An argument that, because the various branches of international humanitarian law protect different societal interests, it therefore permits cumulative convictions is untenable. General international humanitarian law did not develop by reference to application of its various branches to criminal proceedings against individuals, and it does

---

[18] Prosecution Response to Delic/Mucic Supplementary Brief, paras 4.85 and 4.88.

[19] The Prosecution describes the fact that Article 2 is directed at the protection of specific protected groups ("protected persons" under the Geneva Conventions) as being a distinguishing factor from Article 3: Prosecution Response to Delic/Mucic Supplementary Brief, para 4.85. However, this may also be said in respect of Article 3. Where offences under common Article 3 of the Geneva Conventions are charged under Article 3, they are also directed at the protection of a specifically defined group of persons – "Persons taking no active part in the hostilities" – *See* common Article 3(1). There may be, depending on the circumstances, a substantial overlap between the two groups.

[20] *Kupreškic* Judgement, paras 675 and 676.

not purport to provide a solution to this substantive criminal law problem. The Statute itself also does not expressly or implicitly resolve the problem.

22. The majority has held that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions" lead to the conclusion that cumulative convictions should not be permitted.[21] We agree that fairness to the accused dictates that cumulative convictions for offences which are not genuinely distinct should not be permitted in respect of the same conduct. It is appropriate to identify what these "reasons of fairness to the accused" are.

23. Prejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions. The Prosecution suggests that cumulative convictions "do not cause any substantive injustice to the accused" as long as the fact that such convictions are based on the same conduct is taken into account in sentencing.[22] This does not take into account the punishment and social stigmatisation inherent in being *convicted* of a crime. Furthermore, the number of crimes for which a person is convicted may have some impact on the sentence ultimately to be served when national laws as to, for example, early release of various kinds are applied. The risk may therefore be that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend not only on the sentence passed but also on the number and/or nature of convictions. This may prejudice the convicted person notwithstanding that, under the Statute, the Rules and the various enforcement treaties, the President has the final say in determining whether a convicted person should be released early. By the time national laws trigger early release proceedings, and a State request for early release reaches the President, the prejudice may already have been incurred. Finally, cumulative convictions may also expose the convicted person to the risk of increased sentences and/or to the application of 'habitual offender' laws in case of subsequent convictions in another jurisdiction.

(a) Application of the "different elements" test to determine whether crimes charged are genuinely legally distinct

24. As to the 'test' to be applied in order to avoid cumulative convictions, we agree with the majority that an accused may only be convicted of more than one offence in respect of

[21] At para 412 above.
[22] Prosecution Response to Delic/Mucic Supplementary Brief, para 4.89(3).

the same conduct where each offence has a unique element that the other offence or offences do not. We agree with the majority's conclusion that the pairs of offences for which Mucic, Delic and Landžo were convicted under Articles 2 and 3 were impermissibly cumulative. However, we disagree with the majority in relation to the way in which the 'test' should be applied.

25. The particular nature of offences within the Tribunal's jurisdiction – which have elements with no real equivalents of most crimes in domestic jurisdictions – gives rise to an issue as to which of the elements should be taken into account for this purpose. The majority has elected to include in that consideration the legal prerequisites relating to the circumstances of the relevant offences, or the *chapeaux* to the Articles, as well as the elements of the crimes which go to the *actus reus* and *mens rea* of the offences.

26. As we emphasised above,[23] the fundamental consideration arising from charges relating to the same conduct is that an accused should not be penalised more than once for the same *conduct*. The purpose of applying this test is therefore to determine whether the *conduct* of the accused genuinely encompasses more than one crime. For that reason, we believe that it is not meaningful to consider for this purpose legal prerequisites or contextual elements which do not have a bearing on the accused's conduct, and that the focus of the test should therefore be on the substantive elements which relate to an accused's conduct, including his mental state. The elements relating to the international nature of the conflict and protected person status in relation to Article 2, or considerations which may arise under Article 3 such as the limitation of offences charged under common Article 3 to "persons taking no active part in hostilities" – are in practice not relevant to the conduct and state of mind of the accused. Although matters such as protected person status or the internationality of the armed conflict provide the *context* in which the offence takes place, it is, we believe, artificial to suggest that the precise nature of the conflict or the technical status of the victim (*i.e.* classification as a protected person as opposed to a person taking no active part in hostilities) has any bearing on the accused's conduct. Such technicalities are certainly not matters which would have been of any importance to the victim. We therefore consider that, although these matters must clearly be proved before an accused could be convicted under the relevant Articles, they are irrelevant to a test to be applied solely for the

[23] *See* para 12.

purpose of determining whether the *criminal conduct* of an accused in any given case can fairly be characterised as constituting more than one crime.

27. The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct. We believe that taking into account such abstract elements creates the danger that the accused will also be convicted – with, as discussed, the penalty inherent in that conviction alone – in respect of additional crimes which have a distinct existence only as a purely legal and abstract matter, effectively through the historical accidents of the way in which international humanitarian law has developed in streams having distinct contextual requirements.[24] The fact that the Articles of the Statute encompass different, although frequently overlapping, crimes is a result mainly of the history of international humanitarian law rather than any indication that they are intended to describe genuinely distinct bodies of criminal law in *contemporary* international humanitarian law.

28. We again emphasise that, although we do not regard the contextual elements or *chapeaux* as being of assistance *for this purpose*, this does not undermine their undoubted importance for other purposes. They obviously remain matters to be proven in every case before any conviction can be entered. They are also matters which may become relevant at the second stage of selecting between cumulatively charged crimes, which we discuss below.

29. In the circumstances of this case, where only convictions under Articles 2 and 3 of the Statute are raised for consideration, the majority has determined that the relevant pairs of crimes do not each contain a unique element, because the requirement under common Article 3 in the Article 3 charges is not materially distinct from the unique "protected person" requirement of Article 2 crimes, as the latter requirement "includes, yet goes beyond what is meant by an individual taking no active part in the hostilities".[25] However, in relation to crimes charged under other combinations of Articles of the Statute, such as Articles 2 and 5 or Articles 3 and 5, taking into account the different contextual elements or legal prerequisites will have the result that crimes such as torture, rape, and murder/wilful

[24] For example, the two conditions set out in the Geneva Conventions of 1949 for the application of the "grave breaches" regime (*i.e.*, the international character of the conflict and protected persons status) relate to what was called the procedural aspect of this crime, in order to allow its prosecution in national jurisdictions. In other words, they were designed as a safeguard against any attempt by national jurisdictions to interfere in an internal conflict, or what would be considered as an issue falling within a State's sovereignty.

killing will necessarily and in every case be considered to be distinct crimes when charged under the different Articles, and therefore two convictions will have to be entered for what is in reality the same offence.

30. An abstract but potentially common example may serve to explain our concerns more adequately. The rape of a "protected person" in a prison camp, in the context of both an international armed conflict and a widespread or systematic attack on the civilian population, could be charged by the Prosecution as rape as a grave breach under Article 2 of the Statute; rape as prohibited by common Article 3 under Article 3 of the Statute, and rape as a crime against humanity under Article 5 of the Statute. The application of the test as posed by the majority, in addition to a comparison of the elements relating to the *actus reus* and *mens rea* of the offence of rape, must take into account the following elements:

Article 2:
(i) the requirement that the victim be a protected person;
(ii) there must be an international armed conflict;[26]
(iii) the act must have a close nexus with the armed conflict.[27]

Article 3 (common article 3):
(i) the victim must be a person taking no active part in hostilities;
(ii) there must be an armed conflict;[28]
(iii) the act must have a close nexus with the internal or international armed conflict.[29]

Article 5:
(i) there must be an armed conflict;[30]
(ii) there must be a widespread or systematic attack on the civilian population;[31]
(iii) the act must form part of the widespread or systematic attack.[32]

31. Taking the majority's analysis of the relationship between crimes charged only under Article 2 and Article 3 (common Article 3), there would be no reciprocal unique

---

[25] *See* above, para 423.
[26] *Tadic* Jurisdiction Decision, paras 78 and 84.
[27] *Tadic* Jurisdiction Decision, para 70 states that the "required relationship" of the crimes (under Articles 2 and 3) to the conflict is that they were "closely related to the hostilities".
[28] *Tadic* Jurisdiction Decision, para 94.
[29] *Tadic* Jurisdiction Decision, para 70.
[30] *Tadic* Jurisdiction Decision, para 142 (note that there is no nexus with the crimes and the conflict; the proof of the armed conflict is required only as a "basis of jurisdiction": paras 141 and 142; *Tadic* Appeal Judgement, para 251).
[31] *Tadic* Appeal Judgement, para 248.

elements, and convictions could not be entered under both. A conviction would be entered under Article 2. However, in a case where rape is charged under Article 2 and Article 5, Article 2 has the unique requirements that there be an *international* armed conflict and that there be a nexus between the offence and that conflict, and Article 5 has the unique requirements that there be a widespread or systematic attack on a civilian population and that the offence forms part of that widespread or systematic attack. Applying the majority's test, convictions would therefore necessarily and in every case be entered on both counts. In a case where rape is charged under Articles 3 and 5, Article 3 has the unique requirement that the offence must have a nexus with the armed conflict, and Article 5 has the unique elements that there be a widespread or systematic attack on a civilian population and that the offence forms part of that widespread or systematic attack. Again, convictions would necessarily and in every case be entered on both counts. Where rape is charged under all three articles, the situation becomes more complex. Although it is not entirely clear, we assume that the offence under Article 3, despite having a unique element in relation to Article 5, would be rejected as a distinct offence as it has no unique element in relation to Article 2. Even if on that basis no conviction were entered under Article 3, convictions under both Article 2 and Article 5 would necessarily and in every case remain.

32. As a result, a single act of rape could give rise to convictions for two separate crimes under Articles 2 and 5 or Articles 3 and 5. This result is dictated solely on the basis of abstract legal concepts relating to the context of the offence which would have been of little or no practical significance to the accused or the victim.

33. Under the "different elements" test as we believe it should be applied, only those elements relating to the conduct and mental state of the accused would be taken into account. In relation to rape under Articles 2 and 3, these elements would be only the *actus reus* and the *mens rea* of the offence of rape, which are the same in both cases, with the result that the offences cannot be considered to be genuinely legally distinct. In relation to rape under Article 5 of the Statute, the relevant elements would be the *actus reus* and *mens rea* of rape, the latter including the additional requirement that the perpetrator have knowledge that the rape occurs in the context of an attack against a civilian population.[33]

---

[32] *Tadic* Appeal Judgement, para 248 ("the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population").

[33] *Kupreškic* Judgement, para 556; *Prosecutor v Tadic, Case No* IT-94-1-T, Judgement, 7 May 1997, para 659.

Rape under Article 5 would therefore have a unique element not found in the definition of rape under Articles 2 and 3. However, this is not reciprocated, as there is no unique element of rape under Article 2 or 3, and a conviction could therefore be entered under only one of the counts. We believe that this is the more appropriate outcome. It is, we believe, highly artificial to characterise one act of rape committed by a single accused against one victim as constituting two distinct crimes. The most rational and fair outcome is to impose *one* conviction which receives a sentence which recognises the grave seriousness of that crime.

34. Our final difficulty with the majority view that the legal pre-requisite or contextual elements must be taken into account for the application of the "different elements" test is that it is likely to cause practical problems in determining *which* legal pre-requisites or contextual elements will be taken into account, particularly in relation to Article 3. In the *Tadic* Jurisdiction Decision it was held that Article 3 of the Statute is:

> [...] a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.* agreements which have not turned into customary international law [...].[34]

Because Article 3 has been interpreted to be a residual clause, encompassing all of the various types of violations of the laws or customs of war not encompassed by other provisions of the Statute, it is not clear in advance what legal prerequisites or contextual elements may arise in relation to the various crimes that Article encompasses.

35. To take, as one example, the category of "violations of agreements binding on the parties on the conflict, considered *qua* treaty law":[35] would the existence of the agreement itself, as a legal prerequisite to jurisdiction over the crimes, be considered an element of the offence? If so, this may be considered to be a unique element that Article 2 offences do not have, with the result that torture outlawed under Article 2 and torture outlawed under a treaty between the parties and prosecuted under Article 3 could be considered to be two distinct crimes justifying two separate convictions. On the other hand, the requirement of the existence of the agreement may be considered not to be an element of the offence for this purpose, but the problem does not end there. The agreement may have limitations on

---

[34] *Tadic* Jurisdiction Decision, para 89.
[35] *Tadic* Jurisdiction Decision, para 89.

its application, for example a regional or geographical limitation, or the limitation that it applies only to offences committed by combatants in the official armed forces of the State. Such matters are contextual elements or legal pre-requisites in the same way as the "protected persons" or "international armed conflict" requirements. It is unclear from the majority opinion whether it is intended that these would be taken into account but, as there is no basis in principle to distinguish them, presumably they must be. As a result, Article 3 offences with the same *substantive* elements as Article 2 offences (such as torture) will be considered in some circumstances, but not others, to be distinct crimes and therefore may be charged and convicted separately under Article 2 and Article 3. We do not accept that such an arbitrary result, entirely removed from the reality of the circumstances in which the offence was committed, is appropriate in the context of international criminal law.

(b) Selecting between possible cumulative convictions

36. As noted by the majority, where the "different elements" test is not met – the relevant elements of the offences are materially identical or one offence does not have a unique element – the relevant Chamber must decide in relation to which offence it will enter a conviction. The majority held that this choice must be made:

> [...] on the basis of the principle that that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional element, then a conviction should be entered under only that provision.[36]

The majority indicates that, in the case of charges under both Article 2 and 3 of the Statute, the offences charged under Article 2 must be selected as being the more specific on the basis of the protected person requirement, without reference to any other of the elements of the relevant offences which relate to the conduct and state of mind of the accused.

37. We agree with the majority's conclusion that, when a choice must be made between cumulatively charged offences, that choice should be made by reference to specificity, but only in the sense that the crime which more specifically describes *what the accused actually did* in the circumstances of the particular case should be selected. This cannot be done by a rigidly imposed choice of the charges laid under one of the Articles of the Statute with no reference to the substantive elements of the offences or to the evidence as to the actual circumstances under which they were committed. In our view, the choice should involve a

consideration of the totality of the circumstances of the particular case and of the evidence given in relation to the crimes charged, in order to describe most accurately the offence that the accused committed and to arrive at the *closest* fit between the conduct and the provision violated. This would involve a consideration of *all* of the elements of the offences to determine whether one of the offences better or more specifically describes what the accused did.

38. It will often be a substantive element relating to the accused's conduct or state of mind which provides the basis on which a meaningful choice can be made as to the better description of the accused's conduct. For example, the deliberate infliction of pain or suffering, with the intention to do this for the purpose of obtaining information, or punishing, intimidating or discriminating against the victim, constitutes the offence of wilfully causing great suffering or serious injury and the offence of torture. It is the unique additional element relating to the purpose of the perpetrator which makes torture the more specific offence but, under the majority's approach, that element would not be taken into account. Where consideration of the substantive elements of the offences does not provide a basis to determine that one offence more clearly describes what the accused did (such as in the case of torture charged under Articles 2 and 3), it would then be possible to have recourse to the legal pre-requisites, or the *chapeaux*, to ascertain whether they provide a distinguishing factor which makes the offence under one Article a more specific or appropriate description of what the accused did.

39. An assessment of the appropriateness of criminal charges, or (taking the majority's standard of specificity) of the most specific offence to encompass a piece of conduct, must always depend at least to some degree on the *actual circumstances of the case* as established by the evidence. A rigidly imposed preference for the crime charged under a particular Article of the Statute will obviously be less time consuming and more convenient. However, the rigidly imposed choice of Article 2 charges, made in isolation from the relevant conduct to be criminalised in the particular case, will not necessarily always produce the result which must be the ultimate function of criminal proceedings: to recognise and penalise with the most appropriate conviction the proven criminal conduct of an accused.

---

[36] *See* above, para 413.

40. It would appear to follow, from the majority's conclusion that Article 2 convictions must always be upheld as against Article 3 convictions, that in future cases dealing with other combinations of charges – for example Article 2 and Article 5, or Article 3 and Article 5 – the charges under a particular one of those Articles must always be selected. This suggests the development of some sort of gradation of specificity among the Articles of the Statute.

41. We do not regard it as possible to derive from the Statute a hierarchy or gradation of specificity or seriousness amongst the various offences which would assist in any kind of rigidly imposed determination of the question of which possible cumulative convictions should be retained. Nor is it desirable to do so. As observed by the majority of the Appeals Chamber in the Judgement in Sentencing Appeals in *Prosecutor v Tadic*:

> After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or Rule of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the *circumstances of the case*.[37]

Although this observation relates to the determination of seriousness of crimes, the Appeals Chamber's emphasis on taking into account "the circumstances of the case" rather than any perceived distinctions in the Statute is an important caution.

42. A more specific problem with the method of choice provided by the majority and the way it is applied in this case – that specificity can be measured by the presence of an "additional element" in one of the offences[38] – is that it does not cover the full range of circumstances in which this choice must be made. Often, neither of the crimes determined by the application of the different elements test not to be legally distinct will have an "additional" element. All of the elements of each crime may simply be assessed not to be materially different. Indeed, on a proper analysis, neither of the offences in the pairs of offences which arise in this case have an "additional element". The same offences under Article 2 and Article 3 (common article 3) – torture for example – have, on the approach taken by the majority, the same number of elements, with neither having an additional one.

---

[37] *Prosecutor v Tadic*, Case No IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan 2000, para 69 (emphasis added), followed in the *Furundžija* Appeal Judgement, paras 242-243.

[38] *See* above, para 413.

The Article 2 offence, in addition to the substantive elements of torture, has the contextual elements that:

(i) there is an international armed conflict
(ii) there is a nexus between the crime and the conflict
(iii) the victim be a protected person.

43. The same offence charged under Article 3 (common article 3), in addition to the substantive elements, has the contextual requirements that:

(i) there is an armed conflict, internal or international
(ii) there is a nexus between the crime and the conflict
(iii) the victim is a person taking no active part in hostilities.

44. The conclusion that these offences are not legally distinct is based on the assessment that the elements are not materially distinct – ie that the Article 3 elements in (i) and (ii) are simply broader versions of those elements in the Article 2 offence. We therefore cannot agree with the majority's analysis that the Article 2 offences have an "additional element" (the protected person status of the victim) and should be automatically selected on that basis, as the Article 3 offence has a corresponding element relating to the status of the victim (taking no active part in hostilities).[39] The protected person status may in the circumstances be a more appropriate or specific definition of the victim, but it is not an "additional" element in comparison with the Article 3 offence.

45. The problems which we have attempted to identify in the majority's determination that it is possible to make a rigidly imposed determination in every case of the most specific crime demonstrate, we believe, that the perceived virtue of such an approach – certainty or predictability – is in fact illusory. In practice, it is likely to be an inflexible approach with the potential to produce outcomes which are, in the circumstances of any given case, arbitrary and artificial.

D. Application of these principles to the present case

46. The way in which we would apply the principles we have referred to above to the facts of the present case is obviously now a hypothetical matter. However, we consider that it may assist in an understanding of what we consider to be the applicable principles, and of

our differences from the majority, to set out how we would have applied the principles to the present case.

47. Mucic and Delic were convicted of the following crimes: (a) wilful killing under Article 2 and murder under Article 3;[40] (b) wilfully causing great suffering or serious injury to body or health under Article 2 and cruel treatment under Article 3;[41] (c) torture under Article 2 and torture under Article 3;[42] and (d) inhuman treatment under Article 2 and cruel treatment under Article 3.[43] Landžo was cumulatively convicted of the offences in the categories (a),[44] (b)[45] and (c).[46] We agree that, although Landžo did not formally join in this ground of appeal, it is appropriate to apply these legal principles to his convictions also.

1. Whether the crimes charged are legally distinct crimes

(a) Wilful killings and murder

48. The substantive elements of the offence of wilful killing have been defined as requiring an act or omission of the accused which causes the death of the victim, and that the accused intended to kill or to inflict serious bodily injury in the knowledge that such injury would be likely to lead to death while being reckless as to whether it would cause death.[47] Murder has been defined, in the context of a crime against humanity (which for present purposes makes no material difference), as consisting of the death of the victim because of an act or omission of the accused committed with the intention to cause death or to cause grievous bodily harm in the knowledge that such bodily harm would be likely to cause death.[48] The Trial Chamber in the Bla{kic proceedings and the *Celebici* Trial Chamber have expressed the view that the two crimes are not materially different (the

---

[39] *See* above, paras 423, 424 and 425.
[40] Delic: Counts 3 and 4 (Counts 1 and 2 have been quashed – *See* above at para 460); Mucic: Counts 13 and 14.
[41] Delic: Counts 11 and 12; Counts 46 and 47; Mucic: Counts 13 and 14; Counts 38 and 39; Counts 46 and 47.
[42] Delic: Counts 18 and 19; Counts 21 and 22; Mucic: Counts 33 and 34.
[43] Delic: Counts 42 and 43; Mucic: Counts 38 and 39; Counts 44 and 45.
[44] Counts 1 and 2; Counts 5 and 6; Counts 7 and 8.
[45] Counts 11 and 12; Counts 36 and 37; Counts 46 and 47.
[46] Counts 15 and 16; Counts 24 and 25; Counts 30 and 31.
[47] Trial Judgement, para 439; as referred to and essentially followed in the *Bla{kic* Judgement, para 153.
[48] *Akayesu Judgement*, para 589; In *Prosecutor v Jelisic*, Case No IT-95-10-T, Judgement, 14 Dec 1999, at para 35 described the mental element as "the intention to cause death", but cited the *Akayesu* Judgement's definition. It is therefore unclear whether the *Jelisic* Judgement's omission from the definition of the *mens rea* of intention to cause serious injury knowing that it is likely to lead to death and reckless as to whether death ensues was intentional, but we regard the *Akayesu* standard as the applicable one.

Blaškic Judgement defining them as having identical elements).[49] We are of the same view; accordingly, the different elements requirement is not satisfied with respect to this category of convictions.

(b) Wilfully causing great suffering or serious injury to body or health and cruel treatment

49. The offence of wilfully causing great suffering or serious injury to body or health under Article 2 has been defined as an intentional act or omission which causes great suffering or serious injury to body or health, including mental health.[50] Cruel treatment is an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[51] Even if the element of a serious attack on human dignity is additional to the elements of the offence of wilfully causing great suffering or serious injury to body or health, this is not reciprocated as the latter offence has no unique element.

(c) Torture

50. It is clear that this is an identical crime whether charged under Article 2 or 3.

(d) Inhuman treatment and cruel treatment

51. Inhuman treatment has been defined as an intentional act or omission which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.[52] As noted above, cruel treatment has also been defined in substantially the same terms as an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The two crimes have essentially the same elements, with the possible qualification that the *actus reus* of inhuman treatment may be defined more broadly than cruel treatment, so that cruel treatment would be encompassed within inhuman treatment. The requirement that each offence have a unique element is therefore not satisfied.

---

[49] Trial Judgement, para 422; *Blaškic* Judgement, para 181.
[50] *Blaškic* Judgement, para 156, effectively adopting the definition of the offence used by the *Celebici* Trial Chamber: Trial Judgement, para 511.
[51] *Prosecutor v Jelisic*, Case No IT-95-10-T, Judgement, 14 Dec 1999, para 41, adopting the definition of the *Celebici* Trial Chamber: Trial Judgement, para 552.
[52] *Blaškic* Judgement, para 154, adopting the definition of the offence used by the *Celebici* Trial Chamber: Trial Judgement, para 543.

2. The determination of which of the duplicative convictions should be retained

52. We therefore agree with the majority that, in the cases of the convictions under Articles 2 and 3, the elements of the relevant offences are materially identical or one offence does not have a unique element. Convictions cannot be entered for both, and it is necessary to decide which convictions should be retained. In doing so, as stated above, we consider that, through an examination of the circumstances of the case and of the evidence given in relation to the crimes charged, the aim is to determine which of the crimes describes *most* accurately what the accused did.

(a) Wilfully causing great suffering or serious injury to body or health / cruel treatment

53. The only combination of charges in which we consider that there is a material difference in one of the elements (albeit not reciprocated) is the offence of wilfully causing great suffering or serious injury to body or health under Article 2 and that of cruel treatment under Article 3. The additional element is that cruel treatment may be not only an act or omission which causes serious mental or physical suffering or injury but it may also be characterised as constituting a serious attack on human dignity. The slightly different focus of the other offence is on the great suffering or serious physical injury caused by the relevant acts. In relation to these convictions entered against Delic and Landžo under Counts 11 and 12, the original charges had been wilful killing and murder, but the Trial Chamber had found that, although Delic had been involved in the beating of the victim, it could not be certain that these beatings were a direct cause of the victim's death. The Trial Chamber found that convictions could be entered instead for the offences of wilfully causing great suffering or serious injury to body or health and of cruel treatment, which were "lesser offences" of the same nature as the more grave crimes originally charged.[53] The same reasoning necessarily applied in relation to the responsibility of Mucic for these acts as a superior, which was charged under Counts 13 and 14.[54] Having reference then to the nature of the charging, which focussed on the physical consequences to the accused, and to the evidence of the physical injuries which resulted from the beatings, the crime of wilfully causing great suffering or serious injury under Article 2 more accurately describes what Delic and Landžo did and for which Mucic was responsible. That is also the conclusion reached by the majority.

54. The offences charged against Delic, Mucic and Landžo in Counts 46 (wilfully causing great suffering or serious injury to body or health) and 47 (cruel treatment) related to the inhumane living conditions in the camp, including the "atmosphere of terror" and the poor living conditions. In relation to these counts, the Trial Chamber found that the detainees in the camp "were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse" and were "subjected to an immense psychological pressure which may be accurately characterised as 'an atmosphere of terror'".[55] The Trial Chamber also found that the detainees were deprived of adequate food, sleeping facilities, toilet facilities, water and medical facilities, the latter two because of a deliberate policy.[56] These findings, reinforced by specific findings of Delic's humiliating and cruel taunting of prisoners,[57] suggest that it was a key part of this offence that it was intended to degrade and attack the dignity of the victims. Mucic, as a commander, was found to have been aware of these circumstances. For that reason, it is appropriate to select a conviction for cruel treatment under Article 3 against each accused under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

55. Mucic was also convicted of the same offences of wilfully causing great suffering or serious injury to body or health and of cruel treatment in relation to Counts 38 and 39, which related to his responsibility as a superior for acts of severe mistreatment of certain detainees. The mistreatment found by the Trial Chamber included acts which "necessarily entails, at a minimum, a serious affront to human dignity",[58] which suggests an emphasis on cruel treatment. However, the Trial Chamber also found in relation to another victim that the intentional placing of a burning fuse cord against the bare skin in the genital area of an accused caused "such serious suffering and injury" that it constituted both of the offences charged.[59] Thus, under the one count, there are different acts which because of their different emphases could be differently characterised. However, taken as a whole, the conduct encompassed by these counts appears to be violent mistreatment of such an

---

[53] Trial Judgement, paras 865-866.
[54] Trial Judgement, para 912.
[55] Trial Judgement, para 1091.
[56] Trial Judgement, paras 1096, 1097, 1100, 1105, 1108, 1111.
[57] Trial Judgement, paras 1089, 1104, 1109.
[58] Trial Judgement, para 1026.

unusually cruel nature that the offence of cruel treatment under Article 3, which emphasises both conduct which causes serious injury and conduct which constitutes a serious attack on human dignity, best describes the criminal conduct for which Mucic was found responsible under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

56. Landžo was also convicted of this combination of crimes under Counts 36 and 37 for beating a detainee on several occasions, setting fire to his trousers and burning his legs, and forcing him to drink urine. The Trial Chamber found that this caused serious mental and physical suffering to the victim. It is also obvious from the evidence that the particularly cruel and humiliating nature of the abuse inflicted by Landžo was intended to undermine the victim's dignity. Using the same reasoning as above, the offence of cruel treatment, which emphasises both conduct which causes serious injury and conduct which constitutes a serious attack on human dignity under Article 3, best describes Landžo's criminal conduct for which he was convicted under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

(b) Inhuman treatment / cruel treatment

57. The offence of inhuman treatment has been described as an umbrella provision which encompasses various conduct which contravenes the fundamental principle of humane treatment.[60] As cruel treatment under Article 3 is one of the varieties of conduct embraced by inhuman treatment, it may be regarded as more specific and therefore to some degree a more specific and accurate description of what the accused did, and may for that reason be preferred in selecting between Counts 44 and 45 against Mucic and Counts 42 and 43 against Delic. The inflexible majority approach produces the contrary conclusion, that the offence of inhuman treatment, being the Article 2 offence, should be upheld.

---

[59] Trial Judgement, para 1040.
[60] *Blaškic* Judgement, para 154, following the *Celebici* Trial Chamber: Trial Judgement, para 543.

(c) Murder / wilful killing and torture / torture

58. In relation to the materially identical crimes of murder and wilful killing, and in the case of torture convicted under both Articles 2 and 3, reference to the substantive elements of the particular crimes does not provide a solution and it is necessary to look to any features of Articles 2 and 3 generally which may assist in determining the conviction to be retained. In the circumstances of this case, it is open to regard Article 2 as being more specific to the crimes committed by the appellants, in light of the international nature of the armed conflict, and the fact that in relation to *these* crimes and circumstances, Article 3 (based on common Article 3) functions in a residual capacity.[61] We would therefore regard a conviction for the offences under Article 2 to best describe the appellants' offences. That is also the conclusion reached by the majority.

E. Disposition

59. We therefore dissent from the conclusion that, of the offences charged cumulatively in respect of the same conduct, the convictions for all of the offences charged under Article 2 of the Statute should be confirmed and those for all of the offences charged under Article 3 should be dismissed. It is, in our view, unsatisfactory simply to "dismiss" the charges under one or other of the two Articles. There must be a finding on the indictment that the accused is either guilty or not guilty of the charge. An unqualified statement that the charge is "dismissed" may be misunderstood. In our view, where an accused is not found guilty of a particular charge for the sole reason that to find otherwise would produce a cumulative conviction, the disposition should be in terms such as "Not guilty on the basis that a conviction on this charge would be impermissibly cumulative".

60. For the reasons set out above, the convictions on the Article 3 charges should be retained in relation to certain of the counts. Thus, we dissent from the majority judgement in relation to the following charges, for which we would have entered the following disposition:

Mucic: **Count 38:** *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV* in respect of Dragan Kuljanin, Vukašin Mrkajic and Nedeljko Draganic and *inhuman treatment as*

[61] *Tadic* Jurisdiction Decision, para 91.

a Grave Breach of Geneva Convention IV in respect of Mirko Kuljanin: **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 39: *cruel treatment as a Violation of the Laws or Customs of War* in respect of Dragan Kuljanin, Vukašin Mrkajic, Nedeljko Draganic, and Mirko Kuljanin: **CONVICTION CONFIRMED.**

Count 44: *inhuman treatment as a Grave Breach of Geneva Convention IV* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 45: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Delic: **Count 42:** *inhuman treatment as a Grave Breach of Geneva Convention IV* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 43: *cruel treatment as a Violation of the Laws or Customs of War* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Landžo: **Count 36:** *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON**

THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE

Count 37: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

F. Sentencing Consequences

61. The majority noted that the Trial Chamber, in sentencing, referred to its earlier interlocutory decision in which it had held that the matter of accumulation of offences was relevant only to penalty considerations, and held:

> It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently.[62]

The Trial Chamber had earlier also specifically referred to the principle of avoiding imposition of double punishment for the same conduct in the context of convictions in respect of both Article 7(1) and Article 7(3) responsibility.[63] However, it was not apparent that this principle was applied in respect of the convictions which had been entered cumulatively under Articles 2 and 3 and which have been considered above. It appears from the statement of the Trial Chamber quoted above that it regarded this issue as being resolved merely by imposing the sentences concurrently, rather than consecutively, instead of a consideration of the effective length of the sentence actually to be served. However, it is not apparent that the imposition of concurrent sentences will in fact *necessarily* ensure that an accused is not punished more than once for the same conduct. The use of concurrent, rather than cumulative sentencing does not relieve a Trial Chamber of the obligation to impose the effective, appropriate sentence to be served in respect of the totality of the criminal conduct. Merely fixing a sentence for each count and making them

[62] Trial Judgement, para 1286.
[63] Trial Judgement, para 1223.

concurrent rather than consecutive does not make it clear that the Trial Chamber has given consideration to the possibility of duplicative penalty when fixing individual sentences.

62 We therefore agree that it is necessary to have the matter of sentencing in respect of the remaining offences remitted to a Trial Chamber to be designated by the President.

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

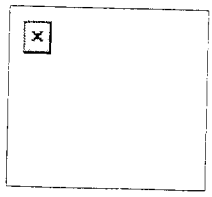
Judge David Hunt, Presiding

Judge Mohamed Bennouna

Dated this twentieth day of February 2001
At The Hague
The Netherlands

ANNEX 4

Rome Statute of the International Criminal Court



ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively

demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to

the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court
or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings

with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the

jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

1. The Court shall apply:

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

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

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

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to

the person being investigated, prosecuted or convicted shall apply.

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37
Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38
The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a

professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43
The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency,

competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45
Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46
Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the

Rules of Procedure and Evidence.

Article 48
Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49
Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation
to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a

statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release

pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the

Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62
Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language

which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70
Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72
Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things,

providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision

shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81
Appeal against decision of acquittal or conviction
or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during

the period allowed for appeal and for the duration of the appeal proceedings.

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85
Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86
General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87
Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88
Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of

cooperation which are specified under this Part.

Article 89
Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91
Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's

probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the

reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity
and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party

and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of
sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106
Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the

proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112
Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114
Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115
Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119
Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120
Reservations

No reservations may be made to this Statute.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122
Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a

Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124
Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court

prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

ANNEX 5

Statute of the Special Court for Sierra Leone.

1211

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts.

Article 3
Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b. Collective punishments;
c. Taking of hostages;
d. Acts of terrorism;
e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f. Pillage;
g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
h. Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

i. Abusing a girl under 13 years of age, contrary to section 6;
ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;
iii. Abduction of a girl for immoral purposes, contrary to section 12.

b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;
ii. Setting fire to public buildings, contrary to sections 5 and 6;
iii. Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:

a. The act for which he or she was tried was characterized as an ordinary crime; or
b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
b. The Prosecutor; and
c. The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").
b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

1214

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel

shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

a. A procedural error;
b. An error on a question of law invalidating the decision;
c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone,

they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

a. Reconvene the Trial Chamber;
b. Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual Report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 6

Prosecutor v. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR72, Appeals Chamber, 5 June 2003.

IT-94-2-AR73 63 1218

A 63 - A 52

05 June 2003 BQ

UNITED NATIONS

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

Case No.: IT-94-2-AR73

Date: 5 June 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Amin El Mahdi

Registrar: **Mr. Hans Holthuis**

Decision of: **5 June 2003**

PROSECUTOR

v.

DRAGAN NIKOLIĆ

DECISION ON INTERLOCUTORY APPEAL CONCERNING LEGALITY OF ARREST

Counsel for the Prosecutor:
Mr. Upawansa Yapa

Counsel for the Accused:
Mr. Howard Morrison
Ms. Tanja Radosavljević

I. Background

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (respectively, "Appeals Chamber" and "International Tribunal") is seised of the "Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 9th October 2002" filed by counsel for Dragan Nikolić (respectively, "Defence" and "Accused" or "Appellant") on 27 January 2003 ("Appeal"), pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Appeal concerns a decision issued by Trial Chamber II on 9 October 2002 on the legality of the Accused's arrest by the Stabilisation Force (respectively, "Impugned Decision" and "SFOR"). The Accused, indicted by the International Tribunal for crimes against humanity and war crimes on 1 November 1994, was arrested by SFOR on or about 20 April 2000 in Bosnia and Herzegovina.[1] In the Impugned Decision, the Trial Chamber found that the Appellant was "allegedly illegally arrested and abducted from the territory of FRY by some unknown individuals and transferred by them to the territory of Bosnia and Herzegovina" and that "neither SFOR nor the Prosecution were involved in these acts".[2] It also determined that since the Accused had "'come into contact with SFOR", SFOR was obliged to arrest, detain and transfer him to the Hague'".[3] It found that the Accused's abduction involved neither a violation of the sovereignty of Serbia and Montenegro[4] that could be attributed either to SFOR or to the Office of the Prosecutor ("OTP" or "Prosecution"), nor a violation of the Accused's human rights or the fundamental principle of due process of law.[5] For all these reasons, it concluded that there did not exist a "legal impediment to the Tribunal's exercise of jurisdiction over the Accused".[6]

3. The question presented in this appeal is whether the International Tribunal can exercise jurisdiction over the Appellant notwithstanding the alleged violations of Serbia and Montengro's sovereignty and of the Accused's human rights committed by SFOR, and by extension OTP, acting in collusion with the unknown individuals who abducted the Accused from Serbia and Montenegro.

---

[1] *Prosecutor v.Dragan Nikolić*, Case No. IT-94-AR72, "Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 9 October 2002.
[2] *Supra* n.1, p. 39.
[3] *Ibid.*
[4] As the name of the Federal Republic of Yugoslavia (FRY) has been officially changed on 4 February 2003 and now is Serbia and Montenegro, this decision will, except where quoting portions of the Impugned Decision, only refer to the State Union of Serbia and Montenegro.
[5] *Ibid.*
[6] *Ibid.*

4. As to the procedural background leading to this appeal, the following must be recalled. On 9 October 2002, the Appellant filed a notice of appeal against the Impugned Decision pursuant to Rule 108 and/or Rule 72 of the Rules[7]. The Prosecution responded on 18 November 2002.[8] On 9 January 2003, the Appeals Chamber dismissed the Notice of Appeal on the ground that the Defence should have filed its Notice of Appeal neither under Rule 108 nor under Rule 72 but under Rule 73 of the Rules.[9]

5. On 14 January 2003, the Appellant sought certification for leave to appeal from the Trial Chamber.[10] OTP responded on 17 January 2003.[11] The Defence replied on 20 January 2003.[12] On 17 January 2003, the Trial Chamber granted certification.[13] On 27 January 2003, the Appellant filed the Appeal. The Prosecution responded on 3 February 2003 ("Response").[14] No reply was filed by the Defence.

II. Submissions of the Parties

Ground I – The Trial Chamber erred in holding that the conduct of third parties who unlawfully abducted the Accused across state borders could not be attributed to SFOR and OTP.

6. The Defence argues that the Trial Chamber erred in holding that the conduct of the persons who apprehended the Appellant should not be imputed to SFOR and, by extension, to the OTP. The Defence asserts that the Trial Chamber's use of the International Law Commission's ("ILC")Draft Articles on State Responsibility[15] to determine whether the conduct of third parties can be attributed to SFOR or the OTP was inappropriate because the Draft Articles are not recognised as customary

---

[7] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Notice of Appeal from the Judgement, pursuant to Rule 108 of the Rules of Evidence and Procedure, of Trial Chamber II dated the 9th day of October 2002 concerning the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 7 November 2002.
[8] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Prosecution Response to the Two Defence Documents filed on 8 November 2002 purporting to be a Notice of Appeal pursuant to Rule 108 and a Motion for Extension of Time under Rule 127 Respectively", 18 November 2002.

[9] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Decision on Notice of Appeal", 9 January 2003.
[10] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Motion for Certification and Relief under the Provisions of Rules 73 and 127 of the Rules", 20 January 2003.
[11] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Prosecution's Response to the Defence Motion for Certification and Relief Under the Provisions of Rules 73 and 127 of the Rules of Procedure and Evidence", Case No. IT-94-2-PT, 17 January 2003.
[12] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Reply to Response of the Prosecutor, filed on the 17th January 2003 to the Defence Motion Filed on the 14th January 2003 for Certification and Relief under Rules 73 and 127 of the Rules of Procedure and Evidence", 20 January 2003.
[13] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal'", 17 January 2003.
[14] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, "Prosecution Response to 'Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 09 October 2002'", 3 February 2003.
[15] Draft Articles of the International Law Commission on the issues of Responsibilities of States for Internationally Wrongful Acts and commentary, adopted by the ILC at its fifty-third session in 2001 (*See* UNGAOR, 56th Sess., Supp. No. 10 (A/56/10), chp.IV.E.2).

or treaty law. The Defence argues that the Appeals Chamber should apply a different test. The Defence contends that SFOR knew that the Accused had been the victim of an unlawful and violent abduction and that by taking the Accused into custody, SFOR colluded in the original crime. Furthermore, it asserts that SFOR's responsibility cannot be excused simply on the ground that it was enforcing its mandate.

7. The Prosecution argues that the Trial Chamber was correct in finding that the ILC Draft Articles offer important guidance on the state of customary international law and constitute a useful distillation of State practice. It submits that in any case, since the Trial Chamber acknowledged the limitations of the ILC Draft Articles as a formal source of law, no error can be imputed to it.

8. As to SFOR's collusion with the "unknown individuals", the Prosecution points out that the parties submitted to the Trial Chamber (on 12 July 2002) a stipulation "that the apprehension and transportation [of the Accused] into the territory of Bosnia and Herzegovina was undertaken by unknown individuals having no connection with SFOR and/or the Tribunal"[16] ("Agreement"). Even without such an agreement, the Prosecution asserts that simply taking an accused into custody from third parties cannot amount to the adoption or approval of any prior irregularity on the part of such parties.

Ground II – The Trial Chamber erred in finding that SFOR implemented its obligations under the International Tribunal's Statute and Rules and that there was no collusion or official involvement in the allegedly illegal acts.

9. As in the previous ground, the Defence argues that SFOR knew that the Accused had been illegally detained and that his subsequent arrest demonstrates SFOR's collusion in the prior criminal activity. This collusion, the Defence contends, constitutes an abuse of process. The Prosecution responds that SFOR had no knowledge of the identity of the Accused's captors and that, because of SFOR's mandate, SFOR was obligated to arrest the Accused once it had confirmation that he was an indictee of the International Tribunal.

Ground III – The Trial Chamber erred by not considering the relationship between SFOR and the OTP.

[16] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber as Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal under Rule 72 and Generally, the Nature of the Relationship between the OTP and SFOR and the Consequences of any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention", 29 October 2001.

10. The Defence asserts that if there was collusion between the Accused's captors and SFOR, the Trial Chamber should have examined the nature of the relationship between SFOR and the OTP when considering the question of whether a stay of the proceedings ought to be granted. In this regard, the Defence refers to its submissions before the Trial Chamber in which it argued that SFOR acts as both a *de facto* and a *de jure* agent of the International Tribunal and the OTP when detaining and arresting indictees.[17] The Defence adds that, in any event, the Trial Chamber ought to have addressed the issue of the relationship between SFOR and OTP in order to come to a reasoned conclusion on the nature and seriousness of the violations of the Accused's rights and the occurrence of an abuse of process.

11. The Prosecution responds that, in the absence of wrongdoing by SFOR, the nature of its relationship with the OTP is irrelevant. While it is true that SFOR and the OTP have a working relationship and actively cooperate with each other, the actions of SFOR are not thereby automatically attributable to the OTP.

Ground IV – The Trial Chamber erred by concluding that SFOR did not breach State sovereignty.

12. The Defence claims that Serbia and Montenegro's constitution prohibits the transfer of persons sought by the Tribunal, and that the Accused's apprehension deprived a national of Serbia and Montenegro of his State's due process protection and of his right to challenge the legality of his arrest before Serbian and Montenegrin courts.

13. The Defence also argues that in arresting indictees such as the Accused, SFOR is analogous to an executive authority of a State. In exercising its mandate, SFOR violated Serbia and Montenegro's sovereignty by denying it the right to protect its nationals from breaches of international law, such as collusion in a cross-border abduction.

14. The Prosecution asserts that, even if SFOR breached Serbia and Montenegro's sovereignty, Serbia and Montenegro was obligated to transfer the Accused to the International Tribunal once he is in its custody. In such a case, the right to exhaust domestic judicial remedies is superseded by the transfer obligations of Serbia and Montenegro.

[17] *Supra* n.7, p.6.

Ground V – The Trial Chamber erred in concluding that the circumstances of the apprehension of the Accused were insufficiently "egregious" to justify the exercise of a discretionary stay of the proceedings.

15. The Defence contends that the Trial Chamber erred in finding that the circumstances of the Accused's arrest were insufficiently egregious to justify a discretionary stay of the proceedings. The Defence argues that, following the reasoning of the Appeals Chamber of the International Criminal Tribunal ("ICTR") in *Barayagwiza*, a court may decline to exercise its jurisdiction in cases where violations of an accused's rights are so egregious that to exercise jurisdiction would be detrimental to the court's integrity. The Defence contends that kidnapping constitutes such an egregious violation. In order to deter future kidnappings, the Defence stresses that the International Tribunal should only exercise jurisdiction over indictees who were transferred to the International Tribunal through lawful means. Exercising jurisdiction in this case amounts to condoning kidnappings that are executed with minimal violence.

16. The Prosecution responds that the Trial Chamber, in accordance with the ICTR Appeals Chamber's reasoning in *Barayagwiza*, correctly concluded that the circumstances of the Accused's arrest did not satisfy the standard of "egregious treatment". In any case, according to the Prosecution, breaches of international law by non-SFOR entities do not divest the International Tribunal of its jurisdiction over indictees.

III. Discussion

(a) Preliminary Considerations

17. The essence of the Defence's position is that SFOR, and by extension the OTP, acted in collusion with the individuals who took the Accused from Serbia and Montenegro to SFOR in Bosnia and Herzegovina. SFOR knew that the accused had been kidnapped. By taking the Accused into its custody, SFOR effectively accepted that kidnapping in breach of Serbia and Montenegro's sovereignty and the Accused's human rights. Therefore, jurisdiction must be set aside.

18. The Appeals Chamber observes that the basic assumption underlying the Defence submissions is that setting aside jurisdiction by the International Tribunal is the appropriate remedy for the violations of State sovereignty and/or human rights that allegedly occurred in this case. That assumption requires further scrutiny. For, if the setting aside of jurisdiction is not the appropriate remedy for such violations, then, even assuming that they occurred and that the Defence is correct that the responsibility for the actions of the Accused's captors should be attributed to SFOR,

jurisdiction would not need to be set aside. Thus, the first issue to be addressed is in what circumstances, if any, the International Tribunal should decline to exercise its jurisdiction because an accused has been brought before it through conduct violating State sovereignty or human rights. Once the standard warranting the declining of the exercise of jurisdiction has been identified, the Appeals Chamber will have to determine whether the facts of this case are ones that, if proven, would warrant such a remedy. If yes, then the Appeals Chamber must determine whether the underlying violations are attributable to SFOR and by extension to the OTP.

19. Before turning to these issues, however, the Appeals Chamber wishes to clarify that what is at issue here, is not jurisdiction *ratione materiae* but jurisdiction *ratione personae*. Jurisdiction *ratione materiae* depends on the nature of the crimes charged. The Accused is charged with war crimes and crimes against humanity. As such, there is no question that under the Statute, the International Tribunal does have jurisdiction *ratione materiae*. In this case, jurisdiction *ratione personae* depends instead on whether the Appeals Chamber determines that there are any circumstances relating to the Accused which would warrant setting aside jurisdiction and releasing the Accused. It is to this determination that the Chamber now turns.

(b) Under what circumstances does a violation of State sovereignty require jurisdiction to be set aside?

20. The impact of a breach of a State's sovereignty on the exercise of jurisdiction is a novel issue for this Tribunal. There is no case law directly on the point, and the Statute and the Rules provide little guidance. Article 29 of the Statute, *inter alia*, places upon all States the duty to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. It also requires States to comply without undue delay with requests for assistance or orders issued by Trial Chambers, including the arrest or detention of persons. The Statute, however, does not provide a remedy for breaches of these obligations. In the absence of clarity in the Statute, Rules, and jurisprudence of the International Tribunal, the Appeals Chamber will seek guidance from national case law, where the issue at hand has often arisen, in order to determine State practice on the matter.

21. In several national cases, courts have held that jurisdiction should not be set aside, even though there might have been irregularities in the manner in which the accused was brought before them. In the *Argoud* case, the French Court of Cassation (Criminal Chamber) held that the alleged violation of German sovereignty by French citizens in the operation leading to the arrest of the

accused did not impede the exercise of jurisdiction over the accused; it would be for the injured State (Germany) to complain and demand reparation at the international level and not for the accused.[18] The *Cour de Sûreté*, the lower court, had actually noted that the State concerned (Germany) had not lodged any formal complaint and that ultimately, the issue was dealt with through diplomatic means.[19] In *Stocke*, the German Federal Constitutional Court (Bundesverfassungsgericht) endorsed a ruling by the Federal Court of Justice (Bundesgerichtshof) rejecting the appeal of the accused, a German national residing in France, claiming that he was the victim of an unlawful collusion between the German authorities and an informant who had deceptively brought him to German territory. The Court found that, even though there existed some decisions taking the opposite approach, according to international practice, courts would in general only refuse to assume jurisdiction in a case of a kidnapped accused if another State had protested against the kidnapping and had requested the return of the accused.[20] In *United States v. Alvarez-Machain*, the Supreme Court of the United States held that the abduction of an accused who was a Mexican citizen, though it may have been in violation of general international law, did not require the setting aside of jurisdiction even though Mexico had requested the return of the accused.[21]

22. On the other hand, there have been cases in which the exercise of jurisdiction has been declined. In *Jacob-Salomon*, an ex-German citizen was abducted on Swiss territory, taken to Germany, and held for trial on a charge of treason. The Swiss Government protested vigorously, claiming that German secret agents had been involved in the kidnapping, and sought the return of Jacob-Salomon. Though it denied any involvement of German agents in Swiss territory, the German government agreed (without arbitration) to return Jacob-Salomon to the Swiss Government.[22] More recently, in *State v. Ebrahim*, the Supreme Court of South Africa had no hesitation in setting aside

---

[18] *In Re Argoud*, Court of Cassation, Judgment of 4 June 1964 in ILR, Vol. 45, p. 97.

[19] See relevant portion of the decision of the *Cour de Sûreté*, which dates 30 December 1963, in *Journal du Droit International*, "Pratique Comparée des États", Vol. 13, 1964, p. 191.

[20] See respectively Decision of 17 July 1985, AZ: 2 BvR 1190/84, Bundesverfassungsgericht (Federal Constitutional Court), para 1 c) and Judgement of 2 August 1984, Az: 4 StR 120/83, Bundesgerichtshof (Federal Court of Justice), para 2 b). The Bundesgerichtshof had found that the jurisdiction of German courts would only have been put into question had the French Republic requested reparation for an alleged violation of the French-German extradition treaty. The case was then brought to the European Commission of Human Rights ("Commission"); see *Stocke v. Federal Republic of Germany*, Commission, Decision on Admissibility, Application No. 11755/85, 9 July 1987. The Commission declared it admissible and, in turn, referred it to the European Court of Human Rights ("ECHR"). The latter dismissed it without passing on, however, the issue here discussed. See *Stocke v.Germany*, ECHR, Judgement of 18 February 1991, para 54.

[21] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See also *United States v. Matta-Ballesteros*, 71 F.3d 754 (1997), and *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

[22] See Preuss Lawrence, "Settlement of the Jacob Kidnapping Case (Switzerland-Germany)", American Journal of International Law, 1936, Vol.30/1, pp. 123-124 and, of the same author, see also "Kidnapping of Fugitives From Justice on Foreign Territory", American Journal of International Law, 1935, Vol. 29/3, pp. 502-507.

jurisdiction over an accused kidnapped from Swaziland by the security services.[23] Similarly, in the *Bennet* case, the House of Lords granted the appeal of a New Zeland citizen, who was arrested in South Africa by the police and forcibly returned to the United Kingdom under the pretext of deporting him to New Zealand. It found that if the methods through which an accused is brought before the court were in disregard of extradition procedure, the court may stay the prosecution and order the release of the accused.[24]

23. With regard to cases concerning the same kinds of crimes as those falling within the jurisdiction of the International Tribunal, reference may be made to *Eichmann* and *Barbie*. In *Eichmann*, the Supreme Court of Israel decided to exercise jurisdiction over the accused, notwithstanding the apparent breach of Argentina's sovereignty involved in his abduction.[25] It did so mainly for two reasons. First, the accused was "a fugitive from justice" charged with "crimes of an universal character...condemned publicly by the civilized world".[26] Second, Argentina had "condoned the violation of her sovereignty and has waived her claims, including that for the return of the appellant. Any violation therefore of international law that may have been involved in this incident ha[d] thus been removed".[27] In *Barbie*, the French Court of Cassation (Criminal Chamber) asserted its jurisdiction over the accused, despite the claim that he was a victim of a disguised extradition, on the basis, *inter alia*, of the special nature of the crimes ascribed to the accused, namely, crimes against humanity.[28]

24. Although it is difficult to identify a clear pattern in this case law, and caution is needed when generalising, two principles seem to have support in State practice as evidenced by the practice of their courts. First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such ("Universally Condemned Offences"), courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction. The initial *iniuria* has in a way been cured and the risk

---

[23] *State v. Ebrahim, Supreme Court* (Appellate Division), Opinion, 16 February 1991. See text in International Legal Materials, Vol. 31, n. 4, July 1992, pp. 890-899.
[24] *Re Bennet, House of Lords*, 24 June 1993, All England Law Reports (1993) 3, pp. 138-139. See also Lowe Vaughan, "Circumventing Extradition Procedures is an Abuse of Process", Cambridge Law Journal, 1993, pp. 371-373.
[25] Fawcett J.E.S., *The Eichmann Case*, British Yearbook of International Law, Vol. 38, 1962, pp. 181-215.
[26] *People of Israel v. Eichmann*, Supreme Court of Israel, Judgement of 29 May 1962 in ILR, Vol. 36, p. 306.
[27] *Ibid.*
[28] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Court of Cassation (Criminal Chamber, Judgement of 6 October 1983 in ILR, Vol. 78, pp. 130-131. See also Benedetto Conforti, "International Law and the Role of Domestic Legal System", Martinus Nijhoff Publishers, p. 157.

of having to return the accused to the country of origin is no longer present. Drawing on these indications from national practice, the Appeals Chamber adds the following observations.

25. Universally Condemned Offences are a matter of concern to the international community as a whole.[29] There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts.

26. This legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused. The latter point will be addressed in Part (c) below. In the opinion of the Appeals Chamber, the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved. This is all the more so in cases such as this one, in which the State whose sovereignty has allegedly been breached has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction.[30] *A fortiori*, and leaving aside for the moment human rights considerations, the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organisation, or other entity, do not necessarily in themselves violate State sovereignty.

27. Therefore, even assuming that the conduct of the Accused's captors should be attributed to SFOR and that the latter is responsible for a violation of Serbia and Montenegro's sovereignty, the Appeals Chamber finds no basis, in the present case, upon which jurisdiction should not be exercised.

[29] See Higgins, Rosalyn, "Problems & Process (International Law and How We Use it)", Clarendon Press, Oxford, 1995, p. 72.

(c) Under what circumstances does a human rights violation require jurisdiction to be set aside?

28. Turning now to the issue of whether the violation of the human rights of an accused requires the setting aside of jurisdiction by the International Tribunal, the Appeals Chamber recalls first the analysis of the Trial Chamber. The Trial Chamber found that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. The Trial Chamber, however, did not exclude that jurisdiction should not be exercised in certain cases. It held that:

> in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment.[31]

29. This approach, the Appeals Chamber observes, is consistent with the dictum of the U.S. Federal Court of Appeals in *Toscanino*.[32] In that case, the Court held that "[we] view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights".[33] A Trial Chamber of the International Tribunal in *Dokmanović* also relied on this approach.[34] Along the same lines, the ICTR Appeals Chamber in *Barayagwiza* held that a court may decline to exercise jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".[35]

30. The Appeals Chamber agrees with these views. Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*,[36] certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of

---

[30] See in this regard *Ocalan v. Turkey*, ECHR, Judgement of 12 March 2003, para 97.
[31] Impugned Decision, para 114.
[32] 500 F.2d 267 (2d Cir. 1974), p. 275.
[33] *Ibid.*
[34] *Prosecutor v. Slavko Dokmanović*, Case No. IT-95-13a-PT, "Decision on the Motion for Release by the Accused Slavko Dokmanović Trial Chamber I", 22 October 1997, paras 70-75.
[35] *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, "Decision", 3 November 1999, para 74. The Appeals Chamber applied this principle in ordering the release of the accused where he was the subject of human rights violations, including an excessively long pre-trial detention and the failure to inform the accused of the charges against him. This decision was reviewed by the Appeals Chamber, at the request of the Prosecutor, in its decision of 31 March 2000. In that decision, the Appeals Chamber reversed the remedy it had previously ordered on the basis of new facts put forward by the Prosecution. These new facts presented a different picture of the violations of rights suffered by the accused and of the omissions of the Prosecutor. However, in the March 2000 decision, the Appeals Chamber "confirmed its Decision of 3 December 1999 on the basis of the facts it was founded on" (para 51).
[36] *Soering v. United Kingdom*, ECHR, Judgment of 26 June 1989, para 100.

these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.

31. In the present case, the Trial Chamber examined the facts agreed to by the parties. It established that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. The Defence has not presented to the Appeals Chamber any alternative or more comprehensive view of the facts that might show that the Trial Chamber erred in its assessment of them. Nevertheless, the Appeals Chamber, in fairness to the Accused, has *proprio motu* reviewed all the facts of this case. Upon this review, the Appeals Chamber concurs with the Trial Chamber that the circumstances of this case do not warrant, under the standard defined above, the setting aside of jurisdiction.

32. In the circumstances, the evidence does not satisfy the Appeals Chamber that the rights of the accused were egregiously violated in the process of his arrest. Therefore, the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction.

33. Thus, even assuming that the conduct of Accused's captors should have been attributed to SFOR and that the latter was as a result responsible for a breach of the rights of the Accused, the Appeals Chamber finds no basis upon which jurisdiction should not be exercised.

IV. Disposition

34. For the foregoing reasons, the Appeal is dismissed.

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

Dated this 5th of June 2003
At the Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]

ANNEX 7

Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration), Separate Opinion of Judge Shahabuddeen, Case No. ICTR-97-19-AR72, Appeals Chamber, 31 March 2000, para. 53.

ICTR-97-19-AR72
7-4-2000
(1481 - 1406)

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza

Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor

Ms Carla Del Ponte
Mr Bernard Muna
Mr Mohamed Othman
Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcussen

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the "Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 December 1999 ("the Motion for Review").

2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.

3. The Decision was stayed by Order of the Appeals Chamber[1] in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

[1] The Decision was first stayed for 7 days pending the filing of the Prosecutor's Motion by the Order of 25 November 1999. By Order of 8 December 1999 the stay was continued pending further order.

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities.[2] The Prosecutor responded to the application, asking to be heard on the same point[3], and in response to this the Appellant withdrew his request.[4]

5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as *amicus curiae* before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon.[5] This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention")[6], informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention.[7]

---

[2] *Notice of Review and Stay of Dispositive Order No.4 of the Decision of the Appeals Chamber dated 3rd November 1999*

[3] *Prosecutor's Response to Appellant's Notice of Review and Stay of Dispositive Order No. 4 of the Appeals Chamber Decision rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor*, filed on 13 November 1999.

[4] *Withdrawal of the Defence's "Notice of Review and Stay of Dispositive Order No.4 of the Decision of the Appeals Chamber dated 3rd November 1999", dated on 5th November 1999*, filed on 18 November 1999.

[5] *Request by the Government of the Republic of Rwanda for Leave to Appear as Amicus Curiae pursuant to Rule 74*, filed on 19 November 1999.

[6] *Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999 (Rule 120 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda)*

[7] *Extremely Urgent Appellant's Response to the Prosecutor "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999"*, filed on 24 November 1999.

7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day.[8] On 8 December 1999 the Appeals Chamber issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit.[9] The Appellant objected to this application.[10]

8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.[11]

9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the

---

[8] A corrigendum to the motion was filed on 20 December 1999. Corrigenda to the annexes were filed on 13 January and 7 February 2000.

[9] *Prosecutor's Motion for Extension of Time to File New Facts*, corrected on 17 February 2000. The Registrar submitted a *Memorandum to the Appeals Chamber from the Registrar, pursuant to rule 33(B), with regard to the Prosecutor's motion for extension of time limit to file new facts* on 21 February 2000, and the Prosecutor filed a *Supplement to "Prosecutor's motion for extension of time to file new facts" in response to memorandum to the Appeals Chamber from the Registrar pursuant to rule 33(B)* on 22 February 2000.

[10] *Extremely urgent appellant's argument in response to the Prosecutor's 16 February 2000 motion to submit new facts in support of motion for review or reconsideration of 3 November 1999 decision*, filed on 28 February 2000. The *Prosecutor's reply to the "extremely urgent appellant's argument in response to the Prosecutor's 16 February 2000 motion to submit new facts in support of motion for review or reconsideration of 3 November decision* was then filed on 7 March 2000.

[11] *Memorial amicus curiae of the Government of the Republic of Rwanda pursuant to Rule 74 of the Rules of Procedure and Evidence.*

Prosecutor's Motion for Review.[12] The Prosecutor filed her response to these motions on 3 February 2000.[13]

10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order[14] clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.

11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000.[15] The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review.[16] The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.[17]

12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

---

[12] *Extremely Urgent Motion of the Defence Challenging the Jurisdiction of the Appeals Chamber to Entertain the Review Proceedings; Extremely Urgent Motion of the Defence in Opposition to the Request by the Government of the Republic of Rwanda for Leave to Appear as Amicus Curiae Pursuant to Rule 74; Extremely Urgent Motion of the Defence for the Clarification and Interpretation of the Appeals Chamber Order of 8 December 1999; Extremely Urgent Motion of the Defence for the Appellant to Give Oral Testimony During the Hearing of the Review on Facts of his Illegal Detention as Proved in the Decision of 3rd November 1999.*

[13] *The Prosecutor's Consolidated Response to Four Defence Motins Filed on 10 December 1999, Following the Order of the Appeals Chamber dated 8 December 1999.*

[14] Filed on 21 December 1999

[15] *Decision on Review in Terms of Article 19(E) of the Directive on Assignment of Defence Counsel*

[16] Requête en extreme urgence en vue du retrait du conseil J.P. Lumumba Nyaberi de la défense de Jean-Bosco Bnarayagwiza (art.20.4,d du Statut; art.45, 45bis, 73, 107 du Règlement), filed on 26 January 2000.

[17] *Appellants' response to Prosecutor's motion for review or reconsideration of the Appeals Chamber decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. the Prosecutor and request for stay of execution,* and *Prosecutor's reply to the appellant's response to the Prosecutor's motion for review or reconsideration of the Appeals Chamber decision rendered on 3 November 2999 in Jean-Bosco Barayagwiza v. the Prosecutor and request for stay of execution,* respectively.

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the tine of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review[18]. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts[19]. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision[20]. The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.[21]

14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.[22]

15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals

---

[18] *Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, filed on 1 December 1999 at § 1.

[19] *Brief in Support of the Prosecutor's Motion for Review of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor Following the Orders of the Appeals Chamber dated 25 November 1999*, at §§ 45 and 46.

[20] *Ibid.*, at § 48.

[21] *Ibid.*, at § 46.

[22] Transcript of Hearing in Arusha on 22 February 2000 ("Transcript") at pages 248 *et seq.* See also, *Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution* ("Reply"), filed on 21 February 2000, at §§ 5-15

Chamber.[23] The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."[24]

16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber,[25] and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision[26]. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review.[27] The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.[28]

17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor.[29] New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.

18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly.[30] She

---

[23] *Supra* note 19 at § 49.
[24] Transcript at page 253-256.
[25] The Prosecutor alleges that these new facts arose as a result of questions asked by the Appeals Chamber in its Scheduling Order of 3 June 1999. See supra note 19 at §§ 29, 50-54, 147 and158.
[26] *Ibid.*, §§ 54-55.
[27] *Ibid.*, § 56.
[28] *Ibid.*, at § 62.
[29] *Ibid.*, §§ 57-62. In making this submission, the Prosecutor refers to §§ 75, 76, 86, 98-100 and 106 of the Decision.
[30] *Ibid.*, §§ 63- 65.

asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate.[31] In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration.[32] The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.[33]

19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.[34]

20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.[35]

21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40*bis* through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in

[31] *Ibid.*, § 66.
[32] *Ibid.*, §§ 70-73.
[33] *Ibid.*, § 85.
[34] *Ibid.*, §§ 74-80.
[35] *Ibid.*, § 84.

the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies.[36]

22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits.[37] She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole.[38]

23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.[39]

24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".[40]

25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.[41]

26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests

---

[36] *Ibid.*, §§ 86,87.
[37] *Ibid.*, § 146.
[38] *Ibid.*, § 181.
[39] *Ibid.*, §§ 147-171.
[40] Transcript at pages 27 and 28.
[41] *Ibid.*, at page 122 and *supra* note 19 at § 184.

are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor[42].

B. The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person"[43].

28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law. [44]

29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.[45]

30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence.[46]

---

[42] *Supra* note 18 at § 7.
[43] *Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution* ("Appellant's Response") filed on 17th February 2000, at §§ 1-12. Transcript at page 129 *et seq.* and pages 227-230.
[44] Appellant's Response at §§ 13 – 16. Transcript at page 139 *et seq.*
[45] Appellant's Response at.§§ 17-24.
[46] *Ibid.*, § 28.

31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Decision was correct in its findings and is fully supported by the Record.

32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.[47]

33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".[48]

[47] *Ibid.*, §§ 45-49.
[48] *Ibid.*, §§ 51-53.

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999."[49] Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review.[50] The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.[51]

35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.

36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

---

[49] Transcript, pages 26-28.

[50] *Ibid.*, pages 290 and 291 : The Attorney General representing the government of Rwanda referred to the "terrible consequences which a decision to release the appellant without a prospect of prosecution by this Tribunal or some other jurisdiction will give rise to. Such a decision will encourage impunity and hamper the efforts of Rwanda to maintain peace and stability and promote unity and reconciliation. A decision of this nature will cost the Tribunal heavily in terms of the support and goodwill of the people of Rwanda."

[51] Rule 7*bis* of the Rules. See also: Prosecutor v. Tihomir Blaškić, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case no. IT-95-14-AR108 bis, 29 October 1997 at §§ 26 and 33; Prosecutor v. Dusko Tadic, *Judgement*, Case no. IT-94-1-A, 15 July 1999 at §51.

A. REVIEW

1. General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.

38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence [52]. Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts"[53]. Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "[54]

39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a

---

[52] *Statute of the International Court of Justice as annexed to the Charter of the United Nations*, 26th June 1945, I.C.J. Acts and Documents No. 5 ("ICJ Statute"). See *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/LibyanArab Jamahiriya)* 1985 (ICJ) Rep 192.

[53] 22 November 1984, 24 ILM 435 at 436.

[54] *Report of the International Law Commission on the work of its 46th session*. Official Records, 49th Session. Supplement number No.10 (A/49/10) at page 128. It should also be noted that the International Covenant on Civil and Political Rights (ICCPR) (1966) also refers to the discovery of "new or newly discovered facts" in Article 14. However it relates primarily to the right to compensation in the event that these new facts (together with other criteria) mean that a conviction is reversed or an accused pardoned.

court will undertake a review can differ from that provided in the legislation for this Tribunal[55].

40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.

41. Returning to the procedure in hand, it is clear from the Statute and the Rules[56] that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.

42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact [57]. In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

> Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision".[58]

Further, the Appeals Chamber stated that-

---

[55] E.g. in Belgium Article 443 *et seq.* of the Code d'Instruction Criminelle provides for "Demandes en Révision"; In Sweden, Chapter 58 of Part 7 of the Swedish Code of Judicial Procedure (which came into force on 1 January 1948, provision cited as per amendments of the Code as of 1 January 1999) provides for the right of review; In France, Article 622 *et seq.* of the Code de Procédure Pénale (as amended by the law of 23 June 1989) provides for "Démandes en Révision"; In Germany, Section 359 *et seq.* of the German Code of Criminal Procedure 1987 (as amended) provides for "re-opening"; In Italy, Articles 629-647 of the *Codice de Procedura Penale* provides for review; and in Spain Article 954 of *La Ley de Enjuiciamiento Criminal* provides for "Revision".

[56] Article 25, Rules 120 and 121.

[57] Prosecutor v. Duško Tadić, *Decision on Appellant's Motion for the extension of the time-limit and admission of additional evidence*, Case no, IT-94-1-A, 15th October 1998.

[58] *Ibid.*, at 30.

> a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.[59]

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed, in *Prosecutor v. Dražen Erdemović*,[60] the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadić* in consideration of the matter before it now.

44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

> Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.[61]

---

[59] *Ibid.*, at 32.
[60] *Judgement*, Case no IT-96-22-A, 7 October 1997 at § 15.
[61] Transcript of the hearing of 22 February 2000 ("transcript"), p.134.

As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was common ground that the Prosecutor could appeal against a decision of acquittal, which would not be the case if the interpretation submitted by the Appellant was accepted.

47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals [62] demonstrate that a right of appeal is also available in *inter alia* the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction.[63] Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.

48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the " convicted person" in the wording of

---

[62] i.e. the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).
[63] Rule 72(D) of the Rules. See also the additional provisions for appeal provided in Rules 65(D), 77D and 91(C) of the Rules, and in Rules 72, 73, 77(J), 65(D), 91(C) of the Rules of Procedure and Evidence of the ICTY, as pointed out in the Reply at §§ 11.

the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.

49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120[64]. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.

50. The Appeals Chamber therefore has jurisdiction to review its Decision pursuant to Article 25 of the Statute and to Rule 120.

3. Merits

51. With respect to this Motion for Review, the Appeals Chamber begins by confirming its Decision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision. Pursuant to Article 25 of the Statute, in such an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant case before the Chamber.

52. The Appeals Chamber confirms that in considering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new facts which were not known at the time of the proceedings before the Chamber, and which could have been a decisive factor in the decision, pursuant to Article 25 of the Statute. It then considers the condition introduced by Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.

---

[64] In this respect, the Appeals Chamber does not agree with the *Decision on the Alternative Request for Renewed Consideration of Delalić's Motion for an Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina* (IT-96-

53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996.[65] It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed[66] at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent »[67]. The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

> l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui. [68]

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

21-T, 22 June 1998), which suggests that interlocutory decisions can be subject to review. The Appeals Chamber confirms that the law is as stated above.

[65] Annexes 8, 9 and 11 to the Motion for Review.

[66] On page 3 of the transcript of 3 May, the Public Prosecutor explains that he is waiting for "the Tribunal to send us the relevant documentation (« *que le Tribunal International nous procure les documents* »).

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 – 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

1. The report by Judge Mballe of the Supreme Court of Cameroon.[69] In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States.[70] Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997

---

[67] Page 4 of the transcript.
[68] Decision, §85.
[69] Annexe N°1 de la Demande en révision.
[70] Filed on 10 December 1999.

the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant"[71], as there was no proof to the contrary. The above information however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

> It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.[72]

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged

[71] Decision, §59.
[72] Decision, §96 (emphasis added).

additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000[73], the Appeals Chamber decides to accept this additional information.

60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.

61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

> There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.[74]

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial delay and that the Appellant's rights have still been violated. However, the Appeals Chamber finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

---

[73] The President of the Appeals Chamber authorised the filing of this document during the hearing of 22 February, see page 57 of the transcript.
[74] Decision, §69.

(d) Were the new facts known to the Prosecutor?

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known **to the moving party** at the time of the proceedings before a Chamber, **and could not have been discovered through the exercise of due diligence**" (emphasis added).

64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."[75]

65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.

66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse"[76].

---

[75] Decision, §101.

[76] Berggren v Mutual Life Insurance Co., 231 Mass. at 177. The full passage reads:
"The mischief naturally flowing from retrials based upon the discovery of alleged new evidence leads to the establishment of a somewhat stringent practice against granting such motions unless upon a survey of the

67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin.*[77] In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

> I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information which is now given to me ...would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of *McMartin v The Queen*, the court held, *per* Ritchie J, that:

> In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.[78]

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts

---

whole case a miscarriage of justice is likely to result if a new trial is denied. This is the fundamental test, in aid of which most if not all the rules upon the matter from time to time alluded to have been formulated. Ease in obtaining new trials would offer temptations to the securing of fresh evidence to supply former deficiencies. But courts cannot close their eyes to injustice on account of facility of abuse'."

[77] Court of Appeal (Civil Division) 6 May 1964.

presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.

70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements:

> ... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.[79]

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that consequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

---

[78] (1964) 1 CCC 142, 46 DLR (2d) 372.
[79] Decision, §106.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejects the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

1) ALLOWS the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;

2) REJECTS the application by the Appellant to be released;

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:

   a) If the Appellant is found not guilty, he shall receive financial compensation;

   b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.

Judge Vohrah and Judge Nieto-Navia append Declarations to this Decision.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

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

_____s/._____	_____s/._____	_____s/._____
Claude Jorda, Presiding	Lal Chand Vohrah	Mohamed Shahabuddeen

_____s/._____	_____s/._____
Rafael Nieto-Navia	Fausto Pocar

Dated this thirty-first day of March 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]

DECLARATION OF JUDGE LAL CHAND VOHRAH

1. I would like to reiterate that I fully agree with the conclusions of the Appeals Chamber in the present decision and with the disposition that follows this Review. This agreement, however, calls for a few observations on my part. In the original decision the Appeals Chamber invoked the abuse of process doctrine. In the light of the facts which where then before it, the Chamber found that to proceed with the trial of the Appellant in the face of the egregious violations of his rights would be unjust to him and injurious to the integrity of the judicial process of the Tribunal. Consequently, the Appeals Chamber decided that the proceedings against the Appellant should be discontinued.

2. In its previous decision, the Appeals Chamber proceeded on the basis of, *inter alia*, its finding that the Prosecutor was responsible for the delays of which the Appellant complained. In this Review a different picture has been shown by the disclosure of new facts which now diminish substantially the blameworthiness attributed to the Prosecutor on the ground of lack of diligence, and the seriousness of the violations suffered by the Appellant. Had the Appeals Chamber been apprised of these facts on appeal, the original decision would have been different and the abuse of process doctrine would not have been called in aid and applied with all the vigour that was implicit in the "with prejudice" order that was made.

3. I must say that I have had the benefit of reading the Declaration in draft of my brother Judge Nieto-Navia and would like to state that I subscribe fully to the views he has expressed therein on the overriding principle relating to the independence of the judiciary (in the light of the considerations which the Prosecutor and the Representative of the Government of Rwanda as amicus curiae have, perhaps unwittingly, asked the Appeals Chamber to take into account), and on the principles of human rights.

4. In conclusion, I am satisfied that there are new facts which now require that the previous decision be modified in the way stated in the disposition of the present decision.

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

S/.

Lal Chand Vohrah

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

1. It is necessary to consider the role of the Tribunal in the context of its mandate in Rwanda as dispenser of justice and the effect, if any, of politics on its work in prosecuting those responsible for genocide and other serious violations of international humanitarian law.

2. This issue was raised specifically during the oral hearing on this matter, in Arusha, on 22 February 2000 by the Chief Prosecutor. It is expedient to set out the relevant section:

> "Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed. It was the trial of Baglishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. Fortunately, things have improved currently, and we again enjoy the support of the government. Why? Because we were able to show our good will, our willingness to continue with our work based on the mandate entrusted to us. However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, judex naturalis. Otherwise I am afraid, as we say in Italian, possiamo chiudere la baracca. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner"[1]

3. The Prosecutor maintained that after the Decision in the instant case was rendered by the Appeals Chamber on 3 November 1999 (hereinafter "the Decision"), justice before the International Criminal Tribunal for Rwanda was effectively suspended as a result of action taken by the Rwandan government, who reacted essentially to what they viewed as an adverse decision of the Appeals Chamber.

[1] Transcript of the hearing on 22 February 2000, (the 'Transcript'), pp. 26-28.

4. It would be naïve to assert that the Tribunal does not depend on the co-operation of States for it to fulfil its duties. Indeed the Appeals Chamber itself has held that

> "The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal."[2]

Without State co-operation, the work of the Tribunal would be rendered impossible.

5. In order to cater for this, and aware of the need to ensure effective and ongoing co-operation, Article 28 of the Statute compels States to co-operate with the Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law"[3]. This is a general obligation incumbent on all States but the Rwandan government is specially obliged, because the Tribunal was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda"[4]. In addition, being the territory in which most of the crimes alleged took place, the co-operation of the Rwandan government with the Tribunal in fulfilment of their obligations as prescribed by Article 28, is paramount.

6. This obligation of the Rwandan government is absolute. It is an obligation which cannot be overridden in particular circumstances by considerations of convenience or politics.

7. In my view, the Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co-operation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise

---

[2] Prosecutor v. Tihomir Blaškić, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case no. IT-95-14-*AR108bis*, 29 October 1997, §26.

[3] Article 28.1. *Security Council Resolution 955 (1994) (S/RES/955) (1994)* § 2, also states that "all states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chaber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures."

its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being exerted by an angry government.

8. Faced with non co-operation by a State and having exhausted the facilities available to it to ensure co-operation, a clear mechanism has been provided in the Statute and Rules[5] whereby the Tribunal may make a finding concerning the particular State's failure to observe the provisions of the Statute or the Rules and thereafter may report this finding to the Security Council.[6] It then falls to the Security Council to determine appropriate action to take against the State in question.[7] The involvement of the Tribunal will cease at the point of referral to the Security Council and indeed its position is safeguarded further by the stipulation, as has been held, that "the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding."[8]. This mechanism ensures that clear separation in roles is maintained and more importantly that the independence of the Tribunal cannot be called into question. Its mandate is the prosecution of those responsible for serious violations of international humanitarian law[9] and it must do so in an impartial and unbiased fashion. It must not qualify this independence under any circumstances.

9. The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch." [10] It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence.

---

[4] *Security Council Resolution 955 (1994) (S/RES/955)(1994)* § 1.
[5] *E.g.*, Rule 54 includes the power to issue orders, summonses, subpoenas, warrants and transfer orders. *See* Prosecutor v. Duško Tadić, *Judgement*, Case no. IT-94-1-A, 15 July 1999, § 52.
[6] Rule *7bis* of the Rules. *Supra* note 2 at 26 and 33. Also, Prosecutor v. Duško Tadić, *Judgement*, Case no. IT-94-1-A, 15 July 1999 § 51.
[7] Such failure by States to comply with their obligations under the Statute, have been referred to the Security Council on several occasions to date *(Supra.* note 2, § 34).
[8] *Supra.* note 2 § 36.
[9] Article 1 of the Statute.
[10] *Blacks Law Dictionary*, 6th edition, West Publishing Co, 1990, p. 1365.

10. As a result, the judiciary holds a privileged position in national jurisdictions and is subjected to unceasing public scrutiny of its activities. This however is accepted as being a necessary component of its existence so that public confidence in the system can be maintained.

11. In consideration of this issue, I note the importance accorded to the principle by the United Nations, in appointing a Special Rapporteur on the Independence of Judges and Lawyers and by the General Assembly, in the promulgation of the 1985 UN Basic Principles on the Independence of the Judiciary.[11] The Principles as a whole are of the utmost importance, but it serves now to highlight the following provisions:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary;
>
> 2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[12]"

The principle of the independence of the judiciary is overriding and should at all times take precedence faced with any conflict, political pressures or interference. The proposition put forward by the Prosecutor that political considerations can play a role in the Appeals Chamber's decision making and actions is not acceptable.

12. Indeed it is important to note the remark made by Robert H. Jackson, Chief of Counsel for the United States at the International Military Tribunal, sitting at Nuremberg, in his opening speech before the Tribunal on 21 November 1945:

---

[11] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 August - 6 September 1985: Report prepared by the Secretariat Chap.IV, sect. B, as referred to in GA Resolution A/RES/40/146 of 13 December 1985 *"Human Rights in the Administration of Justice"*. The Resolution was also pointed out by the Appellant in the Oral Hearing on 22 February 2000 and recorded at page 213 of the Transcript.

[12] *Ibid.*, § 1, 2. Note also, the UN 1990 Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba from 27 August to 7 September 1990. The General Assembly has welcomed these principles and invites governments to respect them and to take them into account within the framework of their national legislation and practice (A/RES/45/166 of 18 December 1990).

> "The United States believed that the law has long afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons"[13]

13. Political reasons are not the right reasons. The Tribunal is endowed with a Statute, which ensures that trials take place by means of a transparent process, wherein widely accepted international standards of criminal law are applied. Central to this process is the maintenance of human rights standards of the highest level, to ensure that the basic Rule of Law is upheld.

14. The basic human right of an accused to be tried before an independent and impartial tribunal is recognised also in the major human rights treaties and is one to which the Tribunal accords the utmost importance.[14] Indeed the Appeals Chamber in a case before the ICTY, held in consideration of its function that:

> "For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments"[15]

15. It must not be forgotten that the Rwandan government itself has recognised the importance of impartial justice. In requesting the establishment of a Tribunal by the international community, the Rwandan government stated that it supported an international tribunal because of its desire to avoid "any suspicion of its wanting to organise speedy vengeful justice".[16] Accordingly, this Tribunal's fundamental aim is to vindicate the highest standards of international criminal justice, in providing an impartial and equitable system of justice.

---

[13] *The Trial of German Major War Criminals by the International Military Tribunal sitting at Nuremberg Germany (commencing 20 November 1945) Opening Speeches of the Chief Prosecutors.* Published under the Authority of H.M. Attorney-General By His Majesty's Stationery Office, London: 1946. pp. 36 and 37.

[14] Article 14 (1) of the *International Covenant of Civil and Political Rights,1966* ("ICCPR") provides, *inter alia,* that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Similarly, Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ("ECHR"), protects the right to a fair trial and requires, *inter alia,* that cases be heard by an "independent and impartial tribunal established by law," and Article 8(1) of the *American Convention on Human Rights* (1969) ("ACHR") provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law."

[15] Prosecutor v. Duško Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case no. IT-94-1-AR72, 2 October 1995, § 45.

[16] UN Doc. S/PV.3453 (1994) at 14.

16. But now the government of Rwanda has suggested that the Tribunal should convict all the indictees who come before it. It is wrong. The accused can be acquitted if the Trial Chamber is not satisfied that guilt has been proven beyond a reasonable doubt.[17] Alternatively, the accused can be released on procedural grounds, as was the case in the Decision. In the application of impartial justice the role of the Tribunal is not simply to convict all those who appear before it, but to consider a case upholding the fundamental principles of human rights.

17. By virtue of Resolution 955 of 1994, the Security Council stated:

> "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace",[18]

This was subsequently reiterated by Resolution 1165 of 1998, when the Security Council stated that it "remain[ed] convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region"[19]. This aim can only be achieved by an independent Tribunal, mindful of the task entrusted to it by the international community.

18. Both Tribunals, ICTY and ICTR, find themselves in the midst of very emotive atmospheres and are charged with the duty to maintain their independence and transparency, as expected by the international community, preserving the norms of international human rights. The international community needs to be sure that justice is being served but that it is being served through the application of their Rules and Statutes, which are applied in a consistent and unbiased manner. I recall the words of the Zimbabwean Court in the Mlambo case, as cited in the Decision:

> "The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are

[17] Rule 87(A) of the Rules of Procedure and Evidence.
[18] *Supra* note 4.
[19] *Security Council Resolution 1165 (1998) (S/RES/1165) (1998).*

> charged with the commission of serious crimes. Yet that trial can only be undertaken if the guarantee under.... the Constitution has not been infringed."[20]

Difficult as this may be for some to understand, these are the principles which govern proceedings before this Tribunal at all times, even if application of these principles on occasion renders results which for some, are hard to swallow.

. . .

19. I wish to draw attention to the matter of *res judicata,* which was referred to by both the Appellant and the Prosecutor in their written briefs[21]. I wish to briefly discuss the applicability of this principle to the case in hand, noting that the Appeals Chamber has now reviewed its Decision.

20. The principle of *res judicata* is well settled in international law as being one of those "general principles of law recognized by civilised nations", referred to in Article 38 of the Statutes of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ").[22] As such, it is a principle which should be applied by the Tribunal. The principle can be enunciated as meaning that, once a case has been decided by a final and valid judgement rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law[23].

---

[20] Jean-Bosco Barayagwiza v. The Prosecutor, *Decision*, Case no. ICTR-97-19-AR72, 3 November 1999 (the 'Decision'), § 111.

[21] *Brief in Support of the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor following the Orders of the Appeals Chamber Dated 25 November 1999*, § 74. *Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, § 17. *Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, § 21.

[22] *See* Judge Anzilotti's dissenting opinion in the *Chorzow Factory Case* (Interpretation), PCIJ Series A (1927), 13 at 27. *See* also PCIJ, Advisory Committee of Jurists: *Procès-verbaux of the Proceedings of the Committee, June 16-July 24, 1920, with Annexes*, The Hague, 1920, pp. 315-316.

[23] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports 1954, p. 47.

21. The rationale behind the principle is that security is required in juridical relations. The determinative and obligatory character of a judgement prevents the parties from contemplating the possibility of not complying with the decision or alternatively from seeking the same or another court to decide in a different manner. At the same time it is understood that only final judgements are considered *res judicata*, as judgements of lower courts can generally take advantage of appellate proceedings.

22. The impact of the Appeals Chamber Decision is twofold. On the one hand the Appeals Chamber decided to allow an appeal[24] against a decision of Trial Chamber II[25] which dismissed a preliminary objection by the accused based on lack of personal jurisdiction, on the grounds *inter alia*, that the fundamental human rights of the accused to a fair and expeditious trial were violated as a result of his arrest and long detention in Cameroon before being transferred to the U.N. Detention Facilities in Arusha. On the other hand, the Decision "DISMISSE[D] THE INDICTMENT with prejudice to the Prosecutor."[26] This rendered the Decision final and definitive, as stated by the Appeals Chamber in its decision today.[27]

23. The International Court of Justice has held:

> "It is contended that the question of the Applicants' legal right or interest was settled by the [1962][28] Judgement and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, --whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to its merits, whether or not it has in fact been dealt with in connection with the preliminary objection".[29]

24. In domestic jurisdictions a preliminary objection on lack of competence, raised by a party before a court does not prevent the matter being brought before the competent court. However, some decisions on preliminary points which are primarily within the competence

---

[24] *Supra* note 20, § 113(1).
[25] Prosecutor v. Barayagwiza, *Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect*, Case No. ICTR-97-19-1, 17 November 1998, and Prosecutor v. Barayagwiza, *Corrigendum*, Case No. ICTR-97-19-1, 24 November 1998.
[26] *Supra* note 20, § 113(2).
[27] § 49.
[28] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections*, ICJ Reports. 1962, p. 319.
[29] *South West Africa, Second phase, Judgement*, ICJ Reports. 1966, p. 6 at § 59.

of the court acquire the force of *res judicata* on the question decided and the court is bound by its own decisions.[30]

25. In this Tribunal, Article 25 of the Statute opens up the possibility for review of "final" decisions, if certain criteria are satisfied. The Appeals Chamber has clearly explained this in its decision today. It is clear to me that if the Statute provides for a "final" decision to be reviewed, when a Chamber acts pursuant to this provision, the principle of *res judicata* does not apply.

26. Some common law systems consider that dismissal of an indictment with prejudice bars the right to bring an action again on the same issue and is, therefore, *res judicata*.[31] The instant case has not been litigated on the merits. What seems to be "final" is the issue of the prejudice to the Prosecutor, because the Prosecutor was barred from bringing the case before the Tribunal again. As I understood it, the Decision considered the finding of "prejudice to the Prosecutor" as a form of punishment due to the violations of fundamental human rights committed by the Prosecutor against the Appellant.[32]

27. If the new facts brought before the Appeals Chamber under Article 25 mean that the Prosecutor is responsible for less extensive violations (as accepted by the Appeals Chamber today),[33] she cannot be punished because of them, the dismissal cannot be with prejudice to her and hence the Decision must be amended. That is what we are deciding today.

28. Human rights treaties provide that when a state[34] violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such

---

[30] The distinction in the civil law systems between *peremptory* (which put an end to the procedure) and *dilatory* (which simply delay the procedure) preliminary objections is very useful.

[31] This concept is unknown to civil law systems.

[32] *Supra* note 20, § 76.

[33] § 72.

[34] In these treaties, the "subject-parties" are always States. *See* Article 2.1 ICCPR; Article 1 ECHR; Article 1.1 ACHR. The Inter-American Court of Human Rights held that "as far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of States and not to that of individuals" (*International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, § 56.

violations and in certain circumstances to provide for fair compensation to the injured party.[35]

29. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights. As it is impossible to turn back the clock, I think that the remedy decided by the Appeals Chamber fulfills the international requirements.

* * *

30. Finally, I wish to emphasise that the Appeals Chamber made its Decision, based on certain facts which were presented before it at that time. The new facts which are before the Appeals Chamber now, change its position. If these facts which the Appeals Chamber has concluded to be new facts and which are discussed in today's decision, had been before the Appeals Chamber when considering the Decision, it is my opinion that the Appeals Chamber would have reached a different decision at that time.

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

s/.
Rafael Nieto-Navia

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[35] Article 50 ECHR; Article 63.1, ACHR. International jurisprudence has considered a "general concept of law" that violations of international obligations which cause harm deserve adequate reparation (*Factory at Chorzów, Jurisdiction*, Judgement No. 8, 1927, P.C.I.J., Series A, No. 9, p.21; *Factory at Chorzów, Merits*, Judgement No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. This is an important case: it is not every day that a court overturns its previous decision to liberate an indicted person. This is what happens now. New facts justify and require that result. But possible implications for the working of the infant criminal justice system of the international community need to be borne in mind. Because of this, and also because I agreed with the previous decision, I believe that I should explain why I support the present decision to cancel out the principal effect of the former.

(i) The limits of the present hearing

2. Except on one point, I was not able to agree with the grounds on which the previous decision rested. However, the points on which I differed are not now open for discussion. This is because the present motion of the Prosecutor has to be dealt with by way of review and not by way of reconsideration. Under review, the motion has to be approached on the footing that the earlier findings of the Appeals Chamber stand, save to the extent to which it can be seen that those findings would themselves have been different had certain new facts been available to the Appeals Chamber when the original decision was made; under that procedure, it is not therefore possible to challenge the previous holdings of the Appeals Chamber as incorrect on the basis on which they were made. By contrast, under reconsideration, the appeal would have been reopened, with the result that that kind of challenge would have been possible, as I apprehend is desired by the prosecution. To cover all the requests made by the prosecution, it is thus necessary to say a word on its motion for reconsideration. I agree that the motion should not be granted. These are my reasons:

3. Decisions rendered within the International Criminal Tribunal for the former Yugoslavia ("ICTY") on the competence of a Chamber to reconsider a decided point vary from the exercise of a relatively free power of reconsideration to a denial of any such power based on the statement, made in *Kordić,* "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International

Tribunal".[1] Where the decisions suggest a relatively free power of reconsideration, they concern something in the nature of an operationally passing position taken in the course of continuing proceedings; in such situations the Chamber remains seised of the matter and competent, not acting capriciously but observing due caution, to revise its position on the way to rendering the ultimate decision. In situations of more lasting consequence, it appears to me that the absence of rules does not conclude the issue as to how a judicial body should behave where complaint is made that its previous decision was fundamentally flawed, and more particularly where that body is a court of last resort, as is the Appeals Chamber. Not surprisingly, in *^elebići* the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal".[2] The first branch of that statement is important, including its non-reproduction of the *Kordić* words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in "particular circumstances".

4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define "particular circumstances" which might justify reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently *res judicata*, is void, and therefore non-existent

---

[1] *Kordić*, IT-95-14/2-PT, 15 February 1999. And see similarly *Kovačević*, IT-97-24-PT, 30 June 1998.
[2] Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, IT-96-21-A, 1 June 1999.

in law, for the reason that a procedural irregularity has caused a failure of natural justice.[3] An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v. Broome (No.2)* [1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.[4]

5. I understand this to mean that, certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been "subjected to an unfair procedure". I see no reason why the principle involved does not apply to criminal matters if a useful purpose can be served, particularly where, as here, the decision in question has not been acted upon.

6. I have referred to unfairness in procedure because it appears to me that this is the criterion which is attracted by the posture of the Prosecutor's case. Was there such unfairness?

7. Whether a party was or was not "subjected to an unfair procedure" is a matter of substance, not technicality. If the party did not understand that an issue would be considered (which is the Prosecutor's contention), that could found a claim that it was disadvantaged. But, provided that that was understood and that there was opportunity to

---

[3] See, in English law, *Halsbury's Laws of England*, 4th edn., vol. 26, pp 279-280, para. 556, where mention is made of other situations in which a decision may be set aside and the proceedings reopened.

respond, I do not see that the procedure was unfair merely because a Chamber considered an issue not raised by the parties. The interests involved are not merely those of the parties; certainly, they are not interests submitted by them to adjudication on a consensual jurisdictional basis; they include the interests of the international community and are intended to be considered by a court exercising compulsory jurisdiction. In *Erdemović*[5] the Appeals Chamber raised, considered and decided issues not presented by the parties, observing that there was "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties".[6]

8. Further, a Chamber need not echo arguments addressed to it; its reasoning may be its own.[7] When the present matter is examined, all that appears is that the Appeals Chamber in some cases used arguments other than those presented to it. The basic issue was one on which the parties had an opportunity to present their positions, namely, whether the rights of the appellant had been violated by undue delay so as to lead to lack of jurisdiction. For the reasons given below, I am satisfied that there is not any substance in the contention of the prosecution that it had no notice that certain questions would be determined. It is more to the point to say that the prosecution did not avail itself of opportunities to present its position on certain matters; in particular, it did not assist either the Trial Chamber or the Appeals Chamber with relevant material at the time when that assistance should have been given.

---

[4] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*, [1999] 1 All ER 577, HL, at pp. 585-586, per Lord Browne-Wilkinson.
[5] IT-96-22-A, 7 October 1997, para. 16.
[6] With respect, this can benefit from qualification in the case of the International Court of Justice. That court would be acting *ultra petita* if it decided issues (as distinguished from arguments concerning an issue) not presented by the parties, since the jurisdiction is consensual. See Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (Cambridge, 1986), p. 531.

9. In short, there was no unfairness in procedure in this case. Accordingly, the previous decision of the Appeals Chamber cannot be set aside and the appeal reopened. It is thus not possible to accede to the Prosecutor's proposition, among others, that that decision was wrong when made and should for that reason be now changed.[8]

10. For the reasons given in today's judgment, the procedure of review is nevertheless available.[9] As mentioned above, the possibility of revision which this opens up is however limited to consideration of the question whether the same decision would have been rendered if certain new facts had been at the disposal of the Appeals Chamber, and, if not, what is the decision which would then have been given.

(ii) The Prosecutor's complaint that she had no notice of the intention of the Appeals Chamber to deal with the question of the legality of the detention between transfer and initial appearance

11. Before moving on, I shall pause over the question, alluded to above, as to whether the prosecution availed itself of opportunities to present its position on certain points. The question may be considered illustratively in relation to the issue of detention between the appellant's transfer from Cameroon to the Tribunal's detention unit in Arusha and his initial appearance before a Trial Chamber, extending from 19 November 1997 to 23 February 1998. The prosecution takes the position, which it stresses, that it had no opportunity to address this issue because it did not know that the Appeals Chamber would be dealing with it. That, if correct, is a sufficiently weighty matter to justify

---

[7] See the *"Lotus", (1927), PCIJ, Series A, No. 10*, p. 31; *Fisheries, ICJ Reports 1951*, p. 116, at p. 126; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, ICJ Reports 1974*, p. 3, at pp. 9-10, para. 17. As to a distinction between issues and arguments, see Fitzmaurice, *supra*.
[8] Transcript, Appeals Chamber, 22 February 2000, p. 13.
[9] See also *Zejnil Delalić*, IT-96-21-T, 22 June 1998, paras. 38-40, which would seem, however, to apply the idea of review to an ordinary interlocutory decision even if it does not put an end to the case.

reconsideration, as it would show that the prosecution was subjected to an unfair procedure in the Appeals Chamber. So it should be examined.

12. The prosecution submitted that the issue of delay between transfer and initial appearance was not argued by the appellant in the course of the oral proceedings in the Trial Chamber and was not included in his grounds of appeal. Although, as will be seen, the appellant did include a claim on the point in his motion, I had earlier made a similar observation, noting that, in the Trial Chamber, "no issue was presented as to delay between transfer and initial appearance",[10] that the "Trial Chamber was not given any reason to believe that there was such an issue", and, in respect of the appeal proceedings, that it "does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance".[11] But it seems to me that, apart from the action of the appellant, account has to be taken of the action of the Appeals Chamber and that the position changed with the issuing by the latter of its scheduling order of 3 June 1999; that order, referred to below, clearly raised the matter. After the order was made, the appellant went back to the claim which he had originally raised; equally, the prosecution gave its reaction. Thus, in the event, the Appeals Chamber did not pass on the matter without affording an opportunity to the Prosecutor to address the point.

13. To fill out this brief picture, it is right to consider the factual basis of the proposition that the appellant did include a claim on the point in his motion. As I noted

---

[10] Possibly, there was a misunderstanding as to the need for specific argument in the Trial Chamber, for the Presiding Judge said, as he properly could, "We have read the motion and the documents that have been attached to it so we have a general idea of what it is, so, counsel, if you may introduce your motion to highlight what you consider to be important issues that should get the Trial Chamber's attention". (See transcript, Trial Chamber, 11 September 1998, p. 4, Presiding Judge Sekule). Thus defence counsel was not expected to deal with each and every aspect of his written motion. He contended himself with speaking merely of "continued provisional detention" (ibid., pp. 12 and 14), and with referring to the "summary on the detention times" as set out in annexure DM2 to his motion and as explained below (ibid., p. 39).

[11] Separate opinion, 3 November 1999, p. 3, cited in part in the Brief in Support of the Prosecutor's Motion for Review, 1 December 1999, p. 8, para. 51.

at page 1 of a separate opinion appended to the decision of the Appeals Chamber of 3 November 1999, in paragraphs 2 and 9 of the motion the appellant complained of "continued provisional detention". Viewing the time when that complaint was made (three months after the transfer), he was thus also complaining of the detention following on his transfer, inclusive of delay between transfer and initial appearance. In fact, as I also pointed out, annexure DM2 to his motion spoke of "**98 days** of detention after transfer and before initial appearance" (original emphasis, but actually 96 days). Further, in paragraph 11 of his brief in support of that motion he referred to Articles 7, 8, 9 and 10 of the Universal Declaration of Human Rights, relating *inter alia* to protection of the law and to freedom from arbitrary arrest and detention. More particularly, he also referred to Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), stating that this required that "the accused should be brought before the court without delay". That was obviously a reference to paragraph 3 of Article 9 of the ICCPR which stipulates that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". It follows that, in his motion, the appellant did make a complaint on the matter to the Trial Chamber.

14. Now, how did the prosecution react to the appellant's complaint? The complaint having been made in the motion, and the motion being heard seven months after it was brought, it seems to me that, by the time when the motion was heard, the prosecution should have been in possession of all material relevant to the issue whether there was undue delay between transfer and initial appearance; it also had an opportunity at that stage to present all of that material together with supporting arguments. The record shows that it did not do so.

15. In the Trial Chamber, the prosecution did not file a response to the appellant's motion in which the appellant complained of delay between transfer and initial appearance. Indeed, some part of the oral hearing before the Trial Chamber on 11 September 1998 was taken up with this very fact - that the prosecution had not submitted a reply, with the consequential difficulty, about which the appellant

remonstrated, that he did not know exactly what issues the prosecution intended to challenge at the hearing before the Trial Chamber. In the words then used by his counsel, "... in an adversarial system we should not leave leeway for ambush".[12] In his reply, counsel for the prosecution simply said, "We didn't do it in this case and I have no explanation for that. ... we don't have an explanation for why we haven't followed our *usual practice*".[13] In turn, the Presiding Judge, though not sanctioning the prosecution, noted that what was done was contrary to the established procedure.[14] At the oral hearing before the Appeals Chamber on 22 February 2000, counsel for the prosecution took the position that there was no rule requiring the prosecution to file a response.[15] Counsel for the prosecution before the Trial Chamber had earlier made the same point.[16] They were both right. But that circumstance was not determinative. As the Presiding Judge of the Trial Chamber had made clear, it was the practice to file a response; and, as counsel for the prosecution later conceded at the oral hearing before the Appeals Chamber on 22 February 2000, the Presiding Judge "did draw the conclusion that [what was done] was contrary ... to the practice of the Tribunal".[17] Indeed, at the hearing before the Trial Chamber on 11 September 1998, counsel for the prosecution accepted, as has been seen, that the failure of the prosecution to submit a written reply was contrary to the "usual practice" of the prosecution itself.

16. The failure of the prosecution to respond to the appellant's complaint of undue delay between transfer and initial appearance did not of course remove the complaint. The dismissal of the appellant's motion included dismissal of that complaint. The complaint and its dismissal formed part of the record before the Appeals Chamber. This being so, it appears to me that at this stage the question of substance is whether the

---

[12] Transcript, Trial Chamber, 11 September 1998, p. 5.
[13] Ibid., p. 8, emphasis added.
[14] Ibid., p. 9.
[15] Transcript, Appeals Chamber, 22 February 2000, p. 105.
[16] Transcript, Trial Chamber, 11 September 1998, p. 8.

Prosecutor knew that the Appeals Chamber intended to deal with the complaint, and, if so, whether the Prosecutor had an opportunity to address it. The answer to both questions is in the affirmative. This results from the Appeals Chamber's scheduling order of 3 June 1999, referred to above.

17. That order required the parties "to address the following questions and provide the Appeals Chamber with all relevant documentation: ....4). The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance". The requisition was made on the stated basis that the Appeals Chamber needed "additional information to decide the appeal". At the oral hearing in the Appeals Chamber on 22 February 2000, a question from the bench to counsel for the Prosecutor was this: "Did the prosecution understand from that, that the Appeals Chamber was proposing to consider reasons for any delay between transfer of the Appellant and his initial appearance?".[18] Counsel for the Prosecutor correctly answered in the affirmative. He also agreed that the prosecution did not object to the competence of the Appeals Chamber to consider the matter and did not ask for more time to respond to the request by the Appeals Chamber for additional information.[19] In fact, in paragraphs 17-20 of its response of 21 June 1999, the prosecution sought to explain the delay in so far as it then said that it could, stating that it had no influence over the scheduling of the initial appearance of accused persons, that these matters lay with the Trial Chambers and the Registrar, that assignment of defence counsel was made only on 5 December 1997, and that there was a judicial holiday from 15 December 1997 to 15 January 1998. In stating these things (how adequate they were being a different matter), the prosecution fell to be understood as having accepted that the Appeals Chamber would be dealing one way or another with the question to which those things were a response.

---

[17] Transcript, Appeals Chamber, 22 February 2000, p. 107.

18. Focusing on the issues as she saw them, the Prosecutor, as I understood her, submitted that the Appeals Chamber was confined to the issues presented by the parties. As indicated above, that is not entirely correct. The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, as is shown by *Erdemović*,[20] the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond. I think that this was the position in this case.

19. As has been demonstrated above, the record before the Appeals Chamber included both a claim by the appellant that there was impermissible delay between transfer and initial appearance[21] and dismissal by the Trial Chamber of the motion which included that claim. Where an issue lying within the prescribed grounds of appeal is raised on the record, the Appeals Chamber can properly require the parties to submit additional information on the point; there is not any basis for suggesting, as the Prosecutor has done, that in this case the Appeals Chamber went outside of the appropriate limits in search of evidence.

20. In conclusion, it appears to me that the substance of the matter is that the Prosecutor had notice of the intention of the Appeals Chamber to deal with the point, had

---

[18] Ibid., p. 108.
[19] Ibid.
[20] IT-96-22-A, 7 October 1997.
[21] By contrast, the appellant's motion did not, in my opinion, include a claim that there was impermissible delay in the hearing of his habeas corpus motion.

an opportunity to address the point both before the Trial Chamber and the Appeals Chamber, and did address the point in her written response to the Appeals Chamber. In particular, the Prosecutor knew that the Appeals Chamber would be passing on the point and did not object to the competence of the Appeals Chamber to do so. Her approach fell to be understood as acquiescence in such competence. I accordingly return to my previous position that it is not possible to set aside the previous decision and to reopen the appeal, and that the only way of revisiting the matter is through the more limited method of review on the basis of discovery of new facts.

(iii) The Prosecutor's argument that the Appeals Chamber did not apply the proper test for determining whether there was a breach of the appellant's rights

21. In dealing with this argument by the Prosecutor, it would be useful to distinguish between the breach of a right and the remedy for a breach. The former will be dealt with in this section; the latter in the next.

22. An opinion which I appended to the decision given on 2 July 1998 by the Appeals Chamber of the ICTY in *Prosecutor v. Kovačević* included an observation to the effect that, because of the preparatory problems involved, the jurisprudence recognises that there is "need for judicial flexibility" in applying to the prosecution of war crimes the principle that criminal proceedings should be completed within a reasonable time. The prosecution correctly submits that, in determining whether there has been a breach of that principle, a court must weigh competing interests. As it was said in one case, the court "must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in" the territory concerned.[22] To do this, the court "should assess such factors

---

[22] *Bell v. Director of Public Prosecutions* [1985] 1 AC 937, PC.

as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant".[23] The reason for the delay could of course include the complexity of the case and the conduct of the prosecuting authorities as well as that of the court as a whole.

23. These criteria are correct; but I do not follow why it is thought that they were not applied by the Appeals Chamber. Their substance was considered in paragraphs 103-106 of the previous decision of the Appeals Chamber, footnote 268 whereof specifically referred to the leading cases of *Barker v. Wingo* and *R. v. Smith*, among others. Applying that jurisprudence in this case, it is difficult to see how the balance came out against the appellant. On the facts as they appeared to the Appeals Chamber, the delay was long; it was due to the Tribunal; no adequate reasons were given for it; the appellant repeatedly complained of it; and, there being nothing to rebut a reasonable presumption that it prejudiced his position, a fair inference could be drawn that it did.

24. The breach of the appellant's rights appears even more clearly when it is considered that the jurisprudence which produced principles about balancing competing interests developed largely, if not wholly, out of cases in which the accused was in fact brought before a judicial officer shortly after being charged, but in which, for one reason or another, the subsequent trial took a long time to approach completion. By contrast, the problem here is not that the proceedings had taken too long to complete, but that they had taken too long to begin. It is not suggested that those principles are irrelevant to the resolution of the present problem; what is suggested is that, in applying them to the present problem, the difference referred to has to be taken into account. To find a solution it is necessary to establish what is the proper judicial approach to detention in the early stages of a criminal case, and especially in the pre-arraignment phase.

---

[23] *Barker v. Wingo,* 407 US 514 (1972); and see *R. v. Smith* [1989] 2 Can. S.C.R. 1120, and *Morin v. R.* [1992] 1 S.C.R. 771.

25. The matter turns, it appears to me, on a distinction between the right of a person to a trial within a reasonable time and the right of a person to freedom from arbitrary interference with his liberty. The right to a trial within a reasonable time can be violated even if there has never been any arrest or detention; by contrast, a complaint of arbitrary interference with liberty can only be made where a person has been arrested or detained. I am not certain that the distinction was recognised by the prosecution.[24] In the view of its counsel, which he said was based on the decision of the Appeals Chamber and on other cases, the object of the Rule 62 requirement for the accused to be brought "without delay" before the Trial Chamber was to allow him "to know the formal charges against him" and to enable him "to mount a defence".[25] The submission was that, in this case, both of these purposes had been served before the initial appearance, the indictment having been given to the appellant while he was still in Cameroon. But it seems to me that, as counsel later accepted,[26] there was yet another purpose, and that that purpose could only be served if there was an initial appearance. That purpose – a fundamentally important one – was to secure to the detained person a right to be placed "without delay" within the protection of the judicial power and consequently to ensure that there was no arbitrary curtailment of his right to liberty. That purpose is a major one in the work of an institution of this kind; it is worthy of being marked.

26. For present purposes, the law seems straightforward. It is not in dispute that the controlling instruments of the Tribunal reflect the internationally recognised requirement that a detained person shall be brought "without delay" to the judiciary as required by Rule 40*bis*(J) and Rule 62 of the Tribunal's Rules of Procedure and Evidence, or "promptly" as it is said in Article 5(3) of the European Convention on Human Rights and Article 9(3) of the ICCPR, the latter being alluded to by the appellant in paragraph 11 of

---

[24] Transcript, Appeals Chamber, 22 February 2000, pp. 97-98.
[25] Ibid., pp. 72-73.
[26] Ibid., pp. 95-97.

the brief in support of his motion of 19 February 1998, as mentioned above. It will be convenient to refer to one of these provisions, namely, Article 5(3) of the European Convention on Human Rights. This provides that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.*c* of this article [relating to arrests for reasonable suspicion of having committed an offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

27. So first, as to the purpose of these provisions. Apart from the general entitlement to a trial within a reasonable time, it is judicially recognised that the purpose is to guarantee to the arrested person a right to be brought promptly within the protection of the judiciary and to ensure that he is not arbitrarily deprived of his right to liberty.[27] The European Court of Human Rights, whose case law on the subject is persuasive, put the point by observing that the requirement of promptness "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.... Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5§3 [of the European Convention on Human Rights], which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society ...'".[28]

28. Second, as to the tolerable period of delay, the decision of the Appeals Chamber of 3 November 1999 correctly recognised that this is short. The work of the United Nations Human Rights Committee shows that it is about four days. In *Portorreal v. Dominican Republic*, a period of 50 hours was held to be too short to constitute delay.[29]

---

[27] Eur. Court H.R., Schiesser judgment of 4 December 1979, Series A no. 34, p. 13, para. 30.
[28] Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, p. 32, para. 58.
[29] United Nations Human Rights Committee, Communication No. 188/1984 (5 November 1987).

But a period of 35 days was considered too much in *Kelly v. Jamaica.*[30] In *Jijón v. Ecuador*[31] a five-day delay was judged to be violative of the rule.

29. The same tendency in the direction of brevity is evident in the case law of the European Court of Human Rights. In *McGoff*[32], on his extradition from the Netherlands to Sweden, the applicant was kept in custody for 15 days before he was brought to the court. That was held to be in violation of the rule. *De Jong, Baljet and van den Brink*[33] concerned judicial proceedings in the army. "[E]ven taking due account of the exigencies of military life and military justice", the European Court of Human Rights considered that a delay of seven days was too long.

30. In *Koster,*[34] which also concerned judicial proceedings in the army, a five-day delay was held to be in breach of the rule. The fact that the period included a weekend and two-yearly military manoeuvres, in which members of the court - a military court - had been participating was disregarded; in the view of the European Court of Human Rights, the rights of the accused took precedence over matters which were "foreseeable".[35] The military manoeuvres "in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of [Article 5(3) of the European Convention on Human Rights], *if necessary on Saturday or Sunday*".[36]

---

[30] United Nations Human Rights Committee, Communication No. 253/1987 (8 April 1991).
[31] United Nations Human Rights Committee, Communication No. 277/1988 (26 March 1992).
[32] Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, pp. 26-27, para. 27.
[33] Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.
[34] Eur. Court H.R., Koster judgment of 28 November 1991, Series A no. 221.
[35] Ibid., para. 25.
[36] Ibid., emphasis added.

31. No doubt, as it was said in *de Jong, Baljet and van den Brink*, "The issue of promptness must always be assessed in each case according to its special features".[37] The same thing was said in *Brogan*.[38] But this does not markedly enlarge the normal period. *Brogan* was a case of terrorism; the European Court of Human Rights was not altogether unresponsive to the implications of that fact, to which the state concerned indeed appealed.[39] Yet the Court took the view that a period of six days and sixteen and a half hours was too long; indeed, it considered that even a shorter period of four days and six hours was outside the constraints of the relevant provision. The Court began its reasoning by saying:

> No violation of Article 5§3 [of the European Convention on Human Rights] can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible ... If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.[40]

32. Thus, in measuring permissible delay, the Court started out by having regard to the time within which it would have been "feasible" to establish judicial control of the detention in the circumstances of the case. The idea of feasibility obviously introduced a margin of flexibility in the otherwise strict requirement of promptness. But how to fix the limits of this flexibility? The Court looked at the "object and purpose of Article 5", or, as it said, at the "aim and ... object" of the Convention", and stated that –

> the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features ..., the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5§3 [of the European Convention on Human Rights], that is to the point of effectively

---

[37] Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.
[38] Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, para. 59.
[39] Ibid., para. 62.
[40] Ibid., para. 58.

> negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.[41]

33. In paragraph 62 of its judgment in *Brogan*, the European Court of Human Rights again mentioned that the "scope for flexibility in interpreting and applying the notion of 'promptness' is very limited". Thus, although the Court appreciated the special circumstances which terrorism represented, it said that "[t]he undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5§3".[42]

34. To refer again to *McGoff*, in that case the European Commission of Human Rights recalled that, in an earlier matter, it had expressed the view that a period of four days was acceptable; "it also accepted five days, but that was in exceptional circumstances".[43]

35. In the case at bar, counting from the time of transfer to the Tribunal's detention unit in Arusha (19 November 1997) to the date of initial appearance before a Trial Chamber (23 February 1998), the period - the Arusha period - was 96 days, or *nearly 20 times the maximum acceptable period of delay.*

36. As a matter of juristic logic, any flexibility in applying the requirements concerning time to the case of war crimes has to find its justification not in the nature of the crimes themselves, but in the difficulties of investigating, preparing and presenting cases relating to them. Consequently, that flexibility is not licence for disregarding the requirements where they can be complied with. It is only "the austerity of tabulated legalism", an idea not much favoured where, as here, a generous interpretation is called

---

[41] Ibid., para. 59.
[42] Ibid., para. 62.
[43] Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, Annex, Opinion of the Commission, p. 31, para. 28.

for[44], which could lead to the view that, once a crime is categorised as a war crime, that suffices to justify the conclusion that the requirements concerning time may be safely put aside.

37. In this case, it is not easy to see what difficulty beset the authorities in bringing the appellant from the Tribunal's detention unit to the Trial Chamber. That scarcely inter-galactic passage involved no more than a fifteen minute drive by motor car on a macadamised road. To plead the character of the crimes in justification of the manifest breach of an applicable requirement which was both of overriding importance and capable of being respected with the same ease as in the ordinary case is to transform an important legal principle into a statement of affectionate aspiration.

38. On the facts as they earlier appeared to it, the Appeals Chamber could not come to any conclusion other than that the rights of the appellant in respect of the period between transfer and initial appearance had been breached, and very badly so. As today's decision finds, the new facts do not show that they were not breached. I agree, however, that the new facts show that the breach was not as serious as it at first appeared, it being now clear that defence counsel, although having opportunities, did not object and could be treated as having acquiesced in the passage of time during most of the relevant period.

(iv) Whether a breach could be remedied otherwise than by release

39. Now for the question of remedy, assuming the existence of a breach. In this respect, the prosecution argues that, if there was a breach of the appellant's rights, it was open to the Appeals Chamber to grant some form of compensatory relief short of release and that it should have done so. In support, notice may be taken of a view that, particularly though not exclusively in the case of war crimes, the remedy for a breach of

---

[44] See the criticism made by Lord Wilberforce in *Minister of Home Affairs v. Fisher* [1980] AC 319, PC, at 328 G-H.

the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, custody being meanwhile continued.[45]

40. That view is useful, although not altogether free from difficulty;[46] it is certainly not an open-ended one. If the concern of the law with the liberty of the person, as demonstrated by the above-mentioned attitude of the courts, means anything, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment. In this respect, it is to be observed that, according to the European Commission of Human Rights, contrary to an opinion of the German Federal Court, in 1983 a committee of three judges of the German Constitutional Court held that "unreasonable delays of criminal proceedings might under certain circumstances only be remedied by discontinuing such proceedings".[47] As is shown by the last paragraph of the report of *Bell's* case, *supra*, the only reason why a formal order prohibiting further proceedings was not made in that case by the Privy Council was because it was understood that the practice in Jamaica was that there would be no further proceedings. Paragraph 108 of the decision of the Appeals Chamber of 3 November 1999 cites cases from other territories in which further proceedings were in fact prohibited. I find no fault with the position taken in those cases; true, those cases concerned delay in holding and completing the trial, but I do not accept that the principle on which they rest is necessarily inapplicable to extended pre-arraignment delay.

41. More importantly, the view that relief short of release is possible is subject to any statutory obligation to effect a release. In this respect, in its previous decision the

---

[45] See, inter alia, P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague, 1998), pp. 449-450; and see generally the cases cited therein, including *Neubeck*, D & R 41 (1985), p. 57, para. 131; *H v. Federal Republic of Germany*, D & R 41 (1985), pp. 253-254; and *Eckle*, Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no.51, p. 31, para. 67.
[46] See discussion in van Dijk and van Hoop, *loc.cit.*

Appeals Chamber held that Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence applied to the Cameroon period of detention. I respectfully disagreed with that view and still do, but it is the decision of the Appeals Chamber which matters; and so I proceed on the basis that the Rule applied. Now, Sub-Rule (H) of that Rule provided as follows:

> The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event that the indictment has not been confirmed and an arrest warrant signed, the suspect *shall be released* ... (emphasis added).

42. Consistently with the judicial approach to detention in the early phases of a criminal case, the object of the cited provision is to control arbitrary interference with the liberty of the person by guaranteeing him a right to be released if he is not charged within the stated time. In keeping with that object, the Rule, which has the force of law, provides its own sanction. Where that sanction comes into operation through breach of the 90-day limit set by the Rule, release is both automatic and compulsory: a court order may be made but is not necessary. The detained person has to be mandatorily released in obedience to the command of the Rule: no consideration can be given to the possibility of keeping him in custody and granting him a remedy in the form of a reduction of sentence (if any) or of payment of compensation; any discretion as to alternative forms of remedy is excluded, however serious were the allegations.

43. In effect, the premise of the conclusion reached by the Appeals Chamber that the appellant had to be released was the Chamber's interpretation, on the facts then before it, that the Rule applied to the Cameroon period of detention. These being review proceedings and not appeal proceedings, the premise would continue to apply, and so would the conclusion, unless displaced by new facts.

---

[47] *H v. Federal Republic of Germany*, application no. 10884/84, D & R, no. 41, decision of 13 December 1984, p. 253.

(v) Whether there are new facts

44. So now for the question whether there are new facts. The temptation to use national decisions in this area may be rightly restrained by the usual warnings of the dangers involved in facile transposition of municipal law concepts to the plane of international law. Such borrowings were more frequent in the early or formative stages of the general subject; now that autonomy has been achieved, there is less reason for such recourse. It is possible to argue that the current state of criminal doctrine in international law approximates to that of the larger subject at an earlier phase and that accordingly a measure of liberality in using domestic law ideas is both natural and permissible in the field of criminal law. But it is not necessary to pursue the argument further. The reason is that, altogether apart from the question whether a particular line of municipal decisions is part of the law of the Tribunal, no statutory authority needs to be cited to enable a court to benefit from the scientific value of the thinking of other jurists, provided that the court remains master of its own house. Thus, nothing prevents a judge from consulting the reasoning of judges in other jurisdictions in order to work out his own solution to an issue before him; the navigation lights offered by the reflections of the former can be welcome without being obtrusive. This is how I propose to proceed.

45. The books are full of statements, and rightly so, concerning the caution which has to be observed, as a general matter, in admitting fresh evidence. Latham CJ noted that "[t]hese are general principles which should be applied to both civil and criminal trials".[48] Accordingly, there is to be borne in mind the principle familiar in civil cases, somewhat quaintly expressed in one of them, that it is the "duty of [a party] to bring forward his

---

[48] *Green v. R.* (1939) 61 C.L.R. 167, at 175.

whole case at once, and not to bring it forward piecemeal as he found out the objections in his way".[49]

46. The prosecution advanced a claim to several new facts. Agreeably to the caution referred to, the Appeals Chamber has not placed reliance on all of them. I shall deal with two which were accepted, beginning with the statement of Ambassador Scheffer as to United States intervention with the government of Cameroon. Five questions arise in respect of that statement.

47. The first question is whether the Ambassador's statement concerns a "new fact" within the meaning of Article 25 of the Statute. It has to be recognised that there can be difficulty in drawing a clear line of separation between a new fact within the meaning of that Article of the Statute and additional evidence within the meaning of Rule 115 of the Tribunal's Rules of Procedure and Evidence. A new fact is generically in the nature of additional evidence. The differentiating specificity is this: additional evidence, though not being merely cumulative, goes to the proof of facts which were in issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not in issue at the trial. In this case, there has not been an issue of fact in the previous proceedings as to whether the government of the United States had intervened. True, the intervention happened before the hearing, but that does not make the fact of the intervention any the less new. As is implicitly recognised by the wording of Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal, the circumstance that a fact was in existence at the time of trial does not automatically disqualify it from being regarded as new; the newness has to be in relation to the facts previously before the court. In my opinion, Ambassador Scheffer's statement is evidence of a new fact.

---

[49] *In re New York Exchange, Limited* (1888) 39 Ch. D. 415, at 420, CA.

48. The second question is whether the new fact "could not have been discovered [at the time of the proceedings before the original Chamber] through the exercise of due diligence" within the meaning of Rule 120 of the Rules. The position of the prosecution is that it did ask Ambassador Scheffer to intervene with the government of Cameroon. This being so, it is reasonable to hold that the prosecution knew that the requested intervention was needed to end a delay caused by Cameroon, and that it was also in a position to know that the intervention had in fact taken place and that it involved the activities in question. It is therefore difficult to find that the material in question could not have been discovered with due diligence. In this respect, I agree with the appellant.

49. But, for the reasons given in today's judgment, that does not end the matter. Certainly the general rule is that " the interests of justice" will not suffice to authorise the admission of material which was available at trial, diligence being a factor in determining availability. The principle of finality supports that view. But, as has been recognised by the Appeals Chamber of the ICTY, "the principle [of finality] would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice".[50] As was also observed by that Chamber,[51] "the principle of finality must be balanced against the need to avoid a miscarriage of justice". I see no reason why the necessity to make that balance does not apply to a review.

50. Thus, there has to be recognition of the possibility of there being a case in which, notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice. This was done in one case in which an appeal court observed, "All the evidence tendered to us could have been adduced at the trial: indeed, three of the witnesses, whom we have heard... did give evidence at the trial. Nevertheless we have

---

[50] *Tadić*, IT-94-1-A, 15 October 1998, para. 72. The context suggests that the word "not" in the expression "not available" in line 8 of para. 35 of that decision was inserted *per incuriam*.
[51] Ibid., para. 35.

thought it necessary, exercising our discretion in the interests of justice, to receive" their evidence.[52] It is not the detailed underlying legislation which is important, but the principle to be discerned.

51. The principle was more recently affirmed by the Supreme Court of Canada in the case of *R v. Warsing*.[53] There the leading opinion recalled an earlier view that "the criterion of due diligence... is not applied strictly in criminal cases" and said: "It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission".[54] In the same opinion, it was later affirmed that "a failure to meet the due diligence requirement should not 'override accomplishing a just result'".[55]

52. It may be thought that an analogous principle can be collected from *Aleksovski,* in which the Appeals Chamber of the ICTY held "that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during trial ..." ,[56] but stated that it "will nevertheless consider" a new defence. Clearly, if the new defence was sound in law and convincing in fact, it would have been entertained in the higher interests of justice notwithstanding the general rule.

53. Thus, having regard to the superior demands of justice, I would read the reference in Rule 120 to a new fact which "could not have been discovered through the exercise of due diligence" as directory, and not mandatory or peremptory. In this respect, it is said that the "language of a statute, however mandatory in form, may be deemed directory

---

[52] See *R v. Lattimore* (1976) 62 Cr. App. R. 53, at 56.
[53] [1998] 3 S.C.R. 579.
[54] Ibid., para. 51 of the opinion of Justices Cory, Iacobucci, Major and Binnie.
[55] Ibid., para. 56.
[56] See paragraph 51 of IT-95-14/1-A of 24 March 2000.

whenever legislative purpose can best be carried out by [adopting a directory] construction".[57] Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it. This approach, it is believed, is consonant with the broad view that, as it has been said, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case".[58] That remark was made about rules of civil procedure, but, with proper caution, the idea inspiring it applies generally to all rules of procedure to temper any tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex.*[59] I do not consider that this approach necessarily collides with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions.

54. The question then is whether, even if there was an absence of diligence, the material in this case so compellingly demonstrates mistake as to justify its admission. Ambassador Scheffer's statement makes it clear that the delay in Cameroon was due to the workings of the decision-making process in that country, that that process was expedited only after and as a result of his and his government's intervention with the highest authorities in Cameroon, that Cameroon was otherwise not ready to effect a transfer, and that accordingly the Tribunal was not to blame for any delay, as the Appeals Chamber thought it was. Has the Appeals Chamber to close its eyes to Ambassador Scheffer's statement, showing, as it does, the existence of palpable mistake bearing on the correctness of the previous conclusion? I think not.

---

[57] 82 *Corpus Juris Secundum* (Brooklyn, 1990), pp. 871-872, stating also, at p. 869, that "a statute may be mandatory in some respects, and directory in others". And see *Craies on Statute Law*, 7th edn. (London, 1971), pp. 62, 249-250, and 260-271.
[58] *In re Coles and Ravenshear* [1907] 1 K.B. 1, at 4.

55. The third question is which Chamber should process the significance of the new fact: Is it the Appeals Chamber? Or, is it the Trial Chamber? In the *Tadić* Rule 115 application, the ICTY Appeals Chamber took the position, in paragraph 30 of its Decision of 15 October 1998, that the "proper venue for a review application is the Chamber that rendered the final judgement". Well, this is a review and it is being conducted by the Chamber which gave the final judgement - namely, the Appeals Chamber. So the case falls within the *Tadić* proposition.

56. I would, however, add this: On the basis of the statement in question, there could be argument that the Appeals Chamber cannot itself assess a new fact where the Appeals Chamber is sitting on appeal. However, it appears to me that the statement need not be construed as intended to neutralise the implication of Rule 123 of the Rules of Procedure and Evidence of the Tribunal that the Appeals Chamber may itself determine the effect of a new fact in an appeal pending before it. That Rule states: "If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion". The word "may" shows that the Appeals Chamber need not send the matter to the Trial Chamber but may deal with it itself. The admissibility of this course is supported by the known jurisprudence, which shows that matter in the nature of a new fact may be considered on appeal. Thus, in *R. v. Ditch* (1969) 53 Cr. App. R. 627, at p. 632, a post-trial confession by a co-accused was admitted on appeal as fresh or additional evidence, having been first heard *de bene esse* before being formally admitted.[60] Structures differ; it is the principle involved which matters. The jurisprudence referred to above in relation to mandatory and directory provisions also works to the same end. In my view, that end means this:

---

[59] Cited sometimes in legal discourse, as in *Serbian Loans*, P.C.I.J., Ser. A, No. 20-21, p. 56, dissenting opinion of Judge de Bustamante.

[60] Earlier cases suggested that this sort of evidence should be processed through the clemency machinery; but the position was changed by s. 23(2) of the Criminal Appeal Act 1968 (UK).

where the new fact is in its nature conclusive, it may be finally dealt with by the Appeals Chamber itself; a reference back to the Trial Chamber is required only where, without being conclusive, the new fact is of such strength that it might reasonably affect the verdict, whether the verdict would in fact be affected being left to the evaluation of the Trial Chamber.[61]

57. The fourth question is whether the new fact brought forward in Ambassador Scheffer's statement "could have been a decisive factor in reaching the decision", within the meaning of Article 25 of the Statute. The simple answer is "yes". As mentioned above, the decision of the Appeals Chamber proceeded on the basis that the Tribunal was responsible for the delay in Cameroon and that the latter was always ready to make a transfer. The Ambassador's statement shows that these things were not so.

58. The fifth and last question relates to a submission by the appellant that the Appeals Chamber should disregard Ambassador Scheffer's activities because he was merely prosecuting the foreign policy of his government and had no role to play in proceedings before the Tribunal. As has been noticed repeatedly, the Tribunal has no coercive machinery of its own. The Security Council sought to fill the gap by introducing a legal requirement for states to co-operate with the Tribunal. That obligation should not be construed so broadly as to constitute an unacceptable encroachment on the sovereignty of states; but it should certainly be interpreted in a manner which gives effect to the purposes of the Statute. I cannot think that anything in the purposes of the Statute prevents a state from using its good offices with another state to ensure that the needed cooperation of the latter with the Tribunal is forthcoming; on the contrary, those purposes would be consistent with that kind of *démarche*. Thus, accepting that Ambassador Scheffer was prosecuting the foreign policy of his

---

[61] See the statement in a previous case cited by Ritchie, J., in his leading opinion in *McMartin v. The Queen*, 1964 DLR LEXIS 1957, 46 DLR 2d 372. The statement related to "fresh evidence" but there is no reason why the principle involved cannot apply to new facts under the scheme of the Tribunal.

government, I cannot see that he was acting contrary to the principles of the Statute. Even if he was, I do not see that there was anything so inadmissibly incorrect in his activities as to outweigh the obvious relevance for this case of what he in fact did.

59. The statement of Judge Mballe of Cameroon is equally admissible as a new fact. It corroborates the substance of Ambassador Scheffer's statement in that it shows that, whatever was the reason, the delay was attributable to the decision-making process of the government of Cameroon; it was not the responsibility of the Tribunal or of any arm of the Tribunal.

(vi) The effect of the new facts

60. The appellant, along with others, was detained by Cameroon on an extradition request from Rwanda from 15 April 1996 to 21 February 1997. During that period of detention, he was also held by Cameroon at the request of the Prosecutor of the Tribunal for one month, from 17 April 1996 to 16 May 1996. In the words of the Appeals Chamber, on the latter day "the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant".[62] Later, on "15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest".[63] Today's judgment also shows that the appellant knew, at least by 3 May 1996, of the reasons for which he was held at the instance of the Prosecutor. These things being so, it appears to me that, from the point of view of proportionality, the Appeals Chamber focused on the subsequent period of detention at the request of the Tribunal, from 21 February 1997 to 19 November 1997, on which latter date the appellant was transferred from Cameroon to the Tribunal's detention unit in

---

[62] Decision of the Appeals Chamber, 3 November 1999, para. 5, original emphasis.
[63] Ibid., para. 7.

Arusha. How would the Appeals Chamber have viewed the appellant's detention during this period had it had the benefit of the new facts now available?

61. Regard being had to the jurisprudence, considered above, on the general judicial attitude to delay in the early phases of a criminal case, it is reasonable to hold that Rule 40*bis* contemplated a speedy transfer. If the transfer was effected speedily, no occasion would arise for considering whether the provision applied to extended detention in the place from which the transfer was to be made. In this case, the transfer was not effected speedily and the Appeals Chamber thought that the Tribunal (through the Prosecutor) was responsible for the delay, for which it accordingly looked for a remedy. In searching for this remedy, it is clear, from its decision read as a whole, that the central reason why it was moved to hold that the protection of that provision applied was because of its view that there was that responsibility. In this respect, I note that the appellant states that it "is the Prosecutor's failure to comply with the mandates of Rule 40 and Rule 40*bis* that compelled the Appeals Chamber to order the Appellant's release".[64] I consider that this implies that the appellant himself recognises that the real reason for the decision to release him was the finding by the Appeals Chamber that the Prosecutor (and, through her, the Tribunal) was responsible for the delay in Cameroon. It follows that if, as is shown by the statements of Ambassador Scheffer and Judge Mballe, the Tribunal was not responsible, the Appeals Chamber would not have had occasion to consider whether the provisions applied and whether the appellant should be released in accordance with Rule 40*bis*(H).

62. Thus, without disturbing the previous holding, made on the facts then known to the Appeals Chamber, that Rule 40*bis* was applicable to the Cameroon period (with which I do not agree), the conclusion is reached that, on the facts now known, the Appeals Chamber would not have held that the Rule applied to that period, with the

consequence that the Rule would not have been regarded as yielding the results which the Appeals Chamber thought it did.

63. Argument may be made on the basis of the previous holding (with which I disagreed) that Cameroon was the constructive agent of the Tribunal. On that basis, the contention could be raised that, even if the delay was caused by Cameroon and not by the Tribunal, the Tribunal was nonetheless responsible for the acts of Cameroon. However, assuming that there was constructive agency, such agency was for the limited purposes of custody pending speedy transfer. Cameroon could not be the Tribunal's constructive agent in respect of delay caused, as the new facts show, by Cameroon's acts over which the Tribunal had no control, which were not necessary for the purposes of the agency, and which in fact breached the purposes of the agency. Hence, even granted the argument of constructive agency, the new facts show that the Tribunal was not responsible for the delay as the Appeals Chamber thought it was on the basis of the facts earlier known to it.

64. There are other elements in the case, but that is the main one. Other new facts, mentioned in today's judgment, show that the violation of the appellant's rights in respect of delay between transfer and initial appearance was not as extensive as earlier thought; in any case, it did not involve the operation of a mandatory provision requiring release. The new facts also show that defence counsel acquiesced in the non-hearing of the habeas corpus motion on the ground that it had been overtaken by events. Moreover, as is also pointed out in the judgment, the matter has to be regulated by the approach taken by the Appeals Chamber in its decision of 3 November 1999. Paragraphs 106-109 of that decision made it clear that the conclusion reached was based not on a violation of any single right of the appellant but on an accumulation of violations of different rights. As

---

[64] Appellant's Response to Prosecutor's Motion for Review or Reconsideration, 17 February 2000, para.

has now been found, there are new facts which show that important rights which were thought to have been violated were not, and that accordingly there was not an accumulation of breaches. Consequently, the basis on which the Appeals Chamber ordered the appellant's release is displaced and the order for release vacated.

(vii) Conclusion

65. There are two closing reflections. One concerns the functions of the Prosecutor; the other concerns those of the Chambers.

66. As to her functions, the Prosecutor appeared to be of a mind that the independence of her office was invaded by a judicial decision that an indictment was dismissed and should not be brought back. She stated that she had "never seen" an instance of a prosecutor being prohibited by a court "from further prosecution ...".[65] In her submission, such a prohibition was at variance with her "completely independent" position and was "contrary to [her] duty as a prosecutor".[66] Different legal cultures are involved in the work of the Tribunal and it is right to try to understand those statements. It does appear to me, however, that the framework provided by the Statute of the Tribunal can be interpreted to accommodate the view of some legal systems that the independence of a prosecutor does not go so far as to preclude a court from determining that, in proper circumstances, an indicted person may be released and may not be prosecuted again for the same crime. The independence with which a function is to be exercised can be separated from the question whether the function is itself exercisable in a particular situation. A judicial determination as to whether the function may be exercised in a given situation is part of the relief that the court orders for a breach of the person's rights

---

36.
[65] Transcript, Appeals Chamber, 22 February 2000, p. 12.
[66] Ibid.

committed in the course of a previous exercise of those functions. This power of the courts has to be sparingly used; but it exists.

67. Also, the Prosecutor stated, in open court, that she had personally seen "5000 skulls" in Rwanda.[67] She said that the appellant was "responsible for the death of over ... 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty. Give us the opportunity to bring him to justice."[68] Objecting on the basis of the presumption of innocence,[69] counsel for the appellant submitted that the Prosecutor had expressed herself in "a more aggressive manner than she should ..." and had "talked as if she was a depository of justice before" the Appeals Chamber.[70] I do not have the impression that the latter remark was entirely correct, but the differing postures did appear to throw up a question concerning the role of a prosecutor in an international criminal tribunal founded on the adversarial model. What is that role?

68. The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice".[71] The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and the Tribunal must seek to benefit from all of them. Taking due account of that circumstance, I nevertheless

---

[67] Ibid., p. 19.
[68] Ibid., p. 14.
[69] Ibid., p. 243.
[70] Ibid., pp. 138-139.

consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point.

69. As to the functions of the Chambers, whichever way it went, the decision in this case would call to mind that, on the second occasion on which *Pinochet's* case went to the British House of Lords, the presiding member of the Appellate Committee of the House noted that -

> [t]he hearing of this case ... produced an unprecedented degree of public interest not only in this country but worldwide. ... The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. ... This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions.[72]

Naturally, however, (and as in this case), "the members of the Appellate Committee were in no doubt as to their function ...".[73]

70. Here too there has been interest worldwide, including a well-publicised suspension by Rwanda of cooperation between it and the Tribunal. On the one hand, the

---

[71] *R v Banks* [1916] 2 KB 621 at 623, per Avory J. In keeping with that view, it is indeed said that prosecuting counsel "should not regard himself as appearing for a party". See Code of Conduct of the Bar of England and Wales, para. 11(1).
[72] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2),* [1999] 1 All ER 577, HL, at pp. 580-581, per Lord Browne-Wilkinson.
[73] Ibid.

appellant has asked the Appeals Chamber to "disregard ... the sharp political and media reaction to the decision, particularly emanating from the Government of Rwanda".[74] On the other hand, the Prosecutor has laid stress on the necessity for securing the cooperation of Rwanda, on the seriousness of the alleged crimes and on the interest of the international community in prosecuting them.

71. These positions have to be reconciled. How? This way: the sense of the international community has to be respectfully considered by an international court which does not dwell in the clouds; but that sense has to be collected in the whole. The interest of the international community in organising prosecutions is only half of its interest. The other half is this: such prosecutions are regarded by the international community as also designed to promote reconciliation and the restoration and maintenance of peace, but this is possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice. The Tribunal is penal; it is not simply punitive.

72. It is believed that it was for this reason that the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[75] That text, to which counsel for the appellant appealed,[76] is a distant but clear echo of the claim that the law of Rome was "of a sort that cannot be bent by influence, or broken by power, or

---

[74] Defence Reply to the Prosecutor's Motion for Review or Reconsideration, 6 January 2000, para. 53.
[75] See General Assembly Resolution 40/32 of 29 November 1985, para. 1, General Assembly Resolution 40/146 of 13 December 1985, para. 2, and Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985 (United Nations, New York, 1986), p. 60, para. 2.
[76] Transcript, Appeals Chamber, 22 February 2000, pp. 213-214.

spoilt by money". The timeless constancy of that ancient remark, cited for its substance rather than for its details, has in turn to be carried forward by a system of international humanitarian justice which was designed to function in the midst of powerful cross-currents of world opinion. Nor need this be as daunting a task as it sounds: it is easy enough if one holds on to the view that what the international community intended to institute was a system by which justice would be dispensed, not dispensed with.

73. But this view works both ways. In this case, there are new facts. These new facts both enable and require me to agree that justice itself has to regard the effect of the previous decision as now displaced; to adhere blindly to the earlier position in the light of what is now known would not be correct.

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

s/.

Mohamed Shahabuddeen

Dated this 31st day of March 2000
At The Hague
The Netherlands

ANNEX 8

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915.

United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specific ity of the Special Court, its jurisdiction (subject -matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

00-66177 (E) 041000
0066177

security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and

(c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal juris diction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

> "In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Govemment of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed

by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations

For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3
Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chambers, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a four-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons most responsible for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a four-year term and shall be eligible for reappointment. He or she shall be of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a four-year term and be eligible for reappointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him o r her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by a Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 9

1969 Vienna Convention on the Law of Treaties.

1338

International Law Commission

Vienna Convention on the Law of Treaties*

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I
INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Article 2
Use of terms

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 or persons 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;

(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;

(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 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.

Article 3
International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II
CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6
Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11
Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12
Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13
Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Article 14
Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15
Consent to be bound by a treaty expressed by accession

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.

Article 16
Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;

(b) their deposit with the depositary; or

(c) their notification to the contracting States or to the depositary, if so agreed.

Article 17
Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification,

acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19
Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20
Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22
Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23
Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III
OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

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

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject-matter

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

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to

determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36
Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the

parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38
Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV
AMENDMENT AND MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) 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.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V
INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45
Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46
Provisions of internal law regarding competence to conclude treaties

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

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

Article 47
Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48
Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49
Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50
Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51
Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53
Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or

withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 58
Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59
Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60
Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
Emergence of a new peremptory norm of general international law (*jus cogens*)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65
Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66
Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67
Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65 paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68
Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69
Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in

accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
Consequences of the invalidity of a treaty which conflict with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(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 obstruct the resumption of the operation of the treaty.

PART VI
MISCELLANEOUS PROVISIONS

Article 73
Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74
Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75
Case of an aggressor State

The provisions of the present Convention 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 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

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

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications 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, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

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 signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78
Notifications and communications

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

(a) if there is no depositary, be transmitted direct 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 when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79
Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, 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 an 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 shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procés-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the 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 signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

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

Article 80
Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII
FINAL PROVISIONS

Article 81
Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83
Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85
Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

1361

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Abstract:-
* (back)

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

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

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

ANNEX 10

1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

International Law Commission

VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

(21 March 1986)

The Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the consensual nature of treaties and their ever-increasing importance as a source of international law,

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized,

Affirming the importance of enhancing the process of codification and progressive development of international law at a universal level,

Believing that the codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations are means of enhancing legal order in international relations and of serving the purposes of the United Nations,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights

and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Bearing in mind the provisions of the Vienna Convention on the Law of Treaties of 1969,

Recognizing the relationship between the law of treaties between States and the law of treaties between States and international organizations or between international organizations,

Considering the importance of treaties between States and international organizations or between international organizations as a useful means of developing international relations and ensuring conditions for peaceful cooperation among nations, whatever their constitutional and social systems,

Having in mind the specific features of treaties to which international organizations are parties as subjects of international law distinct from States,

Noting that international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes,

Recognizing that the practice of international organizations in

concluding treaties with States or between themselves should be in accordance with their constituent instruments,

Affirming that nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members which are regulated by the rules of the organization,

Affirming also that disputes (concerning treaties, like other international disputes, should be settled, in conformity with the Charter of the United Nations, by peaceful means and in conformity with the principles of justice and international law,

Affirming also that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.

Have agreed as follows:

PART I

INTRODUCTION

Article 1

Scope of the present Convention

The present Convention applies to:

(a) treaties between one or more States and one or more international

organizations, and

(b) treaties between international organizations.

Article 2

Use of terms

1. For the purposes of the present Convention:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the

international act so named whereby a State or an international organization 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 or from the competent organ of an international organization designating a person or persons to represent the State or the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State or of the organization 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 or by an international organization when signing, ratifying, formally confirming, 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 or to that organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State, or

(ii) an international organization,

which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean

respectively:

(i) a State, or

(ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" and "third organization" mean respectively:

(i) a State, or

(ii) an international organization,

not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

2. The provisions of paragraph 1 regarding 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 or in the rules of any international organization.

Article 3

International agreements not within the scope

of the present Convention

The fact that the present Convention does not apply:

(i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations; or

(iv) to international agreements between subjects of international law other than States or international organizations;

shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law

independently of the Convention;

(c) the application of the Convention to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the Convention, the Convention applies only to such treaties concluded after the entry into force of the present Convention with regard to those States and those organizations.

Article 5

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any

relevant rules of the organization.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6

Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the rules of that organization.

Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full

powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty between States and international organizations;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with

the rules of the organization, without having to produce full powers.

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the states and international organizations or, as the case may be, all the organizations participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place in accordance with the procedure agreed upon by the participants in that conference. If, however, no agreement is reached on any such procedure, the adoption of the text shall take place by the vote of two-thirds of the participants present and voting unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States and those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11

Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12

Consent to be bound by a treaty expressed by signature

1. The consent of a State or of an international organization to be bound by a treaty is expressed by the signature of the representative of that State or of that organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case any be, the negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the State or organization to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations so agreed;

(b) the signature ad referendum of a treaty by the representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

Article 13

Consent to be bound by a treaty expressed
by an exchange of instruments constituting a treaty

The consent of States or of international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States and those organizations or, as the case may be, those organizations were agreed that the exchange of instruments should have that effect.

Article 14

Consent to be bound by a treaty expressed by ratification,
act of formal confirmation, acceptance or approval

1. The consent of a State to be bound by at treaty is expressed by ratification when;

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the full powers of its

representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

Article 15

Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

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

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case amy be, the negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

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

Article 16

Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of a State or of an international organization to be bound by treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting organizations or to the depositary, if so agreed.

Article 17

Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organizations or, as the case may be, the contracting organizations so agree.

2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object
and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organizations or, as the case may be, the contracting organizations so agree.

2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object
and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and

provided that such entry into force is not unduly delayed.

SECTION 2.

RESERVATIONS

Article 19

Formulation of reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international

organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or an international organization objecting to a

reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:
(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3.

ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24

Entry into force

1. A treaty enters into force in such manner and upon such date as it

may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and negotiating organizations or, as the case may be, all the negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States and negotiating organizations or, as the

case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1.

OBSERVANCE OF TREATIES

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law of States, rules of international organizations

and observance of treaties

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

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

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

SECTION 2.

APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more

international organizations is binding upon each State party in respect of its entire territory.

Article 30

Application of successive treaties
relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between at party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual

rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an organization under another treaty.

6. The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.

SECTION 3.

INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all

the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4.

TREATIES AND THIRD STATES OR THIRD ORGANIZATIONS

Article 34

General rule regarding third States and third organizations

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35

Treaties providing for obligations for third States or third organizations

An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the rules of that organization.

Article 36

Treaties providing for rights for third States or third organizations

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise

provides.

2. A right arises for a third organization from a provision of a teaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of international organizations to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the rules of the organization.

3. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37

Revocation or modification of obligations or rights
of third States or third organizations

1. When an obligation has arisen for a third State or a third organization in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State or the third organization, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State or a third organization in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be

revocable or subject to modification without the consent of the third State or the third organization.

3. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the rules of that organization.

Article 38

Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39

General rule regarding the amendment of treaties

1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the rules of that organization.

Article 40

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State or organization.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall,

failing an expression of a different intention by that State or that organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) 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.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their

intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions

of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation

of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

SECTION 2. INVALIDITY OF TREATIES

Article 46

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

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

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

3. A violation is manifest if it would be objectively evident to any

State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

Article 47

Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the negotiating States and negotiating organizations prior to his expressing such consent.

Article 48

Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international

organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 80 then applies.

Article 49

Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State
or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51

Coercion of a representative of a State

or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a State or of an international organization
by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53

Treaties conflicting with a peremptory norm
of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3.

TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES

Article 54

Termination of or withdrawal from a treaty under
its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 55

Reduction of the parties to a multilateral treaty
below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57

Suspension of the operation of a treaty
under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 58

Suspension of the operation of a multilateral treaty by

agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State

or international organization, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in;

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the

protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for

terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States

parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached

within a period of twelve months following the date on which the objection was raised, the procedures specified in the following paragraphs shall be followed.

2. With respect to a dispute concerning the application or the interpretation of article 53 or 64:

(a) if a State is a party to the dispute with one or more States, it may, by a written application, submit the dispute to the International Court of Justice for a decision;

(b) if a State is a party to the dispute to which one or more international organizations are parties, the State may, through a Member State of the United Nations if necessary, request the General Assembly or the Security Council or, where appropriate, the competent organ of an international organization which is a party to the dispute and is authorized in accordance with Article 96 of the Charter of the United Nations, to request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court;

(c) if the United Nations or an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations is a party to the dispute, it may request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court;

(d) if an international organization other than those referred to in

sub-paragraph (c) is a party to the dispute, it may, through a Member State of the United Nations, follow the procedure specified in sub-paragraph (b);

(e) the advisory opinion given pursuant to sub-paragraph (b), (c) or (d) shall be accepted as decisive by all the parties to the dispute concerned;

(f) if the request under sub-paragraph (b), (c) or (d) for an advisory opinion of the Court is not granted, any one of the parties to the dispute may, by written notification to the other party or parties, submit it to arbitration in accordance with the provisions of the Annex to the present Convention.

3. The provisions of paragraph 2 apply unless all the parties to a dispute referred to in that paragraph by common consent agree to submit the dispute to an arbitration procedure, including the one specified in the Annex to the present Convention.

4. With respect to a dispute concerning the application or the interpretation of any of the articles in Part V, other than articles 53 and 64, of the present Convention, any one of the parties to the dispute may set in motion the conciliation procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce full powers.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5.

CONSEQUENCES OF THE INVALIDITY

TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If it State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(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 obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73

Relationship to the Vienna Convention on the Law of Treaties

As between States parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those States under a treaty between two or more States and one or more international organizations shall be governed by that Convention.

Article 74

Questions not prejudged by the present Convention

1. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

2. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from the international

responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

3. The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.

Article 75

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 76

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations 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 77

Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 78

Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in

particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

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

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or of instruments of acceptance, approval or accession

required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

Article 79

Notifications and communications

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

(a) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been nude by the State or organization in question only upon its receipt by the State or organization 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 or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1(e).

Article 80

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless those States and organizations decide upon some other means of correction, 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 an 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 shall notify the signatory States and international organizations and the contracting States and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procs-verbal of the rectification of the text and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

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 signatory States and international organizations and the contracting States and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and international organizations and the contracting

States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procs-verbal specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Article 81

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII

FINAL PROVISIONS

Article 82

Signature

The present Convention shall be open for signature until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1987, at United Nations Headquarters, New York by:

(a) all States;

(b) Namibia, represented by the United Nations Council for Namibia;

(c) international organizations invited to participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.

Article 83

Ratification or act of formal confirmation

The present Convention is subject to ratification by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by international organizations. The instruments of ratification and those relating to acts of formal confirmation shall be deposited with the Secretary-General of the United Nations.

Article 84

Accession

1. The present Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by

any international organization which has the capacity to conclude treaties.

2. An instrument of accession of an international organization shall contain a declaration that it has the capacity to conclude treaties.

3. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 85

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.

2. For each State or for Namibia, represented by the United Nations Council for Namibia, ratifying or acceding to the Convention after the condition specified in paragraph 1 has been fulfilled, the Convention shall enter into force on the thirtieth day after deposit by such State or by Namibia of its instrument of ratification or accession.

3. For each international organization depositing an instrument relating to an act of formal confirmation or an instrument of accession, the Convention shall enter into force on the thirtieth day after such deposit, or at the date the Convention enters into force pursuant to

paragraph 1, whichever is later.

Article 86

Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized by their respective Governments, and duly authorized representatives of the United Nations Council for Namibia and of international organizations have signed the present Convention.

DONE at VIENNA this twenty-first day of March one thousand nine hundred and eighty-six.

ANNEX

ARBITRATION AND CONCILIATION PROCEDURES
ESTABLISHED IN APPLICATION OF ARTICLE 66

I. ESTABLISHMENT OF THE ARBITRAL TRIBUNAL
OR CONCILIATION COMMISSION

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and

maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations and every party to the present Convention shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of office of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph 2, sub-paragraph (f), or agreement on the procedure in the present Annex has been reached under paragraph 3, the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph 4, the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States, international organizations or, as the case may be, the States and organizations which constitute one of the parties to the dispute shall appoint by common consent:

(a) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one arbitrator or, as the case may be, one conciliator, who shall

be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute, provided that a dispute between two international organizations is not considered by nationals of one and the same State.

The States, international organizations or, as the case may be, the States and organizations which constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way. The four persons chosen by the parties shall be appointed within sixty days following the date on which the other party to the dispute receives notification under article 66, paragraph 2, sub-paragraph (f), or on which the agreement on the procedure in the present Annex under paragraph 3 is reached, or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within sixty days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the

International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this sub-paragraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the rules of that organization.

II. FUNCTIONING OF THE ARBITRAL TRIBUNAL

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the vote of the Chairman shall be decisive.

6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. FUNCTIONING OF THE CONCILIATION COMMISSION

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

11. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

13. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

ANNEX 11

Aust, *Modern Treaty Law and Practice* (2000).

MODERN TREATY LAW AND PRACTICE

ANTHONY AUST

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK www.cup.cam.ac.uk
40 West 20th Street, New York, NY 10011-4211, USA www.cup.org
10 Stamford Road, Oakleigh, Melbourne 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain

First published 2000

Printed in the United Kingdom at the University Press, Cambridge

Typeset in Minion 10.5/14 pt *System* QuarkXpress® [SE]

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data

Aust, Anthony.
Modern treaty law and practice / Anthony Aust.
p. cm.
Includes bibliographical references and index.
ISBN 0 521 59153 8 (hardbound)
1. Treaties. I. Title.
KZ1301.A93 2000
341.3'7–dc21 99-33753 CIP

ISBN 0 521 59153 8 hardback
ISBN 0 521 59846 X paperback

1

The Vienna Convention on the Law of Treaties

> The Convention clearly marked the beginning of a new era in the law of treaties.[1]

A large part of this book is necessarily devoted to the Vienna Convention on the Law of Treaties. Although the Convention does not occupy the whole ground of the law of treaties, it covers the most important areas and is the starting point for any description of the modern law and practice of treaties. It thus merits a short introduction. The other purpose of this chapter is to define the scope of this book by mentioning briefly those aspects of the law of treaties which the Convention does not deal with, but which will be covered in this book.

The Convention is one of the prime achievements of the International Law Commission. The Commission was established by the UN General Assembly in 1947 with the object of promoting the progressive development of international law and its codification. The law of treaties was one of the topics selected by the Commission at its first session in 1949 as being suitable for codification. A series of eminent British international legal scholars (James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock) were appointed as Special Rapporteurs. The Commission adopted a final set of draft articles in 1966. They were considered by the United Nations Conference on the Law of Treaties in Vienna in 1968 and 1969. The Convention was adopted on 22 May 1969 and entered into force on 27 January 1980. By the end of 1998 it had only eighty-four parties out of the some 190 states there are today.[2] Some of the reasons for this will be discussed below.

The full text of the Convention is at Appendix A.

[1] P. Reuter, *Introduction to the Law of Treaties* (2nd. English edn, 1995), para. 32.

[2] The 188 members of the United Nations do not include, for example, the Holy See, Switzerland or Tuvalu, although Andorra, Liechtenstein, Monaco and San Marino became members in the early 1990s and Kiribati, Nauru and Tonga in 1999.

Scope of the Convention

The Convention sets out the law and procedure for the making, operation and termination of a treaty. The Convention does not apply to all international agreements, only those between states (Article 1). Nor is it concerned with the substance of a treaty as such. That is a matter for the parties to the treaty.

Oral agreements

For reasons of clarity and simplicity oral agreements were excluded from the Convention. But this does not affect their legal force, or the application to them of any of the rules in the Convention to which they would be subject under international law independently of the Convention, such as customary international law[3] (Article 3(a)). Oral agreements between states, although rare, are not unknown even today. The dispute between Denmark and Finland about the construction of a Danish bridge across the Store Bælt (Great Belt) was settled in 1992 by a telephone conversation between the Danish and Finnish Prime Ministers, in which, in return for a payment by Denmark, Finland agreed to discontinue its case before the International Court of Justice. There is no joint record of the agreement.[4] US law requires an oral agreement to be reduced to writing by the US Government.[5]

Treaties with or between other subjects of international law

States do not enter into treaties only with other states; they enter into treaties with other subjects of international law, in particular international organisations; and international organisations enter into treaties with each other. The Convention does not apply to such treaties, which are the subject of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986,[6] which, in effect, applies to such treaties the provisions of the 1969 Convention, suitably adapted. Although the 1986 Convention is not yet in force, there can be little doubt that its provisions,

[3] See p. 10 below for an explanation of customary international law

[4] *Finnish Yearbook of International Law* (1992), pp. 610–13, and ILM (1993), p. 103.

[5] See pp. 32–3 below. [6] ILM (1986), p. 543.

following closely as they do those of the 1969 Convention[7], are generally accepted as the applicable law. Although the 1969 Convention does not apply to treaties between states and international organisations, such as a host country agreement, in so far as the rules of the Convention reflect the rules of customary international law applicable to treaties with international organisations, they will apply (Article 3(b)). Where states which are parties to the 1969 Convention are parties to a treaty to which other subjects of international law, in particular international organisations such as the European Community are also parties, *as between the states parties* it is the 1969 Convention which applies, not customary international law (Article 3(c)).

No retrospective effect

The Convention applies to only those treaties which are concluded by states after the date the Convention enters into force for those states (Article 4).[8] There is no problem in applying this rule to bilateral treaties. In the case of a multilateral treaty, the Convention will apply to those states which participated in the conclusion of the treaty after the Convention entered into force for them, but not for other states.[9] The Convention entered into force on 27 January 1980. The UN Convention on the Law of the Sea (UNCLOS) was concluded on 10 December 1982. Thus for those states which were parties to the Convention on that date, its rules will apply as between them with regard to UNCLOS. Article 4 provides, however, that the rule against retrospection is without prejudice to the application of any rules in the Convention to which treaties would be subject under international law independently of the Convention. Thus, those rules of the Convention which reflect customary international law apply (but as customary law) to treaties concluded before the entry into force of the Convention, or concluded afterwards but before the Convention entered into force for parties to those treaties.[10]

[7] The first seventy-two articles deal with the same subjects as Articles 1–72 of the 1969 Convention.

[8] For an account of the negotiation of Article 4, see Sinclair, p. 230. See also P. McDade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969', ICLQ (1986), pp. 499–511; and E. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty', BYIL (1988), pp. 75–111.

[9] See Sinclair, pp. 8–9.

[10] As to the *Gabcikovo* case, see p. 11 below.

International organisations

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

State succession, state responsibility and the outbreak of hostilities

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

Bilateral and multilateral treaties

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

The Convention and customary international law

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

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

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

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

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

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

[16] See M. Shaw, *International Law* (4th edn, 1998), pp. 54–77.
[17] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1990), p. 87.
[18] See T. Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer', *Hague Recueil* (1990), IV, vol. 223, pp. 25–60; and H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal', AJIL (1985), pp. 871–90.
[19] See Thirlway, 'Law and Procedure', at p. 86. [20] See Sinclair, pp. 10–24.
[21] See p. 127 below about the time limit for notifying objections to reservations.

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

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

Effect of emerging customary law on prior treaty rights and obligations

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

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

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

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

application. But, since 1945 so-called 'law-making' treaties have become so numerous that a sizeable number of topics have come to be regulated by both customary law and treaty law. Whether the emergence of a new rule of customary law can supplant a prior treaty rule seems to have been studied in depth only quite recently.[25] The view has been expressed that international law has no hierarchy of sources of law, custom and treaty being autonomous; and that, even when custom has been codified, it retains its separate existence. This is a controversial theory,[26] and does not reflect the approach to legal problems taken by foreign ministry legal advisers, who, when dealing with an actual problem, naturally give more weight to an applicable treaty rule than a different customary rule. Nevertheless, new customary rules which emerge from economic changes or dissatisfaction with a treaty rule can result in a modification in the operation of a treaty rule. In the *Fisheries Jurisdiction* cases (*United Kingdom* v. *Iceland*; *Federal Republic of Germany* v. *Iceland*) in 1974, the International Court of Justice decided that, since the adoption in 1958 of the High Seas Convention, the right of states to establish twelve-mile fishing zones had crystallised as customary law, despite the provisions in that Convention regarding freedom of fishing on the high seas.[27]

Nor does international law contain any *acte contraire* principle by which a rule can be altered only by a rule of the same legal nature. Article 68(c) in the International Law Commission's 1964 draft of the Convention provided that the operation of a treaty may be modified by the 'subsequent emergence of a new rule of customary international law relating to matters dealt with in the treaty and binding upon all the parties'.[28] Although the article was not included in the final text of the Convention, this was only because the International Law Commission did not see its mandate as extending to the general relationship between customary law and treaty law.

Reference material on the Convention

The single most valuable source of material on the meaning and effect of the articles of the Convention remains the Commentary of the

[25] See M. Villiger, *Customary International Law and Treaties* (2nd edn, 1997); K. Wolfe, 'Treaties and Custom: Aspects of Interrelation', in Klabbers and Lefeber (eds.), *Essays on the Law of Treaties* (1998), pp. 31–9; and *Oppenheim*, pp. 31–6.

[26] See *Nicaragua* (*Merits*), *ICJ Reports* (1986), p. 92, paras. 172–82; and H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1989), pp. 143–4.

[27] *ICJ Reports* (1974), p. 3 at pp. 13 and 37. [28] YBILC (1964), II, p. 198.

International Law Commission on its draft articles and contained in its final report on the topic.[29] The history of the drafting of the articles is in the Yearbooks of the Commission beginning in 1950. However, since the Vienna Conference naturally made changes to the draft articles, one needs to refer also to the summary records of the Conference.[30] A comprehensive guide to the negotiating history (*travaux*) has been produced by Rosenne.[31] This should be used in conjunction with Wetzel's book, which has the text, in English, of all the most important *travaux*.[32] There are useful accounts of the negotiations in Sinclair and by Kearney and Dalton,[33] who took part in the Vienna Conference.

[29] YBILC (1966), II, pp. 173–274. See now A. Watts, *The International Law Commission, 1949–1998* (1999), vol. II, Chapter 8.

[30] UN Doc. A/Conf. 39/11 and Add. 1. The *documents* produced at the Conference are in A/Conf. 39/11/Add. 2.

[31] S. Rosenne, *The Law of Treaties* (1970).

[32] Wetzel and Rausching, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978).

[33] AJIL (1970), pp. 495–561.

ANNEX 12

Brownlie, *Principles of Public International Law.*

PRINCIPLES OF PUBLIC INTERNATIONAL LAW

BY

IAN BROWNLIE, CBE, QC, FBA

Bencher of Gray's Inn
Chichele Professor of Public International Law in the University of Oxford
Fellow of All Souls College, Oxford
Member of the Institute of International Law
Member of the International Law Commission

FIFTH EDITION

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Athens Auckland Bangkok Bogotá Buenos Aires Calcutta
Cape Town Chennai Dar es Salaam Delhi Florence Hong Kong Istanbul
Karachi Kuala Lumpur Madrid Melbourne Mexico City Mumbai
Nairobi Paris São Paulo Singapore Taipei Tokyo Toronto Warsaw

with associated companies in Berlin Ibadan

Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries

Published in the United States
by Oxford University Press Inc., New York

First edition 1966
Second edition 1973
Third edition 1979
Fourth edition 1990
Fifth edition 1998, reprinted 1999, 2001, 2002

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Brownlie, Ian.
Principles of public international law by Ian Brownlie.—5th ed.
Includes bibliographical references.
1. International law. I. Title.
JX3225.B78 1990 341—dc20 89–23244

ISBN 0–19–876298–4
ISBN 0–19–876299–2 (Pbk)

Typeset by Hope Services (Abingdon) Ltd.
Printed in Great Britain by
Biddles Ltd
www.biddles.co.uk

PART X

INTERNATIONAL TRANSACTIONS

CHAPTER XXVI

THE LAW OF TREATIES

1. *Introductory*[1]

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

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

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

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

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

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

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

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

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

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

[4] Art. 84.

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

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

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

[8] *Infra*, p. 678.

[9] *Infra*, p. 661.

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

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

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

declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

The reference to 'other subjects' of the law was designed to provide for treaties concluded by international organizations, the Holy See, and other international entities such as insurgents.[13]

In the Vienna Convention, as in the Final Draft of the Commission, the provisions are confined to treaties between states (Art. 1).[14] Article 3 provides that the fact that the Convention is thus limited shall not affect the legal force of agreements between states and other subjects of international law or between such other subjects of international law or between such other subjects. Article 2(1)(a) defines a treaty as '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[15] and whatever its particular designation'. The distinction between a transaction which is a definitive legal commitment between two states, and one which involves something less than that is difficult to draw but the form of the instrument, for example, a joint communiqué, is not decisive.[16] Article 2 stipulates that the agreements to which the Convention extends be 'governed by international law' and thus excludes the various commercial arrangements, such as purchase and lease, made between governments and operating only under one or more national laws.[17] The capacity of particular international organizations to make treaties depends on the constitution of the organization concerned.[18]

[13] See ch. III on legal personality.

[14] On the concept of a treaty see Widdows, 50 *BY* (1979), 117–49; Virally, in *Festschrift für Rudolf Bindschedler* (1980), 159–72; Thirlway, 62 *BY* (1991), 4–15.

[15] The conclusion of treaties in simplified form is increasingly common. Many treaties are made by an exchange of notes, the adoption of an agreed minute and so on. See: *Yrbk. ILC* (1966), ii. 188 (Commentary); Hamzeh, 43 *BY* (1968–9), 1779–89; Smets, *La Conclusion des accords en forme simplifée* (1969); Gotlieb, *Canadian Treaty-Making* (1968).

[16] See the *Aegean Sea Continental Shelf Case*, ICJ Reports (1978), 3 at 38–44; and the *Nicaragua* case (Merits), ibid. (1986), 14 at 130–2.

[17] See Mann, 33 *BY* (1957), 20–51; id., 35 *BY* (1959), 34–57; and cf. the *Diverted Cargoes* case, *RIAA* xii. 53 at 70. See also *British Practice* (1967), 147.

[18] On the capacity of members of federal states: *supra*, pp. 59–60, 77.

2. *Conclusion of Treaties*[19]

(*a*) *Form.*[20] The manner in which treaties are negotiated and brought into force is governed by the intention and consent of the parties. There are no substantive requirements of form, and thus, for example, an agreement may be recorded in an exchange of letters or the minutes of a conference.[21] In practice form is governed partly by usage, and thus form will vary according to whether the agreement is expressed to be between states, heads of states, governments (increasingly used), or particular ministers or departments. The Vienna Convention applies only to agreements 'in written form' but Article 3 stipulates that this limitation is without prejudice to the legal force of agreements 'not in written form'. Obviously substantial parts of the Convention are not relevant to oral agreements: the fact remains that important parts of the law, for example, relating to invalidity and termination, will apply to oral agreements.[22]

(*b*) *Full powers and signature.*[23] The era of absolute monarchs and slow communications produced a practice in which a sovereign's agent would be given a Full Power to negotiate and to bind his principal. In modern practice, subject to a different intention of the parties, a Full Power involves an authority to negotiate and to sign and seal a treaty. In the case of agreements between governments Full Powers, in the sense of the formal documents evidencing these and their reciprocal examinations by the negotiators, are often dispensed with.[24]

The successful outcome of negotiation is the adoption and authentication of the agreed text. Signature has, as one of its functions, that of authentication, but a text may be authenticated in other ways, for example by incorporating the text in the final act of a conference or by initialling. Apart from authentication, the legal effects of signature are as follows. Where the signature is subject to ratification, acceptance, or approval (see *infra*), signature does not establish consent to be

[19] The effect on the validity of treaties of non-compliance with internal law is considered in s. 5. On participation in multilateral treaties, see *infra*, p. 639.

[20] See generally Aust, 35 *ICLQ* (1986), 787–812. On 'gentleman's agreements' see E. Lauterpacht, *Festschrift für F. A. Mann* (1977), 381–98; Eisemann, *JDI* (1979), 326–48; Virally, *Annuaire de l'Inst.* 60 (1983), i. 166–374; ibid. 60, ii. 284 (Resol.); Thirlway, 63 *BY* (1991), 18–22.

[21] See *Case Concerning Maritime Delimitation and Territorial Questions* (*Qatar* v. *Bahrain*), ICJ Reports, 1994, 112 at 120–2.

[22] See Whiteman, xiv. 29–31; *Yrbk. ILC* (1966) ii. 190, Art. 3, commentary, para. 3.

[23] See Mervyn Jones, *Full Powers and Ratification* (1946); ILC draft, Art. 1(i)(d)(e), 4–7, 10–11; *Yrbk. ILC* (1962), ii. 164 ff; Waldock, ibid. 38 ff; *Yrbk. ILC* (1966), ii. 189, 193–7; Whiteman, xiv. 35–45; Vienna Conv., Arts. 7–11.

[24] Other exceptions exist in modern practice. Thus heads of state, heads of government, and Foreign Ministers are not required to furnish evidence of their authority.

bound. However, signature qualifies the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty.[25] Where the treaty is not subject to ratification, acceptance, or approval, signature creates the same obligation of good faith and establishes consent to be bound. Signature does not create an obligation to ratify.[26] In recent times signature has not featured in the adoption of all important multilateral treaties: thus the text may be adopted or approved by the General Assembly of the United Nations by a resolution and submitted to member states for accession.[27]

(*c*) *Ratification*.[28] Ratification involves two distinct procedural acts: the first is the act of the appropriate organ of the state, which is the Crown in the United Kingdom, and may be called ratification in the constitutional sense; the second is the international procedure which brings a treaty into force by a formal exchange or deposit of the instruments of ratification. Ratification in the latter sense is an important act involving consent to be bound. However, everything depends on the intention of the parties, where this is ascertainable, and modern practice contains many examples of less formal agreements not requiring ratification and intended to be binding by signature. A problem which has provoked controversy concerns the small number of treaties which contain no express provision on the subject of ratification. The International Law Commission[29] at first considered that treaties in principle require ratification[30] and specified exceptional cases where the presumption was otherwise, for example if the treaty provides that it shall come into force upon signature. However, the Commission changed its view, partly by reason of the difficulty of applying the presumption to treaties in simplified form. Article 14 of the Vienna Convention regulates the matter by reference to the intention of the parties.

[25] See Vienna Conv. Art. 18; *Upper Silesia* case, PCIJ, Ser. A, no. 7, p. 30; McNair, *Law of Treaties*, pp. 199–205; Fauchille, *Traité*, i. pt. iii (1926), 320.

[26] *Yrbk. ILC* (1962), ii. 171. But see Lauterpacht, ibid. (1953), ii. 108–12; and Fitzmaurice, ibid. (1956), ii. 112–13, 121–2.

[27] See the Conv. on the Privileges and Immunities of the United Nations, *infra*, pp. 682–3.

[28] See Whiteman, xiv. 45–92; Mervyn Jones, *Full Powers*; Delhousse, *La Ratification des traités* (1935); Sette-Camara, *The Ratification of International Treaties* (1949); Fitzmaurice, 15 *BY* (1934), 113–37; id., 33 *BY* (1957), 255–69; Blix, 30 *BY* (1953), 352–80; Frankowska, 73 *RGDIP* (1969), 62–88.

[29] ILC draft, Arts. 1(1)(d), 12; *Yrbk. ILC* (1962), ii. 171; Waldock, ibid. 48–53. See the Final Draft, Arts. 2(1)(b), 10, 11 and 13; *Yrbk. ILC* (1966), ii. 197–8; and the Vienna Conv., Arts. 2(1)(b), 11, 14, 16.

[30] See McNair, *Law of Treaties*, p. 133; Detter *Essays*, 15–17. Some members of the Commission were of opinion that no specific rule on the question existed. See also *British Practice* (1964), i. 81–2 and the *Ambatielos* case, ICJ Reports (1952), 43.

(*d*) *Accession, acceptance, and approval.*[31] 'Accession', 'adherence', or 'adhesion' occurs when a state which did not sign a treaty, already signed by other states, formally accepts its provisions. Accession may occur before or after the treaty has entered into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. Accession may appear in a primary role as the only means of becoming a party to an instrument, as in the case of a convention approved by the General Assembly of the United Nations and proposed for accession by member states.[32] Recent practice has introduced the terms 'acceptance' and 'approval' to describe the substance of accession. Terminology is not fixed, however, and where a treaty is expressed to be open to signature 'subject to acceptance', this is equivalent to 'subject to ratification'.

(*e*) *Expression of consent to be bound.* Signature, ratification, accession, acceptance, and approval are not the only means by which consent to be bound may be expressed. Any other means may be used if so agreed, for example an exchange of instruments constituting a treaty.[33]

3. *Reservations*[34]

In the Vienna Convention, a reservation is defined as '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'. This definition begs the

[31] ILC draft, Arts. 1(1)(d), 13–16. See the Final Draft, Arts. 2(1)(b), 11, 12, and 13; *Yrbk. ILC*, (1966), ii. 197–201; Vienna Conv. Arts. 2(1)(b), 11, 14–16.

[32] As in the case of the Conv. on the Privileges and Immunities of the United Nations. See McNair, *Law of Treaties*, pp. 153–5.

[33] Vienna Conv., Arts. 11 and 13.

[34] ILC draft, Arts. 1(1)(f), 18–22; *Yrbk. ILC* (1962), ii. 175–82; Waldock, ibid. 60–8; Final Draft, Arts. 2(1)(d), 16–20; *Yrbk. ILC* (1966), ii. 189–90, 202–9; Vienna Conv., Arts. 19–23; Lauterpacht, *Yrbk. ILC* (1953), ii. 123–36; Fitzmaurice, 2 *ICLQ* (1953), 1–27; id., 33 *BY* (1957), 272–93; Holloway, *Les Réserves dans les traités internationaux* (1958); id., *Modern Trends* (1967), 473–542; McNair, *Law of Treaties*, ch. IX; Bishop, 103 Hague *Recueil* (1961), ii. 249–341; Anderson, 13 *ICLQ* (1964), 450–81; Whiteman, xiv. 137–93; Detter, *Essays*, pp. 47–70; Jennings, 121 Hague *Recueil* (1967, II), 534–41; Cassese, *Recueil d'études en hommage à Guggenheim* (1968), 266–304; Tomuschat, 27 *Z.a.ö.R.u.V.* (1967), 463–82; Kappeler, *Les Réserves dans les traités internationaux* (1958); Mendelson, 45 *BY* (1971), 137–71; Ruda, 146 Hague *Recueil* (1975, III), 95–218; Gaja, *Ital. Yrbk.* (1975), 52–68; id., *Essays in Honour of Roberto Ago*, i (1987), 307–30; 49 *BY* (1978), 378–80; Bowett, 48 *BY* (1976–7), 67–92; McRae, 49 *BY* (1978), 155–73; Imbert, *Les Réserves aux traités multilatéraux* (1979); Sinclair, *The Vienna Convention*, pp. 51–82; Gamble, 74 *AJ* (1980), 372–94; Horn, T.M.C. Asser Instituut, Swedish Institute, *Studies in International Law*, Vol. 5 (1988); Cameron and Horn, 33 *German Yrbk.* (1990), 62–129; Clark, 85 *A.J.* (1991), 281–321; Redgwell, 64 *BY* (1993), 245–82; Sucharipa-Behrmann, 1 *Austrian Review of Int. and Europ. Law* (1996), 67–88; Greig, *Austral. Yrbk.*, 16 (1995), 21–172. See further Pellet, Second Report on Reservations to Treaties, UN Doc. A/CN.4/477; Third Report, A/CN.4/491; *UN Juridical Yrbk.*, 1976, p. 209.

question of validity, which is determined on a contractual and not a unilateral basis. The formerly accepted rule for all kinds of treaty was that reservations were valid only if the treaty concerned permitted reservations and if all other parties accepted the reservation. On this basis a reservation constituted a counter-offer which required a new acceptance, failing which the state making the counter-offer would not become a party to the treaty. This view rests on a contractual conception of the absolute integrity of the treaty as adopted.[35]

In the period of the League of Nations (1920–46) the practice in regard to multilateral conventions showed a lack of consistency. The League Secretariat, and the later the Secretary-General of the United Nations, in his capacity as depositary of conventions concluded under the auspices of the League, followed the principle of absolute integrity. In contrast the members of the Pan-American Union, later the Organization of American States, adopted a flexible system which permitted a reserving state to become a party *vis-à-vis* non-objecting states. This system, dating from 1932, promotes universality at the expense of depth of obligation. Thus a state making sweeping reservations could become a party though bound only in regard to two or three non-objecting states and, even then, with large reservations.

Following the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the General Assembly of the United Nations in 1948, a divergence of opinion arose on the admissibility of reservations to the Convention, which contained no provision on the subject. The International Court was asked for an advisory opinion, and in giving its opinion[36] stressed the divergence of practice and the special characteristics of the Convention, including the intention of the parties and the General Assembly that it should be universal in scope. The principal finding of the Court was that 'a State which has made . . . a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention. . . .' In 1951 the International Law Commission rejected the 'compatibility' criterion as too subjective and preferred a rule of unanimous consent. However, in 1952 the General Assembly requested the Secretary-General of the United Nations to conform his practice to the opinion of the Court in respect of the Genocide Convention; and, in respect of *future*[37] conventions concluded under the auspices of the United Nations of which he was depositary, to act as depositary without

[35] See *Reservations to Genocide Convention*, ICJ Reports (1951), 15 at 21, 24.
[36] Last note.
[37] Concluded after 12 Jan. 1952, when the resolution was adopted.

passing upon the legal effect of documents containing reservations and leaving it to each state to draw legal consequences when reservations were communicated to them. In its practice the Secretariat adopted the 'flexible' system for future conventions, and in 1959 the General Assembly reaffirmed its previous directive and extended it to cover *all* conventions concluded under the auspices of the United Nations, unless they contain contrary provisions. In 1962 the International Law Commission decided in favour of the 'compatibility' doctrine.[38] The Commission pointed out that the increase in the number of potential participants in multilateral treaties made the unanimity principle less practicable.

The Final Draft of the Commission was followed in most respects by the Vienna Convention. Article 19 of the Convention indicates the general liberty to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty and then states three exceptions. The first two exceptions are reservations expressly prohibited and reservations not falling within provisions in a treaty permitting specified reservations and no others. The third class of impermissible reservations is cases falling outside the first mentioned classes in which the reservation is 'incompatible with the object and purpose of the treaty'.

Article 20 provides as follows for acceptance of and objection to reservations other than those expressly authorized by a treaty:[39]

> 2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
>
> 3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
>
> 4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
>
> (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

[38] Draft Art. 18(1)(d) and 20(2). The Commission rejected a 'collegiate' system which would require acceptance of the reservation by a given proportion of the other parties for the reserving state to become a party: cf. Anderson, 13 *ICLQ* (1964), 450–81. See also *British Practice* (1964), i. 83–4.

[39] Special provisions concerning the making of reservations may present difficult problems of interpretation: see the *Anglo–French Continental Shelf Arbitration*, ILR 54, 6 at 41–57 (paras. 34–74); and Bowett, 48 *BY* (1976–7), 67–92.

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;[40]

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

The 'compatibility' test is the least objectionable solution but is by no means an ideal regime,[41] and many problems remain. The application of the criterion of compatibility with object and purpose is a matter of appreciation, but this is left to individual states. How is the test to apply to provisions for dispute settlement, or to specific issues in the Territorial Sea Convention of 1958,[42] such as the right of innocent passage? In practical terms the 'compatibility' test approximates to the Latin-American system and thus may not sufficiently maintain the balance between the integrity and the effectiveness of multilateral conventions in terms of a firm level of obligation.

The reason for the approximation to the Latin-American system[43] is that each state decides for itself whether reservations are incompatible and some states might adopt a liberal policy of accepting far-reaching reservations. The particular difficulty which international tribunals face in practice is the determination of the precise legal consequences of a decision that a particular reservation is incompatible. In the *Belilos*[44] and *Loizidou*[45] cases the European Court of Human Rights treated the objectionable reservation as severable. The issue of severability in relation to human rights treaties is the subject of controversy.

[40] This provision reverses the presumption against entry into force contained in the proposals of the International Law Commission: see Zemanek, in *Essays in Honour of Manfred Lachs* (1984), 323–36.

[41] See Waldock, *Yrbk. ILC* (1962), ii. 65–6; *ILC*, 1966 Report, ibid. (1966), ii. 205–6; Sinclair, 19 *ICLQ* (1970), 53–60.

[42] *Supra*, pp. 177 ff.

[43] For the Standards on Reservations adopted in 1973 by the OAS see *Digest of US Practice* (1973), 179–81. For the history: Ruda, 146 Hague *Recueil* (1975, II), 115–33.

[44] *European Court of Human Rights*, Series A, No. 132. See further Cameron and Horn, 33 *German Yrbk.* (1990), 69–129; Marks, 39 *ICLQ* (1990), 300–27; Chinkin and Others, *Human Rights as General Norms and a State's Right to Opt Out* (1997).

[45] Ibid., Series A, No. 310 (*Loizidou* v. *Turkey* (Preliminary Objections)).

4. *Entry into Force, Deposit, and Registration*[46]

The provisions of the treaty determine the manner in which and the date on which the treaty enters force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty.[47]

After a treaty is concluded, the written instruments, which provide formal evidence of consent to be bound by ratification, accession, and so on, and also reservations and other declarations, are placed in the custody of a depositary, who may be one or more states, or an international organization. The depositary has functions of considerable importance relating to matters of form, including provision of information as to the time at which the treaty enters into force.[48] The United Nations Secretariat plays a significant role as depositary of multilateral treaties.

Article 102 of the Charter of the United Nations[49] provides as follows:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

This provision is intended to discourage secret diplomacy and to promote the availability of texts of agreements. The *United Nations Treaty Series* includes agreements by non-members which are 'filed and recorded' with the Secretariat as well as those 'registered' by members. The Secretariat accepts agreements for registration without conferring any status on them, or the parties thereto, which they would not have otherwise. However, this is not the case where the reg-

[46] ILC drafts, Arts. 23–5; *Yrbk. ILC* (1962), ii. 182–3; Waldock, ibid. 68–73; Final Draft, Arts. 21, 22, and 75; *Yrbk. ILC* (1966), ii. 209–10, 273–4; Vienna Conv., Arts. 24, 25, 80. On registration see Whiteman, xiv. 113–26; McNair, *Law of Treaties*, ch. X; Brandon, 29 *BY* (1952), 186–204; id., 47 *AJ* (1953), 49–69; Boudet, 64 *RGDIP* (1960), 596–604; Broches and Boskey, 4 *Neths. Int. LR* (1957), 189–92, 277–300; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), 328–36; Detter, *Essays*, pp. 28–46.

[47] Vienna Conv., Art. 24(2).

[48] Vienna Conv., Arts. 76, 77; Rosenne, 61 *AJ* (1967), 923–45; ibid. 64 (1970), 838–52; Whiteman, xiv. 68–92.

[49] A similar but not identical provision appeared in Art. 18 of the Covenant of the League of Nations: McNair, *Law of Treaties*, pp. 180–5.

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

5. *Invalidity of Treaties*[54]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] *Yrbk. ILC* (1966), ii. 240–2.
[58] ILC draft, Art. 32; *Yrbk. ILC* (1963), ii. 193; Waldock, ibid. 46–7; Final Draft, Art. 44; *Yrbk. ILC* (1966), ii. 242; Vienna Conv., Art. 47.
[59] *Yrbk. ILC* (1966), ii. 245.
[60] See Lauterpacht, *Yrbk. ILC* (1953), ii. 153; Fitzmaurice, 2 *ILCQ* (1953), 25, 35–7; Waldock, *Yrbk. ILC* (1963), ii. 48–50; Oraison, *L'Erreur dans les traités* (1972); Thirlway, 63 *BY* (1992), 22–8.
[61] See also *Yrbk. ILC* (1966), ii. 243–4.

assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.[62]

(*e*) *Fraud.*[63] There are few helpful precedents on the effect of fraud. The Vienna Convention provides[64] that a state which has been induced to enter into a treaty by the fraud of another negotiating state may invoke the fraud as invalidating its consent to be bound by the treaty. Fraudulent misrepresentation of a material fact inducing an essential error is dealt with by the provision relating to error.

(*f*) *Coercion of state representatives.*[65] The Vienna Convention, Article 51, provides that 'the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without legal effect'. The concept of coercion extends to blackmailing threats and threats against the representative's family.

(*g*) *Coercion of a state.*[66] The International Law Commission in its draft of 1963 considered that Article 2, paragraph 4, of the Charter of the United Nations, together with other developments, justified the conclusion that a treaty procured by the threat or use of force in violation of the Charter of the United Nations shall be void. Article 52 of the Vienna Convention so provides.[67] An amendment with the object of defining force to include any 'economic or political pressure' was withdrawn. A Declaration condemning such pressure appears in the Final Act of the Conference.

(*h*) *Conflict with a peremptory norm of general international law* (jus cogens). See Chapter XXIII, section 5.

(*i*) *Unequal treaties.* The doctrine of international law in Communist states, invoked by their representatives in organs of the

[62] See the *Temple* case, ICJ Reports (1962), 26. See also the sep. op. of Judge Fitzmaurice, ibid. p. 57.

[63] See Lauterpacht, ibid. (1953), ii. 152; Fitzmaurice, ibid. (1958), ii. 25, 37; Waldock, ibid. (1963), ii. 47–8; Oraison, 75 *RGDIP* (1971), 617–73.

[64] Art. 49. See also the Final Draft, *Yrbk. ILC* (1966). ii. 244–5.

[65] Fitzmaurice, ICJ Reports (1958), ii. 26, 38; Waldock, ibid. (1963), ii. 50; Final Draft, Art. 48; *Yrbk. ILC* (1966), ii. 245–6.

[66] ILC draft, Art. 36; *Yrbk. ILC* (1963), ii. 197; Waldock, ibid. 51–2; Lauterpacht, ICJ Reports (1953), ii. 147–52; McNair, *Law of Treaties*, pp. 206–11; Brownlie, *International Law and the Use of Force by States* (1963), 404–6; Fitzmaurice, *Yrbk ILC* (1957), ii. 32, 56–7; ibid. (1958), ii. 26, 38–9; Bothe, 27 *Z.a.ö.R.u.V.* (1967), 507–19; Jennings, 121 Hague *Recueil*, pp. 561–3; Ténékidès, *Ann. français* (1974), 79–102; De Jong, 15 *Neths. Yrbk.* (1984), 209–47. See also *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*), ICJ Reports, (1973) 3 at 14; Briggs, 68 *AJ* (1974), 51 at 62–3; Thirlway, 63 *BY* (1992), 28–31.

[67] See also the Final Draft, Art. 49; *Yrbk. ILC* (1966), ii. 246–7; Whiteman, xiv. 268–70; Kearney and Dalton, 64 *AJ* (1970), 532–5.

United Nations, held that treaties not concluded on the basis of the sovereign equality of the parties to be invalid.[68] An example of such a treaty is an arrangement between a powerful state and a state still virtually under its protectorate, whereby the latter grants extensive economic privileges and or military facilities. The general view is that the principle does not form a part of positive law[69] but it is attractive to some jurists of the 'Third World'.[70] Apart from the presence or absence of general agreement on the content of the principle, a proportion of its dominion may be exercised through the rules concerning capacity of parties, duress (*supra*), fundamental change of circumstances (*infra*, section 6(*h*)), and the effect of peremptory norms of general international law, including the principle of self-determination (*supra*, pp. 593–6 and *infra*, section 6(*i*)).

6. *Withdrawal, Termination and Suspension of Treaties*[71]

(*a*) *Pacta sunt servanda.* The Vienna Convention prescribes a certain presumption as to the validity and continuance in force of a treaty,[72] and such a presumption may be based upon *pacta sunt servanda* as a general principle of international law: a treaty in force is binding upon the parties and must be performed by them in good faith.[73]

(*b*) *State succession.*[74] Treaties may be affected when one state succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive depend on many factors, including the precise form and origin of the 'succession' and the type of treaty concerned. Changes of this kind may of course terminate treaties apart from categories of state succession (section (*h*), *infra*).

[68] See Kozhevnikov (ed.), *International Law* (n.d.), 248, 280–1; Lester, II, *ICLQ* (1962), 847–55; Detter, 15 *ICLQ* (1966), 1069–89. The principle has been advanced both as affecting essential validity and as a ground for termination.

[69] See Caflisch, 35 *German Yrbk.* (1992), 52–80.

[70] See Sinha, 14 *ICLQ* (1965), 121 at 123–4.

[71] See generally *Annuaire de l'Institut*, 49, i (1961); 52, i. ii (1967); Fitzmaurice, *Yrbk. ILC* (1957), ii. 16–70; McNair, *Law of Treaties*, chs. XXX–XXXV; Tobin, *Termination of Multipartite Treaties* (1933); Detter, *Essays*, pp. 83–99; Whiteman, xiv. 410–510; Capotorti, 134 Hague *Recueil* (1971, III), 419–587; Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), 229–425; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 59–85; Thirlway, 63 *BY* (1992), 63–96; Oppenheim, i. 1296–1311.

[72] Art. 42. See also ILC draft, Art. 30; *Yrbk. ILC* (1963), ii. 189; Final Draft, Art. 39; ibid. (1966), ii. 236–7.

[73] See the Vienna Conv. Art. 26; the ILC Final Draft, Art. 23; *Yrbk. ILC* (1966), ii. 210–11; and McNair, *Law of Treaties*, ch. XXX.

[74] See ch. XXVIII, pp. 665–9. In its work on the law of treaties the International Law Commission put this question aside: Final Draft, Art. 69; *Yrbk.* (1966), ii. 267; and see the Vienna Conv., Art. 73.

(*c*) *War and armed conflict.*[75] Hostile relations do not automatically terminate treaties between the parties to a conflict. Many treaties, including the Charter of the United Nations, are intended to be no less binding in case of war, and multipartite law-making agreements such as the Geneva Conventions of 1949 survive war or armed conflict.[76] However, in state practice many types of treaty are regarded as at least suspended in time of war, and war conditions may lead to termination of treaties on grounds of impossibility or fundamental change of circumstances. In many respects the law on the subject is uncertain. Thus, it is not yet clear to what extent the illegality of the use or threat of force has had effects on the right (where it may be said to exist) to regard a treaty as suspended or terminated.[77]

(*d*) *Operation of the provisions of a treaty.* A treaty may of course specify the conditions of its termination, and a bilateral treaty may provide for denunciation by the parties.[78] Where a treaty contains no provisions regarding its termination the existence of a right of denunciation depends on the intention of the parties, which can be inferred from the terms of the treaty and its subject-matter, but, according to the Vienna Convention, the presumption is that the treaty is not subject to denunciation or withdrawal.[79] At least in certain circumstances denunciation is conditional upon a reasonable period of notice. Some important law-making treaties, including the Conventions on the Law of the Sea of 1958, contain no denunciation clause. Treaties of peace are presumably not open to unilateral denunciation.

(*e*) *Termination by agreement.* Termination or withdrawal may take place by consent of all the parties.[80] Such consent may be implied. In particular, a treaty may be considered as terminated if all the parties

[75] See McNair, *Law of Treaties*, ch. XLIII; Briggs, pp. 934–46; Scelle, 77 *JDI* (1950), 26–84; La Pradelle, 2 *ILQ* (1948–9), 555–76; Edwards, 44 *Grot. Soc.* (1958), 91–105; Whiteman, xiv. 490–510; Broms, *Annuaire de l'Inst.* 59 (1981), i. 201–84; ibid. ii. 175–244 (debate); Broms, ibid. 61 (1985), i. 1–27; ibid. 61, ii. 199–255 (debate); 278 (Resol.). The question was put aside by the International Law Commission: Final Draft, Art. 69; *Yrbk.* (1966), ii. 267; and see the Vienna Conv., Art. 73.

[76] See *Masinimport* v. *Scottish Mechanical Light Industries*, ILR 74, 559 at 564 (Scotland, Court of Session).

[77] ILC draft Pt. II, commentary; *Yrbk. ILC* (1963), ii. 189, para. 14.

[78] Vienna Conv., Art. 54; ILC Final Draft, Art. 51; *Yrbk. ILC* (1966), ii. 249.

[79] Vienna Conv., Art. 56; ILC draft, Art. 39; *Yrbk.* ILC draft, Art. 39; *Yrbk. ILC* (1963), ii. 200–1; Waldock, ibid, 64–70; Fitzmaurice, ibid. (1957), ii. 22; McNair, *Law of Treaties*, pp. 502–5, 511–13; ILC, Final Draft, Art. 53; *Yrbk.* (1966), ii. 250–1; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 70–1; Widdows, 53 *BY* (1982), 83–114; Sinclair, *The Vienna Convention*, pp. 186–8; Plender, 57 *BY* (1986), 143–53. See also the Adv. op. on the Interpretation of the Agreement of 25 Mar. 1951 between the WHO and Egypt, ICJ Reports (1980), 73 at 94–6; 128–9 (Mosler, sep. op.); 159–62 (Ago, sep. op.); 176–7 (El-Erian, sep. op.); 184–9 (Sette-Camara); and the *Nicaragua* case (Jurisdiction), ICJ Reports (1984), 392 at 419–20 (para. 63).

[80] Vienna Conv., Art. 54; ILC draft Art. 40, *Yrbk.* (1963), ii. 203–4; ILC Final Draft, Art. 54, *Yrbk.* (1966), ii. 251–2. See also Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994).

conclude a later treaty which is intended to supplant the earlier treaty or if the later treaty is incompatible with its provisions.[81] The topic of 'desuetude', which is probably not a term of art, is essentially concerned with discontinuance of use of a treaty and its implied termination by consent.[82] However, it could extend to the distinct situation of a unilateral renunciation of rights under a treaty. Moreover, irrespective of the agreement of the parties, an ancient treaty may become meaningless and incapable of practical application.[83]

(*f*) *Material breach.*[84] It is widely recognized that material breach by one party entitles the other party or parties to a treaty to invoke the breach as the ground of termination or suspension. This option by the wronged party is accepted as a sanction for securing the observance of treaties. However, considerable uncertainty has surrounded the precise circumstances in which such right of unilateral abrogation may be exercised, particularly in respect of multilateral treaties. Article 60 of the Vienna Convention[85] deals with the matter with as much precision as can be reasonably expected:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties.

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

[81] Vienna Conv., Art. 59; ILC draft, Art. 41, *Yrbk.* 91963), ii. 203–4; ILC Final Draft, Art. 56; *Yrbk.* (1966), ii. 252–3; Plender, 57 *BY* (1986), 153–7. See also the sep. op. of Judge Anzilotti, *Electricity Company of Sofia* case, *PCIJ*, Ser. A/B, no. 77, p. 92. See also *infra*, p. 630.

[82] See ILC Final Draft, Art. 39, Commentary, para.. 5; *Yrbk.* (1966), ii. 237; Fitzmaurice, *Yrbk. ILC* (1957), ii. 28, 47–8, 52; McNair, *Law of Treaties*, pp. 516–18; Yuille, *Shortridge Arbitration,* Lapradelle and Politis, ii. 105; *Nuclear Tests* case (Australia v. France), ICJ Reports (1974) 253 at 337–8 (joint diss. op.), 381 (De Castro, diss.) 404, 415–16 (Barwick, diss.); 55 *BY* (1984), 517 (UK); Sinclair, *The Vienna Convention*, pp. 163–4; Plender, 57 *BY* (1986), 138–45; Kontou, op. cit. supra, 24–31; Thirlway, 63 *BY* (1992), 94–6. See also *Widjatmiko* v. *NV Geobroeders Zomer*, ILR 70, 439.

[83] See Parry, in Sørensen, p. 235.

[84] McNair, *Law of Treaties*, pp. 553–71; Sinha, *Unilateral Deunuciation of Treaty Because of Prior Violations of Obligations by Other Party* (1966); Detter, *Essays*, pp. 89–93; Fitzmaurice, *Yrbk. ILC* (1957), ii. 31, 54–5; *Tacna–Arica Arbitration*, *RIAA*. ii. 929, 943–4; *Ann. Digest* (1925–6), no. 269; Whiteman, xiv. 468–78; Simma, *Öst. Z. für öff. R.* 20 (1970), 5–83; Briggs, 68 *AJ* (1974), 51–68; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 79–85; Sinclair, *The Vienna Convention*, pp. 188–90; Plender, 57 *BY* (1986), 157–66.

[85] See also ILC draft, Art. 42, *Yrbk. ILC* (1963), ii. 204; Waldock, ibid. 72–7; Final Draft, Art. 57; ibid. (1966), ii. 253–5.

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:[86]

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

A State may by its own conduct prejudice its right to terminate a treaty on the ground of material breach.[87]

(*g*) *Supervening impossibility of performance.*[88] The Vienna Convention provides[89] that a party 'may invoke the impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty'. Situations envisaged include the submergence of an island, the drying up of a river, or destruction of a railway, by an earthquake or other disaster. The effect of impossibility is not automatic, and a party must invoke the ground for termination. Impossibility of performance may not be invoked by a party to the relevant treaty when it results from that party's own breach of an obligation flowing from the treaty.[90]

(*h*) *Fundamental change of circumstances.*[91] The principles have been expressed in Article 62 of the Vienna Convention as follows:

[86] This definition was applied by the International Court in the *Namibia* Opinion, ICJ Reports (1971), 46–7, in respect of South African violations of the Mandate for South West Africa (Namibia) and the consequent termination of the Mandate by the UN General Assembly.

[87] See the *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, paras. 105–10.

[88] See generally McNair, *Law of Treaties*, pp. 685–8; Fitzmaurice, *Yrbk. ILC* (1957), ii. 50–1; Sinclair, *The Vienna Convention*, pp. 190–2.

[89] Art. 61(1); ILC draft, Art. 43, *Yrbk. ILC* (1963), ii. 206; Waldock, ibid. 77–9; Final Draft, Art. 58, ibid. (1966), ii. 255–6. Another example of impossibility arises from the total extinction of one of the parties to a bilateral treaty, apart from any rule of state succession which might allow devolution: see Waldock, ibid. (1963), ii. 77–9. and ibid., commentary at pp. 206–7.

[90] See the *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, paras. 102–3.

[91] ILC draft, Art. 44, *Yrbk. ILC* (1963), ii. 207; Waldock, ibid. 79–85; Final Draft, Art. 59, ibid. (1966), ii. 256–60; Fitzmaurice, ibid. (1957), ii. 56–65; McNair, *Law of Treaties*, pp. 681–91; Rousseau, *Principles généraux*, i. 580–615; Chesney Hill, *The Doctrine of 'Rebus sic*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

An example of a fundamental change would be the case where a party to a military and political alliance, involving exchange of military and intelligence information, has a change of government incompatible with the basis of alliance. The majority of modern writers accept the doctrine of *rebus sic stantibus* which is reflected in this provision. The doctrine involves the implication of a term that the obligations of an agreement would end if there has been a change of circumstances. As in municipal systems, so in international law it is recognized that changes frustrating the object of an agreement and apart from actual impossibility may justify its termination. Some jurists dislike the doctrine, regarding it as a primary source of insecurity of obligations, more especially in the absence of a system of compulsory jurisdiction. The Permanent Court in the *Free Zones* case[92] assumed that the principle existed while reserving its position on its extent and the precise

Stantibus' (1934); Harvard Research, 29 *AJ* (1935), Suppl., pp. 1096–126; van Bogaert, 70 *RGDIP* (1966), 49–74; Whiteman, xiv. 478–90; Lissitzyn, 61 *AJ* (1967), 895–922; Poch de Caviedes, 118 Hague *Recueil* (1966), ii. 109–204; Schwelb, 29 *Z.a.ö.R.u.V.* (1969), 39–70; Note, 76 *Yale LJ* (1967), 1669–87; Pastor Ridruejo, 25 *Ann. suisse* (1968), 81–98; Verzijl, *Festschrift für Walter Schätzel*, pp. 515–29; Rousseau, i. 224–30; Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), 327–420; id.; 146 Hague *Recueil* (1975, III), 1–94; Toth, *Juridical Review* (Edinburgh) (1974), 56–82, 147–78, 263–81; Jasudowicz, 8 *Polish Yrbk.* (1976), 155–81; *Répertorie suisse*, i. 178–86; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 71–9; Sinclair, *The Vienna Convention*, pp. 192–6; Cahier, in *Essays in Honour of Roberto Ago*, i. (1987), 163–86; Thirlway, 63 *BY* (1992), 75–82.

[92] (1932), *PCIJ*, Ser. A/B, no. 46, pp. 156–8; *Ann. Digest* (1931–2), 362 at 364. The Court observed that the facts did not justify the applications of the doctrine, which had been invoked by France.

mode of its application. State practice and decisions of municipal courts[93] support the principle, for which three juridical bases have been proposed. According to one theory the principle rests on a supposed implied term of the treaty, a basis which involves a fiction and, where it does not, leaves the matter as one of interpretation. A second view is to import a 'clausula' *rebus sic stantibus* into a treaty by operation of law, the clause operating automatically. The third view, which represents the modern law, is that the principle is an objective rule of law, applying when certain events exist, yet not terminating the treaty automatically, since one of the parties must invoke it. The International Law Commission and the Convention exclude treaties fixing boundaries from the operation of the principle in order to avoid an obvious source of threats to the peace.

In the *Fisheries Jurisdiction* case (United Kingdom v. Iceland)[94] the International Court accepted Article 62 of the Vienna Convention as a statement of the customary law but decided that the dangers to Icelandic interests resulting from new fishing techniques 'cannot constitute a fundamental change with respect to the lapse or subsistence' of the jurisdictional clause in a bilateral agreement. In the *Hungary/Slovakia* case the Court rejected the Hungarian argument in these terms:[95]

> 'Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law . . .
>
> The Court recalls that, in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1973*, p. 63, para. 36), it stated that,
>
> Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.
>
> The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's

[93] e.g. *Bremen* v. *Prussia*, *Ann. Digest* 3 (1925–6), no. 266; *In re Lepeschkin*, ibid. 2 (1923–4), no. 189; *Sransky* v. *Zivnostenska Bank*, ILR 22 (1955), 424–7.

[94] ICJ Reports (1973), 3 at 20–1. See also ibid, 49 (*Fed. Rep. of Germany* v. *Iceland*); and Briggs, 68 *AJ* (1974), 51–68.

[95] Judgment, para. 104.

view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.'

(*i*) *New peremptory norm*. A treaty becomes void if it conflicts with a peremptory norm of general international law (*jus cogens*) established after the treaty comes into force.[96] This does not have retroactive effects on the validity of a treaty.

7. *Invalidity, Termination, and Suspension: General Rules*[97]

The application of the regime of the Vienna Convention concerning the invalidity, termination, and suspension of the operation of treaties is governed by certain general provisions. The validity and continu-

[96] Vienna Conv., Art. 64; ILC draft, Art. 45; *Yrbk. ILC* (1963), ii. 211; Waldock, ibid. 77, 79 (para. 8); Final Draft, Art. 61; ibid. (1966), ii. 261; Fitzmaurice, ibid. (1957), ii. 29–30, 51. See also *supra*, p. 612. Generally on *jus cogens* see ch. XXIII, s. 5.

[97] See further the Vienna Conv., Arts. 69–72 and 75; and Cahier, 76 *RGDIP* (1972), 672–89.

ance in force of a treaty and of consent to be bound is presumed (Art. 42).[98] Certain grounds of invalidity must be invoked by a party[99] and so the treaties concerned are not void but *voidable*. These grounds are: incompetence under internal law, restrictions on authority of representative, error, fraud, and corruption of a representative. The same is true of certain grounds of termination, namely, material breach, impossibility, and fundamental change of circumstances. On the other hand a treaty is *void* in case of coercion of a state (invalidity), and conflict with an existing or emergent peremptory norm (*jus cogens*) (invalidity or termination). Consent to be bound by a treaty procured by coercion of the representative of a state 'shall be without any legal effect' (Art. 51, invalidity). The rules governing separability of treaty provisions (Art. 44), that is, the severance of particular clauses affected by grounds for invalidating or terminating a treaty, do not apply to the cases of coercion of a representative, coercion of a state, or conflict with an *existing* peremptory norm (*jus cogens*). Provisions in conflict with a *new* peremptory norm may be severable, however.[100]

8. *Application and Effects of Treaties*[101]

(*a*) *Justification for non-performance or suspension of performance*. The grounds for termination have been considered in section 6, and the requirements of essential validity in section 5. However, the content of those categories does not exhaust the matters relevant to justification for non-performance of obligations, an issue which can arise irrespective of validity or termination of the *source* of obligation, the treaty itself. The topic of justification belongs to the rubric of state responsibility (Chapter XXI, section 13). Clearly a state may plead necessity, or *force majeure*, for example, the effects of natural catastrophe or foreign invasion.[102] In the same connection legitimate military self-defence in case of armed conflict and civil strife provides a more particular justification.[103] Non-performance by way of legitimate reprisals raises highly controversial issues of the scope of reprisals in

[98] See also Art. 26 and *supra*.

[99] On the procedure see Arts. 65–8. See further Briggs, 61 *AJ* (1967), 976–89; Thirlway, 63 *BY* (1992), 85–94.

[100] See *Yrbk. ILC* (1966), ii. 238–9. 261. For comment on this distinction see Sinclair, 19 *ICLQ* (1970), 67–8.

[101] Vienna Conv., Arts. 28–30, 34–9; ILC draft, Arts. 55–64; 59 *AJ* (1965), 210 ff; Final Draft, Arts. 24–6, 30–4.

[102] See UN Secretariat Study, ST/LEG/13, 27 June 1977.

[103] See Fitzmaurice, *Yrbk. ILC* (1959), ii. 44–5, 64–6.

the modern law.[104] The Vienna Convention does not prejudge any question of state responsibility (Art. 73).

(*b*) *Obligations and rights for third states.*[105] The maxim *pacta tertiis nec nocent nec prosunt* expresses the fundamental principle that a treaty applies only between the parties to it. The final draft of the International Law Commission and the Vienna Convention refer to this as the 'general rule', and it is a corollary of the principle of consent and of the sovereignty and independence of states. Article 34 of the Convention provides that 'a treaty does not create either obligations or rights for a third State without its consent'.

The existence and extent of exceptions to the general rule have been matters of acute controversy. The Commission was unanimous in the view that a treaty cannot by its own force create obligations for non-parties. The Commission did not accept the view that treaties creating 'objective regimes', as, for example, the demilitarization of a territory by treaty or a legal regime for a major waterway, had a specific place in the existing law.[106] Article 35 of the Vienna Convention provides that 'an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.

However, two apparent exceptions to the principle in respect of obligations exist. Thus a rule in a treaty may become binding on non-parties if it becomes a part of international custom.[107] The Hague Convention concerning rules of land warfare and, perhaps, certain treaties governing international waterways fall within this category. Further, a treaty may provide for lawful sanctions for violations of the law which are to be imposed on an aggressor state.[108] The Vienna Convention contains a reservation in regard to any obligation in relation to a treaty which arises for an aggressor state 'in consequence of measures taken in conformity with the Charter of the United Nations with reference to the aggression' (Art. 75). The precise status of

[104] Fitzmaurice, ibid. 45–6, 66–70; McNair, *Law of Treaties*, p. 573; Schwarzenberger, *International Law*, i. 537. Cf. Art. 2(3) of the UN Charter.

[105] Vienna Conv. Arts. 34–8; ILC draft, Arts. 58–62; 59 *AJ* (1965), 217–27; Final Draft, Arts. 30–4; *Yrbk. ILC* (1960), ii. 69–107; Jiménez de Aréchaga, 50 *AJ* (1956), 338–57; McNair, *Law of Treaties*, pp. 309–21; Lauterpacht, *The Development of International Law of the International Court* (1958), 306–13; Guggenheim (2nd edn.), i. 197–204; Lachs, 92 Hague *Recueil* (1957, II), 313–19; Detter, *Essays*, 100–18; Whiteman, xiv. 331–53; Jennings, 20 *ICLQ* (1971), 433–50; Rousseau, i. 182–93; Cahier, 143 Hague *Recueil* (1974, III), 589–736; Rozakis, 35 *Z.a.ö.R.u.V.* (1975), 1–40; *Répertoire suisse*, i. 139–48; Napoletano, *Ital. Yrbk.* (1977), 75–91; Sinclair, *The Vienna Convention*, pp. 98–106; Thirlway, 60 *BY* (1989), 63–71; Chinkin, *Third Parties in International Law* (1993), 25–114; Oppenheim, i. 1260–6.

[106] See McNair, *Law of Treaties*, p. 310, and see further *supra*, pp. 276, 377.

[107] Vienna Conv., Art. 38; ILC Final Draft, Art. 34; *Yrbk. ILC* (1966), ii. 230.

[108] *Yrbk. ILC* (1966), ii. 227, Art. 31, commentary, para. 3; ibid., Art. 70, p. 268.

Article 2, paragraph 6, of the United Nations Charter is a matter of some interest. Kelsen,[109] among others, holds the view that the provision creates duties, and liabilities to sanctions under the enforcement provisions of the Charter, for non-members. Assuming that this was the intention of the draftsmen, the provision can only be reconciled with general principles by reference to the status of the principles in Article 2 as general or customary international law.

More controversial is the conferment of rights on third parties, the *stipulation pour autrui*. Not infrequently treaties make provisions in favour of specified third states or for other states generally, as in the case, it would seem, of treaties concerning certain of the major international waterways, including, on one view, the Panama Canal.[110] The problem is to discover when, if at all, the right conferred becomes perfect and enforceable by the third state. The rule is that the third state only benefits in this sense if it expressly or implicitly assents to the creation of the right, a proposition accepted by the leading authorities.[111] Another view, supported by some members of the International Law Commission, was that the right which it was intended to create in favour of the third state was not conditional upon any specific act of acceptance by the latter.[112] Some authority for this view exists in the Judgment in the *Free Zones* case.[113] In that case the rights contended for by Switzerland, viz., the benefit of a free customs zone in French territory under multipartite treaties to which France was a party, but Switzerland was not, rested in fact on agreements of 1815 and 1816 to which Switzerland was a party.[114] However, the statement by the Court appears to accept[115] the principle that the creation of rights for third states is a matter only of the intention of the grantor states.

In its Final Report the Commission took the view that the two opposing views, referred to above, did not differ substantially in their practical effects. Article 36 of the Vienna Convention creates a presumption as to the existence of the assent of the third state:

[109] *The Law of the United Nations* (1951), 106–10. *Contra*, Bindschedler, 108 Hague *Recueil* (1963, I), 403–7. Cf. McNair, *Law of Treaties*, pp. 216–18.

[110] *Supra*, pp. 272–4.

[111] Rousseau and McNair *ut supra* n. 97. See the Final Draft, 1966, Art. 32.

[112] See Lauterpacht, Fitzmaurice, Jiménez de Aréchaga, *ut supra*, n. 105.

[113] (1932), PCIJ, Ser. A/B, no. 46, pp. 147–8. See also the Committee of Jurists on the Aaland Islands question; 29 *AJ* (1935), Suppl., Pt. III, pp. 927–8; and *Jews Deported from Hungary* case, ILR 44, 301 at 314–15. The point was not really in issue in the *River Oder Commission* case, PCIJ, Ser. A, no. 23, 19–22.

[114] See McNair, *Law of Treaties*, pp. 311–12.

[115] See the comment by Cahier, 143 Hague *Recueil* (1974, III), 629–30, who refers to the ambiguity in the reference by the Ct. to acceptance of the right 'as such' by the third state.

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

The third state may, of course, disclaim any already inhering right expressly or tacitly through failure to exercise the right. The right of a third state may not be revoked or modified by the parties if it is established that it was intended that this could only occur with the consent of the third state: Article 37(2).

(*c*) *Treaties having incompatible provisions.*[116] The relation of treaties between the same parties and with overlapping provisions is primarily a matter of interpretation, aided by presumptions. Thus it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject-matter. A treaty may provide expressly that it is to prevail over subsequent incompatible treaties, as in the case of Article 103 of the Charter of the United Nations. Further, it is clear that a particular treaty may override others if it represents a norm of *jus cogens*.[117]

9. *Amendment and Modification of Treaties*[118]

The amendment[119] of treaties depends on the consent of the parties, and the issue is primarily one of politics. However, the lawyer may concern himself with procedures for amendment, as a facet of the large problem of peaceful change in international relations. Many treaties, including the Charter of the United Nations (Arts. 108 and 109), provide for the procedure of amendment. In their rules and con-

[116] Vienna Conv., Arts. 30, 59; ILC draft, Art. 63; 59 *AJ* (1965), 227–40; Final Draft, Arts. 26, 56; *Yrbk. ILC* (1966), ii. 214–17, 252–3; Lauterpacht, ibid. (1953), ii. 156; ibid. (1954), ii. 133; Fitzmaurice, ibid. (1958), ii. 27, 41–5; Waldock, ibid. (1963), ii. 53–61; McNair, *Law of Treaties*, pp. 215–24; Rousseau, *Principes généraux*, i. 765–814; Jenks, 30 *BY* (1953), 401–53; Cahier, 76 *RGDIP* (1972), 670–2; Sciso, 38 *Öst. Z. für öff. R.* (1987), 161–79.

[117] *Supra*, p. 514.

[118] Vienna Conv., Arts. 39–41; ILC draft, Arts. 65–8; 59 *AJ* (1965), 434–45; Final Draft, Arts. 35–8; *Yrbk. ILC* (1966), ii. 231–6; *Annuaire de l'Inst.* 49 (1961), i. 229–91; 52 (1967), i. 5–401; Handbook of Final Clauses, ST/LEG/6, pp. 130–52; Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959); Blix, 5 *ICLQ* (1956), 447–65, 581–96; Whiteman, xiv. 436–42; Detter, *Essays*, pp. 71–82; Sinclair, *The Vienna Convention*, pp. 106–9.

[119] There is no distinction of quality between 'amendment' of particular provisions and 'revision' of the treaty as a whole.

stituent instruments, international organizations create amendment procedures which in some cases show considerable sophistication. In the League Covenant (Art. 19) and, less explicitly, in the Charter of the United Nations (Art. 14) provision for peaceful change was made as a part of a scheme to avoid threats to the peace.

Apart from amendment, a treaty may undergo 'modification' when some of the parties conclude an '*inter se* agreement' altering the application of the treaty between themselves alone.[120]

Modification may also result from the conclusion of a subsequent treaty[121] or the emergence of a new peremptory norm of general international law.[122] The Final Draft of the International Law Commission[123] provided that 'a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'. This article was rejected at the Vienna Conference on the ground that such a rule would create instability.[124] This result is unsatisfactory. In the first place Article 39 of the Convention provides that a treaty may be amended by agreement without requiring any formality for the expression of agreement. Secondly, a consistent practice may provide cogent evidence of *common* consent to a change. Thirdly, modification of this type occurs in practice: witness the inclusion in practice of fishing zones as a form of contiguous zone for the purposes of the Territorial Sea Convention.[125] The process of interpretation through subsequent practice (section 10(*f*)) is legally distinct from modification, although the distinction is often rather fine.

10. *Interpretation of Treaties*[126]

(*a*) *Competence to interpret.* Obviously the parties have competence to interpret a treaty, but this is subject to the operation of other rules

[120] Vienna Conv., Art. 41. [121] See *supra*, p. 630.
[122] See pp. 514–17. [123] Art. 38, *Yrbk. ILC* (1966), ii. 236.
[124] *Official Records, First Session*, pp. 207–15. See also Kearney and Dalton, 64 *AJ* (1970), 525.
[125] See also US and France, *Air Transport Services Agreement Arbitration*, 1963, ILR, 38, 182; *RIAA* xvi. 5; Award, P. IV, s. 5.
[126] Rousseau, *Droit international public*, i. 241–305; Guggenheim (2nd edn.), i. 245–68; Whiteman, xiv. 353–410; McDougal, Lasswell, and Miller, *The Interpretation of Agreements and World Public Order* (1967); McNair, *Law of Treaties*, chs. XX–XXVIII; Fitzmaurice, 28 *BY* (1951), 1–28; id., 33 *BY* (1957), 203–38; Lauterpacht, *Development*, esp. pp. 116–41; id., 26 *BY* (1949), 48–85; *Annuaire de l'Inst.* 43 (1950), i. 366–460; 44 (1952), ii. 359–401; 46 (1956), 347–49; de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963); Sinclair, 12 *ICLQ* (1963), 508–51; Degan, *L'Interprétation des accords en droit international* (1963); Hogg, 43 *Minnesota LR* (1958–9), 369–441, ibid., 44 (1959–60), 5–73; Berlia, 114 Hague *Recueil* (1965, I), 287–332; Jennings, 121 Hague *Recueil* (1967, II), 544–52; Jacobs, 18 *ICLQ* (1969),

of the law. The treaty itself may confer competence on an *ad hoc* tribunal or the International Court. The Charter of the United Nations is interpreted by its organs, which may seek advisory opinions from the Court of the Organization.[127]

(*b*) *The status of 'rules of interpretation'.* Jurists are in general cautious about formulating a code of 'rules of interpretation', since the 'rules' may become unwieldy instruments instead of the flexible aids which are required.[128] Many of the 'rules' and 'principles' offered are general, question-begging, and contradictory. As with statutory interpretation, a choice of a 'rule', for example of 'effectiveness' or 'restrictive interpretation', may in a given case involve a preliminary choice of meaning rather than a guide to interpretation. The International Law Commission in its work confined itself to isolating 'the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.

(*c*) *The text and the intentions of the parties.* The Commission and the Institute of International Law[129] have taken the view that what matters is the intention of the parties *as expressed in the text*, which is the best guide to the more recent common intention of the parties. The alternative approach regards the intentions of the parties as an independent basis of interpretation. The jurisprudence of the International Court supports the textual approach,[130] and it is adopted in substance in the relevant provisions of the Vienna Convention:[131]

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

318–46; Rosenne, 5 *Columbia Journ. Trans. Law* (1966), 205–30; Yasseen, 151 Hague *Recueil* (1976, III), 1–114; Haraszti, *Some Fundamental Problems of the Law of Treaties*, pp. 13–228; Sinclair, *The Vienna Convention*, pp. 114–58; Thirlway, 62 *BY* (1991), 16–75; Oppenheim, i. 1266–84.

[127] See further, *infra*, p. 699.

[128] For the case in favour of having rules: Beckett, *Annuaire de l'Inst.* 43 (1950), i. 435–40.

[129] *Ut supra*, p. 502. The first rapporteur of the Institute, Lauterpacht, preferred more direct investigation of intention.

[130] See Fitzmaurice, 28 *BY* (1951), 1–28; id. 33 *BY* (1957), 203–38.

[131] On interpretation of treaties authenticated in two or more languages see Art. 33; Hardy, 37 *BY* (1961), 72–155; *James Buchanan and Co. Ltd.* v. *Babco (U.K.) Ltd.* [1977] AC 141; ILR 74, 574; *Young Loan Arbitration*, ILR 59, 495; Ago (sep. op.), *Nicaragua* case (Jurisdiction), ICJ Reports (1984), 522–3; Jennings (sep. op.), ibid. 537–9; Schwebel (diss. op.), ibid. 575–6.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

This economical code of principles follows exactly the Final Draft of the International Law Commission.[132] At the Vienna Conference the United States proposed an amendment with the object of removing the apparent hierarchy of sources by combining the two Articles, and thus giving more scope to preparatory work and the circumstances in which the treaty was concluded. This proposal received little support. In its Commentary[133] the Commission emphasized that the application of the means of interpretation in the first article would be a single combined operation: hence the heading 'General rule' in the singular. The various elements present in any given case would interact. The Commission pointed out that the two articles should operate in conjunction, and would not have the effect of drawing a rigid line between 'supplementary' and other means of interpretation. At the same time the distinction itself was justified since the elements of interpretation in the first article all relate to the agreement between

[132] Arts. 27, 28. [133] *Yrbk. ILC* (1966), ii. 219–20.

the parties 'at the time when or after it received authentic expression in the text'. Preparatory work did not have the same authentic character 'however valuable it may sometimes be in throwing light on the expression of agreement in the text'.

(*d*) *Textual approach: natural and ordinary meaning.*[134] The first principle stated in Article 31 of the Vienna Convention is that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty . . .'.[135] In the Advisory Opinion on the *Polish Postal Service in Danzig*[136] the Permanent Court observed that the postal service which Poland was entitled to establish in Danzig under treaty was not confined to operation inside the postal building, as 'postal service' must be interpreted 'in its ordinary sense so as to include the normal functions of a postal service'. A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole[137] and in the light of its objects and purposes.[138] Another corollary is the principle of contemporaneity: the language of the treaty must be interpreted in the light of the rules of general international law in force at the time of its conclusion,[139] and also in the light of the contemporaneous meaning of terms.[140] The doctrine of ordinary meaning involves only a presumption: a meaning other than the ordinary meaning may be established, but the proponent of the special meaning has a burden of proof.[141] Other logical presumptions exist. Thus general words following or perhaps preceding special words are limited to the genus indicated by the special words (the *ejusdem generis* doctrine); and express mention excludes other items (*expressio unius est exclusio alterius*).

(*e*) *Context to be used.* The context of a treaty for purposes of interpretation comprises, in addition to the treaty, including its preamble[142]

[134] There seems to be no real difference between the principle of actuality (or textuality) and the principle of natural and ordinary meaning in the scheme of Fitzmaurice.

[135] See the *Admissions* case, ICJ Reports (1950), 8.

[136] (1925), PCIJ, Ser. B, no. 11 at p. 37. See also the *Eastern Greenland* case (1933), PCIJ, Ser. A/B, no. 53 at p. 49; US–Italy Arbitration, *Interpretation of Air Transport Services Agreement*, *RIAA*, xvi. 75 at 91.

[137] See the Vienna Conv., Art. 31(1); *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ., Ser.B, nos. 2 and 3, p. 23; *Free Zones* case (1932), Ser. A/B, no. 46, p. 140; US–France Arbitration, *Case Concerning the Air Services Agreement of 27 March 1946*, RIAA xviii. 417 at 435; ILR 54, 304 at 328–9.

[138] See the Vienna Conv., Art. 31(1); *U.S. Nationals in Morocco*, ICJ Reports (1952), 183–4, 197–8.

[139] See the *Grisbadarna* case, *RIAA* xi. 159–60. Generally on inter-temporal law *supra*, p. 126.

[140] *U.S. Nationals in Morocco, supra*, p. 132. See also Fitzmaurice, 33 *BY* 225–7.

[141] For critical comment on the concept of natural or plain meaning see Lauterpacht, *Development*, pp. 52–60.

[142] See Fitzmaurice, 33 *BY* 227–8.

and annexes, any agreement or instrument related to the treaty and drawn up in connection with its conclusion.[143]

(*f*) *Subsequent practice.* The parties may make an agreement regarding interpretation of the treaty. It follows also that reference may be made to 'subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation'.[144] Subsequent practice by individual parties also has some probative value.

(*g*) *Practice of organizations.*[145] In a series of important advisory opinions the International Court has made considerable use of the subsequent practice of organizations in deciding highly controversial issues of interpretation.[146] Two points arise. The first is that constitutionally members who were outvoted in the organs concerned may not be bound by the practice.[147] Secondly, the practice of political organs involves elements of politics and opportunism, and what should be referred to, subject to the constitutional issue, is the reasoning *behind* the practice, which can reveal its legal relevance, if any.[148]

(*h*) *Preparatory work.* When the textual approach, on the principles referred to already, either leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[149] Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach.[150] In general the International Court, and the Permanent Court before it, have refused to resort to preparatory work if the text is sufficiently clear in

[143] See the Vienna Conv., Art. 31(2); and *Young Loan Arbitration*, ILR 59, 495 at 534–40 (Decision), 556–8 (diss. op.).

[144] See the Vienna Conv., Art. 31(3)(b); *Yrbk ILC* (1966), ii. 221, para. 15; *Air Transport Services Agreement Arbitration* (1963), ILR 38, 182 at 245–8, 256–8; *Air Transport Services Agreement Arbitration* (1965), *RIAA* xvi. 75 at 99–101; *Young Loan Arbitration*, ILR 59, 495 at 541–3 (Decision), 573–4 (diss. op.). See also Fitzmaurice, 28 *BY* 20–1; 33 *BY* 223–5, where subsequent practice is commended for its 'superior *reliability*' as an indication of meaning.

[145] See Engel, 16 *ICLQ* (1967), 865–910; Judge Spender, *Expenses* case, ICJ Reports (1962), 187 ff; Judge Fitzmaurice, ibid. 201–3.

[146] *Competence of the General Assembly*, ICJ Reports (1950), 9; *IMCO* case, ibid. (1960), 167 ff; and the *Expenses* case ibid. (1962), 157 ff.

[147] See further *infra*, pp. 694 ff.

[148] See the sep. op. of Judge Spender in the *Expenses* case, pp. 187 ff. The ILC did not deal with the problem in the present draft: 59 *AJ* (1965), 456 (para. 14).

[149] See the Vienna Conv., Art. 32, *supra*; *Yrbk. ILC* (1966), ii. 222–3, paras. 18–20; Jennings, 121 Hague *Recueil*, pp. 550–2; *Young Loan Arbitration*, ILR 59, 495 at 543–8 (Decision), 562–7 (diss. op.); *Fothergill* v. *Monarch Airlines Ltd.* [1981] AC 251; ILR 74, 627; *Commonwealth of Australia* v. *State of Tasmania* (1983) 46 ALR 625; ILR 68, 266.

[150] See further Lauterpacht, *Development*, pp. 116–41; 48 *Harv. LR* (1935), 549–91; McNair, *Law of Treaties*, ch. XXIII.

itself.[151] On a number of occasions the Court has used preparatory work to confirm a conclusion reached by other means.[152] Preparatory work is an aid to be employed with discretion, since its use may detract from the textual approach, and, particularly in the case of multilateral agreements, the records of conference proceedings, treaty drafts, and so on may be confused or inconclusive. The International Law Commission has taken the view that states acceding to a treaty and not taking part in its drafting cannot claim for themselves the inadmissibility of the preparatory work, which could have been examined before accession.[153]

(*i*) *Restrictive interpretation.*[154] In a number of cases the Permanent Court committed itself to the principle that provisions implying a limitation of state sovereignty should receive restrictive interpretation.[155] As a general principle of interpretation this is question-begging and should not be allowed to overshadow the textual approach: in recent years tribunals have given less scope to the principle.[156] However, in cases which give rise to issues concerning regulation of rights and territorial privileges the principle may operate:[157] in these instances it is not an 'aid to interpretation' but an independent principle. The principle did not find a place in the provisions of the Vienna Convention.

(*j*) *Effective interpretation.*[158] The principle of effective interpretation is often invoked, and suffers from the same organic defects as the principle of restrictive interpretation. The International Law Commission did not give a separate formulation of the principle, considering that, as a matter of the existing law, it was reflected sufficiently in the doctrines of interpretation in good faith in accordance with the ordinary meaning of the text (paragraph (*d*) above).[159] The International Court has generally subordinated the principle to the

[151] *Admissions* case, ICJ Reports (1948), 63; *Competence of the General Assembly*, ibid. (1950), 8. See Fitzmaurice, 28 *BY* 10–3; 33 *BY* 215–20.

[152] e.g. *Convention of 1919 concerning the Work of Women at Night* (1932), PCIJ, Ser. A/B, no. 50, p. 380.

[153] Differing thus from the *River Oder Commission* case (1929), PCIJ, Ser. A, no. 23. See further Sinclair, 12 *ICLQ* (1963), at 512–17; *Arbitral Comm. on Property, etc., in Germany*, ILR 29, 442 at 460–8.

[154] See Lauterpacht, 26 *BY* (1949), 48–85; id., *Development*, pp. 300–6; McNair, *Law of Treaties*, pp. 765–6.

[155] e.g. *River Oder Commission* case, *ut supra*, p. 269.

[156] See, however, *De Pascale Case*, *RIAA* xvi. 227; *De Leon Case*, ibid. 239. Cf. *Droutzkoy Case*, ibid. 273 at 292.

[157] *Supra*, pp. 369 ff.

[158] See p. 635 n. 146, *supra*; *Annuaire de l'Inst.* 43 (1950), i. 402–23; McNair, *Law of Treaties*, ch. XXI.

[159] *Yrbk. ILC* (1966), ii. 219, para. 6.

textual approach.[160] In the *Peace Treaties* case[161] the Court made this clear and avoided revision of the treaties by refusing to remedy a fault in the machinery for settlement of disputes not curable by reference to the texts themselves.

(*k*) *The teleological approach.*[162] The International Law Commission and the Vienna Convention gave a cautious qualification to the textual approach by permitting recourse to further means of interpretation when the latter 'leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.'[163] Somewhat distinct from this procedure is the more radical teleological approach according to which a court determines what the objects and purposes are and then resolves any ambiguity of meaning by importing the substance 'necessary' to give effect to the purposes of the treaty. This may involve a judicial implementation of purposes in a fashion not contemplated in fact by the parties. At the same time the textual approach in practice often leaves the decision-maker with a choice of possible meanings and in exercising that choice it is impossible to keep considerations of policy out of account. Many issues of interpretation are by no means narrow technical inquiries.

In advisory opinions concerning powers of organs of the United Nations, the International Court has adopted a principle of institutional effectiveness and has freely implied the existence of powers which in its view were consistent with the purposes of the Charter.[164] This tendency reached its apogee in the opinion given in the *Expenses* case, and the problems raised by this decision are considered elsewhere.[165] The work of the European Court of Human Rights has involved a tendency to an effective and 'evolutionary' approach in applying the European Convention on Human Rights.[166]

The teleological approach has many pitfalls. However, in a small specialized organization, with supranational elements and efficient procedures for amendment of constituent treaties and rules and

[160] Fitzmaurice, 28 *BY* 19–20; 33 *BY*, 211, 220–3.

[161] ICJ Reports (1950), 229. See also the *South West Africa* cases (Prelim. Objections), ibid. (1962), 511–13 (diss. op. of Judges Spender and Fitzmaurice); *South West Africa* cases (Second Phase), ibid. (1966), 36, 47–8.

[162] See Fitzmaurice, 28 *BY* 7–8, 13–14; 33 *BY* 207–9; Waldock, *Mélanges offerts à Paul Reuter* (1981), 535–47.

[163] ILC, Final Draft, Art. 28; Vienna Conv., Art. 32.

[164] The cases are cited *infra*, pp. 686–8. See further the *International Status of South West Africa*, ICJ Reports (1950), 128, the *South West Africa* cases, ibid. (1962), 319, and the *Namibia* Opinion, ibid. (1971), 16 at 47–50. See also the opinions of Fitzmaurice, in the *Expenses* case, ICJ Reports (1962), 198 ff. See further Gordon, 59 *AJ* (1965), 794–833. Cf., however, the joint dissent of Fitzmaurice and Spender in the *South West Africa* cases, ICJ Reports (1962), at 511–22; and the view of the Court in the *South West Africa* cases (Second Phase), ICJ Reports (1966), 36, 47–8.

[165] *Infra*, pp. 696 ff.

[166] See Waldock, *Mélanges offerts à Paul Reuter.*

regulations, the teleological approach, with its aspect of judicial legislation, may be thought to have a constructive role to play. Yet the practice of the Court of the European Communities has not shown any special attraction to this approach, and it would seem that the delicate treaty structure with its supranational element dictates a generally textual and relatively conservative approach to texts.

11. *Classification of Treaties*

A number of distinguished writers have developed or supported classifications of treaties. Lord McNair long ago pointed to the variety of functions which the treaty performs and the need to free ourselves from the traditional notion that the treaty is governed by a single undifferentiated set of rules.[167] As he suggests, some treaties, dispositive of territory and rights in relation to territory, are like conveyances in private law. Treaties involving bargains between a few states are like contracts; whereas the multilateral treaty creating either a set of rules, such as the Hague Conventions on the Law of War, or an institution, such as the Copyright Union, is 'law-making'. Moreover, the treaty constituting an institution is akin to a charter of incorporation. It is certainly fruitful to contemplate the unique features of parts of the large terrain to which the law of treaties applies and to expect the development of specialized rules. Thus it is the case that the effect of war between parties varies according to the type of treaty involved. However, Lord McNair and others have tended to support the position that the genus of treaty (the contents of the genus may themselves be a matter of dispute) produces fairly *general* effects on the applicable rules. Thus the law-making character of a treaty is said (1) to rule out recourse to preparatory work as an aid to interpretation; (2) to avoid recognition by one party of other parties as states or governments; and (3) to render the doctrine of *rebus sic stantibus* inapplicable.[168] More especially, Lord McNair,[169] Sir Gerald Fitzmaurice,[170] and Sir Humphrey Waldock,[171] among others, have regarded certain treaties as creating an 'objective regime' creating rights and duties for third states. Examples given include the treaty regimes for international

[167] 11 *BY* (1930), 100–18; also in *The Law of Treaties*, pp. 739–54. See also Rousseau, *Principes généraux*, i. 132–41, 677, 728–64; Vitta, *Ann. français* (1960), 225–38. On the special role of multilateral treaties see Lachs, 92 Hague *Recueil* (1957, II), 233–341.

[168] See McNair, *Law of Treaties*.

[169] *Law of Treaties*, ch. XIV.

[170] *Yrbk. ILC* (1960), ii. 96 ff. (with considerable caution).

[171] 106 Hague *Recueil* (1962, II), 78–81 (with some caution).

waterways,[172] regimes for demilitarization,[173] and treaties creating organizations.[174] Significantly the International Law Commission deliberately avoided any classification of treaties along broad lines and rejected the concept of the 'objective regime' in relation to the effects of treaties on non-parties.[175] The Commission has accepted specialized rules in a few instances,[176] but has been, correctly it would seem, empirical in its approach. In formulating the general rules of interpretation the Commission did not consider it necessary to make a distinction between 'law-making' and other treaties.[177] The drafts of the Commission and the Vienna Convention treat the law of treaties as essentially a unity.[178] The evidence is that jurists are today less willing to accept the more doctrinal versions of the distinction between treaty-contract (*vertrag*) and treaty-law (*vereinbarung*),[179] the latter category representing multilateral treaties making rules for future conduct and framing a generally agreed legislative policy. The contrast intended is thus between the bilateral political bargain and the 'legislative act' produced by a broad international conference. But in fact the distinction is less clear: for example, it is known that political issues and cautious bargaining lie behind law-making efforts like the Geneva Conventions on the Law of the Sea. Further, the distinction obscures the real differences between treaty-making and legislation in a municipal system.[180]

12. *Participation in General Multilateral Treaties*

In an early draft (Article 1(1)(c)) the International Law Commission defines a 'general multilateral treaty' as 'a multilateral treaty which concerns general norms of international law and deals with matters of general interest to States as a whole'. Such a treaty has been described as 'the nearest thing we yet have to a general statute in international

[172] *Supra*, pp. 267–72.

[173] See the Committee of Jurists on the Aaland Islands question, 29 *AJ* (1935), Suppl., Pt. III, pp. 927–8.

[174] Cf. the *Reparation* case, *infra*, p. 678.

[175] *Supra*, s. 8(b); *infra*, s. 12. See also, in the context of aids to interpretation, 59 *AJ* (1965), 449–50 (commentary on the draft).

[176] See the Vienna Conv., Art. 62(2), *supra*, p. 616. Cf. the provisions on reservations, *supra*, pp. 612–15.

[177] *Yrbk. ILC* (1966), ii. 219, para. 6. But note the view of Berlia, 114 Hague *Recueil*, 287 at 331.

[178] See Dehaussy, *Recueil d'études en hommage à Guggenheim*, pp. 305–26; and Reuter, *Introduction au droit des traités*, pp. 37–9.

[179] For the history see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), para. 70.

[180] Waldock, 106 Hague *Recueil* (1962, ii), 74–6.

law'.[181] United Nations practice in convening a conference to draw up a treaty is to leave the question of composition to a political organ, the General Assembly, and a number of Communist states[182] were excluded as a result. In the Commission it was proposed that states should have a right to become parties to this type of treaty. This solution was adopted in a provisional draft in the insubstantial form that the right existed except where the treaty or the rules of an international organization provide otherwise.[183] The Final Draft of the Commission contained no provision on the subject and amendments intended to give 'all States a right to participate in multilateral treaties' were defeated at the Vienna Conference.[184]

[181] Waldock, 106 Hague *Recueil* (1962, ii), 81. See also Lachs, 92 Hague *Recueil* (1957, II), 233–41.

[182] For a long time Mongolia; also China, East Germany, North Vietnam, and North Korea. These states were not represented at the Law of the Sea Conference in 1958.

[183] ILC draft, Art. 8; *Yrbk. ILC* (1962), ii. 167–9; Waldock, ibid. 53–8.

[184] *Yrbk. ILC* (1966), ii. 200; UN Secretariat Working Paper, A/CN.4/245, 23 Apr. 1971, pp. 131–4. See also Lukashuk, 135 Hague *Recueil* (1972, I), 231–328.

ANNEX 13

Details of Sierra Leone's ratification of the ICC Statute.

8/8 1486

International Criminal Court

The ICC at a glance
News Point
Upcoming Events
States Parties
Victims issues
Job opportunities
Basic documents
Organs of the Court
Cases
Witness protection

Sierra Leone (Africa)

Historica
Assembl
Parties
The State

Signature status:
Sierra Leone signed on 17 October 1998.

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

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

Ratification and Implementation Process:
No information is available.

Last Updated:
30 September 2002

ANNEX 14

Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002).

The Parliament of the Commonwealth of Australia

Report 45

The Statute of the International Criminal Court

Joint Standing Committee on Treaties

May 2002

ISBN

Contents

Foreword vii
Membership of the Committee xiii
Terms of reference xv
Recommendations xvii

1 Introduction 1

What is the International Criminal Court? 1
Overview 1
Key elements of the Statute 2
Officials of the Court 2
Jurisdiction of the Court 4
Conduct of investigations and the complementarity principle 6
Principles of law 8
General obligations 10
Evolution of the Court 11
Australian involvement in developing the Court 13
Purpose of this review 13

2 Issues raised in evidence 15

Introduction 15
Impact on national sovereignty 16
Effectiveness of the complementarity principle 20
Concerns about constitutionality 24
The proposed implementing legislation and the ICC crimes 35

Definition of ICC crimes 42
Role and accountability of the Prosecutor and Judges 47
Impact on the Australian Defence Force 51
Other issues 55
Permanent vs ad hoc 55
Victor's justice 57
The international position 59
Application to non-State parties 61
Extradition 64
'Opt out' clause 65
The ICC and the United Nations 66
Timing of ratification 67

3 Conclusions 69

Aims of the Court 71
Impact on national sovereignty 71
Concerns about constitutionality 78
The proposed implementing legislation and the ICC crimes 81
Definitions of ICC crimes 81
The definition of rape 83
Exemption on the basis of official capacity 84
Breaches of the Geneva Conventions 85
Subdivision H of the consequential amendments bill 85
Additional legislative issues 86
Accountability of the Prosecutor and Judges 87
Withdrawal from the Statute 90
Impact on the Australian Defence Force (ADF) 91
Permanent court *vs. ad hoc* tribunals 92
Application to non-State parties 92
'Opt out' clause 93
Timing of Ratification 93

Appendix A – Additional comments 95

Appendix B – Inquiry process, submissions, exhibits and witnesses 97

Inquiry process 97

Submissions 98

Exhibits 102

Witnesses 104

Monday, 30 October 2000 – Canberra 104

Tuesday, 13 February 2001 - Sydney 104

Wednesday, 14 March 2001 – Melbourne 105

Thursday, 19 April 2001 - Perth 106

Monday, 24 September 2001 - Canberra 106

Tuesday, 9 April 2002 – Sydney 107

Wednesday, 10 April 2002 – Canberra 107

Appendix C – The Like-Minded Group 109

Appendix D – Signatories and States parties to the ICC Statute 111

Chair's Foreword

Over the last 100 years the international community has grappled with the consequences of armed conflict, and the need to strike a balance between what is militarily necessary to achieve national aims and the inherent inhumanity of war, particularly its impact on non-combatant civilians.

The idea of the establishment of an international court to impose international and humanitarian law was first raised at the Hague Peace Conference in 1907. It was discussed again after the Great War at the Versailles Peace Conference in 1919. At the end of World War II the Nuremberg and Tokyo Tribunals were established to try, for the first time, individuals for war crimes and crimes against humanity. Thereafter, the idea of a permanent international criminal court was taken up by the United Nations and by 1953 a constitution for such a court was drafted. However, tensions created by the Cold War led to a stalemate over the idea and there was little or no progress on the proposal until after the end of the Cold War.

In 1993 the International Law Commission submitted to the United Nations a draft proposal recommending an international conference be held to finalise a treaty. Subsequently in July 1998 a conference was held in Rome at which 120 States, including Australia, voted in favour of signing a draft Statute for the establishment of an International Criminal Court (ICC).

As at the date of tabling this Report, 66 States had ratified the Statute with the consequence that the ICC Statute will come into force as from 1 July 2002.

The aim of the ICC is to be a permanent international criminal tribunal to prosecute those individuals who commit, in the eyes of the international community, the most serious of crimes - war crimes, genocide and crimes against humanity.

The ICC Statute was referred to this Committee in October 2000. For the past 18 months the Committee has received a significant number of submissions on the Statute and its likely or perceived impact on Australian sovereignty, on our legal system, on our international obligations and on the operations of our defence forces.

The Committee has reviewed and analysed not only the text of the ICC Statute but also the proposed implementing legislation referred by the Attorney General which would incorporate into Australian law the crimes under the ICC Statute, with a view to creating within the Australian legal system a jurisdiction complementary to the ICC.

The consequences of ratification of the Statute are a matter of considerable interest within the community. There have been strong opinions expressed both in favour of and against the establishment of the ICC. While most submissions support the objectives of the ICC as laudable, a number believed that the proposed ICC is seriously flawed. The position of the United States, in its recent notification to the United Nations of its intention not to become a party to the ICC Statute, perhaps best summarises these views when it stated:

> " We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world - and perhaps one day such a court will come into being. But the International Criminal Court that emerged from the Rome negotiations...will not effectively advance these worthy goals."[1]

Others expressed a strong view that ratification of the Statute would impact on Australia's sovereignty to the extent that Australian law would be subverted and we would be surrendering to an international authority the right to detain and try Australian citizens.

The Committee recognises that Australia's entry into any international treaty involves a degree of loss of sovereignty and therefore to ratify this Statute will necessarily involve a degree of voluntary surrender of exclusive criminal jurisdiction. However, the committee is also mindful of the benefits to Australia and its defence forces, prisoners of war and civilian population that could flow from the protection of an effective international instrument dedicated to upholding established principles of international law.

The constitutional validity of ratification of the ICC Statute was also challenged, with a number expressing the opinion that it would be inconsistent with Chapter III of the Constitution which provides for the Commonwealth judicial power to be vested in the High Court and other federal courts. The Committee notes that if there were a constitutional barrier to ratification, it has not been applied to

---

1 Marc Grossman, United States Under Secretary for Political Affairs, in a speech to the Centre for Strategic and International Studies, Washington DC, 6 May 2002 http://www.state.gov/9949.htm.

previous acts of ratification in similar circumstances, notably the establishment of the International Court of Justice.

Without seeking to summarise all the objections, there were other concerns about the definitions of the crimes covered by the Statute, the likely operation of the Court, whether the rules of procedure and evidence will be of a standard equal to that in the Australian legal system, the likelihood of politically motivated prosecutions, the role of the Prosecutor and the overall accountability of the Court.

Those in favour of ratification of the Statute pointed to the undeniable fact that the international community has not previously come up with a means to ensure that those responsible for the atrocities that have been committed, often against civilian populations, have been brought to account for their crimes. The Nuremberg and Tokyo War Tribunals were as effective as they could be in the circumstances, given that they came into operation after the event. The ad hoc tribunals set up to deal with the crimes committed in the former Yugoslavia and Rwanda have also been effective, given the circumstances.

However, the supporters of the ICC point out that the crimes of genocide, ethnic cleansing and other atrocities have occurred in countries such as Cambodia, Guatemala, El Salvador, Iraq, Liberia, Somalia, Sierra Leone, Burundi and East Timor and those who have committed these crimes have often gone unpunished.

It is feared that if nothing is done on an international scale to bring to justice perpetrators of gross crimes against humanity, such as the establishment of a permanent criminal court, then such criminals will continue to act with impunity.

In weighing the arguments for and against ratification, the Committee was deeply conscious of the laudable objectives of the ICC. It is designed to hold accountable the perpetrators of the worst violations against humanity. Clearly, there is an expectation on the part of ratifying States that, if the ICC operates in a way such as to earn credibility and the respect of the international community, it should promote a greater commitment to human rights and international humanitarian law in the global context.

Undeniably, the establishment of such a court involves risks. It will be the first demonstration of the collective will of a number of States, to establish a permanent institution that will have the power to act in relation to the perpetration of war crimes, genocide and crimes against humanity, in circumstances where the State who otherwise would have jurisdiction to try such crimes is unwilling or unable to do so.

There are risks associated with how the ICC will evolve, in what circumstances it will claim jurisdiction, the manner by which cases are referred to the ICC, the impact on domestic legal systems and the impact on the rights of citizens.

The Committee recognises these risks, but believes that, with an appropriate level of monitoring and review of the ICC's operations, as recommended in this report, these risks can be minimised insofar as they impact upon Australia, our legal system and our citizens. There are numerous checks and balances inherent in the proposed process but the Committee acknowledges that only when it is established and fully functioning will those risks be completely assessable.

Therefore the Committee has in this report recommended to the Government that there be an annual review and detailed scrutiny by the Parliament of the ICC and its operations. This further check on the accountability of the ICC has persuaded a number of committee members that Australia will be able to retain an effective watching brief over our participation in and support for the ICC should it act or develop in a way adverse to Australia's national interest and contrary to the expectations of the maintenance of the primacy of Australian law.

Concerns have been expressed that the ICC will be an unaccountable supranational body with unfettered power able to initiate or preside over capricious or politically motivated prosecutions. There were concerns that our defence forces could be unfairly targeted by those opposed to Australia's interests. The Committee believes that if the Court were to entertain such prosecutions it would quickly lose the support of the international community. Ultimately under the terms of the Statute, Australia retains the right to withdraw from the treaty.

To put this concern in a broader context, Australia is one of the oldest continuous democracies in the world. It has a proud history of active involvement in world affairs. Our nation is party to hundreds of international treaties and instruments, which has had the consequence of engaging our nation in a process of internationalisation since the earliest days of Federation.

Over the past century we have as a nation, participated in a number of armed conflicts and peacekeeping missions. Our defence forces have served with distinction and in accordance with established principles of international law.

Our commitment to the rule of law, to human rights, to democratic principles and to open and accountable government is widely recognised and respected. Our legal system is well established, just and equitable. Australia should stand proud as an example of a country dedicated to international peace and security.

The likelihood of Australia being targeted in a malicious or politically motivated way by the ICC or its officers is remote.

Further, upon ratification of the ICC Statute and the passage of the implementing legislation, Australia will recognise at law the crimes of genocide, war crimes and crimes against humanity. Australia will have primary jurisdiction to deal with perpetrators of these crimes on our territory, or if the unthinkable were to occur, by Australian citizens on the territory of another State.

The ICC Statute has no retrospective application, but will come into force as of 1 July 2002.

The Committee believes that upon ratification, Australia should seek to play a significant role with other like-minded States in the development of the Court, including the nomination process for Judges and Prosecutors as well as the establishment of the rules of procedure and evidence.

The 20th Century will be remembered for its unprecedented social and economic progress and the astounding advances in science and technology. It was also a century marred by armed conflicts so unprecedented in their scale and intensity that it may well be remembered as the most violent and bloody century in recorded history.

At the beginning of the 21st century, the international community is prepared to take a significant step forward in pursuit of international peace and security. Given international support, the ICC has the potential to be a valuable and effective instrument in that pursuit.

The Committee has been ably assisted in its deliberations by the Secretariat and wishes to place on record our gratitude to the staff who have served the Committee in both the current and the previous Parliaments.

The Committee is also grateful for the assistance from those who provided written submissions and gave oral evidence at the public hearings.

Julie Bishop MP
Committee Chair

Membership of the Committee

Chair	Ms Julie Bishop MP	
Deputy Chair	Mr Kim Wilkie MP	
Members	The Hon Dick Adams MP	Senator Andrew Bartlett
	Mr Bob Baldwin	Senator Barney Cooney
	Mr Kerry Bartlett MP	Senator Joe Ludwig
	Mr Steven Ciobo MP	Senator Brett Mason
	Mr Martyn Evans MP	Senator Julian McGauran
	Mr Peter King MP	Senator the Hon Chris Schacht
	The Hon Bruce Scott MP	Senator Tsebin Tchen

Committee Secretariat

Secretary	Paul McMahon
Inquiry Secretary	Robert Morris
Administrative Officer	Lisa Kaida

Terms of reference

On 10 October 2000 the Government presented to Parliament the text of the Statute of the International Criminal Court and a national interest analysis summarising the objectives of the Court and the costs and benefits to Australia of ratifying the Statute.

The Treaties Committee ordinarily reviews proposed treaty actions and reports back to Parliament within 15 sitting days of the text and national interest analysis being presented to Parliament.

In this instance the Committee resolved that the Government's proposal to ratify the Statute, warranted comprehensive examination. Accordingly, on 2 November 2000 the Chair of the Committee wrote to the Minister for Foreign Affairs advising that:

> Ratifying the Statute would be a significant treaty action for Australia and there are many matters to be considered before the Committee can report to Parliament on whether such action would be in the national interest. ...
>
> When dealing with a treaty action like this, with potentially wide ramifications, we believe it is important to offer the opportunity to comment to as many people in the community who wish to comment. We intend to facilitate this process by placing advertisements in the national press inviting written submission from interested parties.

A full description of the Committee's inquiry process can be found at Appendix B.

Copies of the Statute of the International Criminal Court and of the national interest analysis are available through the internet site http://www.aph.gov.au/house/committee/jsct/ICC/links.htm .

Recommendations

Recommendation 1

The Committee recommends that, subject to other recommendations incorporated elsewhere in this report, Australia ratify the Statute of the International Criminal Court (Paragraph 3.8).

Recommendation 2

The Committee recommends that Clause 3 (2) of the International Criminal Court Bill be amended to read:

Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC (Paragraph 3.32).

Recommendation 3

The Committee recommends that Section 268.1 (2) of the International Criminal Court (Consequential Amendments) Bill be amended to read:

(2)(i)It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

(ii) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences in this Division that are also offences within the jurisdiction of the ICC (Paragraph 3.34).

Recommendation 4

The Committee recommends that the Government of Australia concur with the preamble of the Statute which notes that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes and that the International Criminal Court

established under this Statute shall be complementary to national criminal jurisdictions.

The Committee further recommends that, in noting the provisions of the Statute of the International Criminal Court, the Australian Government should declare that

- it is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and

- Australia further declares that it interprets the crimes listed in Articles 6 to 8 of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill* (Paragraph 3.37).

Recommendation 5

The Committee recommends that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* be introduced into Parliament as soon as practicable subject to consideration of recommendations elsewhere in this report (Paragraph 3.50).

Recommendation 6

The Committee recommends that:

the Australian Government, pursuant to its ratification of the Statute, table in Parliament annual reports on the operation of the International Criminal Court and, in particular, the impact on Australia's legal system; and that

- these annual reports stand referred to the Joint Standing Committee on Treaties, supplemented by additional Members of the House of Representatives and Senators if required, for public inquiry.

The Committee envisages that, in conducting its inquiries into these annual reports, it would select a panel of eminent persons to provide expert advice (Paragraph 3.57).

Recommendation 7

The Committee recommends that the Attorney-General review clauses 268.13 and 268.58 pertaining to the crime of rape in the International Criminal Court (Consequential Amendments) Bill 2001 and harmonise the definitions with the approach taken in the *Elements of Crimes* paper in a manner consistent with Commonwealth criminal law (Paragraph 3.60).

Recommendation 8

The Committee recommends that the Attorney-General review the legislation to ensure that the responsibilities required under Article 27 of the Statute are fully met either in the proposed bills or in current applicable legislation (Paragraph 3.63).

Recommendation 9

The Committee recommends that the Attorney-General ensure that the *International Criminal Court (Consequential Amendments) Bill* does not limit the jurisdiction of Australian courts with respect to crimes under Part II of the *Geneva Conventions Act* 1957, for the period between 1957 and the commencement of the proposed legislation. The Committee further recommends that the *Explanatory Memorandum* for the proposed legislation state clearly how coverage of these crimes for the intervening period is to be provided (Paragraph 3.65).

Recommendation 10

The Committee recommends the Attorney-General review Subdivisions H, D and E of the *International Criminal Court (Consequential Amendments) Bill* to ensure consistency in the definition of offences (Paragraph 3.68).

Recommendation 11

The Committee recommends that Attorney-General review the *International Criminal Court Bill* and *the International Criminal Court (Consequential Amendments) Bill* in relation to the matters listed in paragraph 3.67 of this report (Paragraph 3.70).

1

Introduction

What is the International Criminal Court?

Overview

1.1 In July 1998, 120 nations attending a diplomatic conference in Rome agreed to establish an International Criminal Court (ICC). The Court is intended to be a permanent international criminal tribunal to prosecute those individuals who commit the most serious crimes of concern to the international community of nations. These crimes are described in the Statute of the ICC (the ICC Statute, also known as the Rome Statute) as being genocide, crimes against humanity, war crimes and, should a definition be agreed in the future, the crime of aggression.

1.2 Australia was one of the early signatories to the ICC Statute, having played a leading role in developing the text of the Statute.[1]

1.3 As of 11 April 2002 139 nations had signed the ICC Statute and 66 nations had taken the additional step of ratifying the Statute,[2] thus formally agreeing to be bound to the terms of the Statute. The ICC will enter into force internationally on 1 July 2002. The first meeting of States Parties is likely to be held in September 2002.

---

1 The Australian Government signed the ICC Statute on 9 December 1998.

2 In a ceremony at UN Headquarters on 11 April 2002, the threshold of 60 ratifications required for the ICC to come into force was surpassed, with the total number of 66 ratifications. Cable, Department of Foreign Affairs and Trade, 11 April 2002, p. 1. See Appendix D for a list of signatories.

1.4 The ICC is proposed to stand as a third pillar beside the United Nations (UN) and the International Court of Justice (ICJ) in global efforts to promote peace and security. The ICC will complement the UN and the ICJ, which focus on the accountability of States, by calling to account those individuals who commit the most serious crimes of international concern.

1.5 Unlike the ICJ, which is one of the primary organs of the UN, the ICC will be established as an independent institution. While it will have a relationship with the UN, it will have its own statutory basis.

Key elements of the Statute

1.6 The ICC Statute is a comprehensive instrument which, according to a National Interest Analysis prepared by the Government, seeks to establish a new international criminal justice system, complementary to the national criminal justice systems of each State Party.[3]

1.7 The Statute, which is intended to operate as the constitution of the ICC, establishes the Court as a permanent institution (Article 1), to be in relationship with the UN (Article 2), and to be based at The Hague in the Netherlands (Article 3).

Officials of the Court

Judges

1.8 The ICC will consist of 18 judges to be elected by the Assembly of States Parties.[4] The judges are to hold office for a period of 9 years and shall not be eligible for re-election (Article 36). [5]

---

3 The National Interest Analysis for the ICC Statute (NIA for the Statute) is available from the JSCOT Secretariat, or at: http://www.austlii.edu.au/au/other/dfat/nia/2000/2000024n.html The text of the ICC Statute is available from the JSCOT Secretariat, or at: http://www.un.org/law/icc/statute/romefra.htm.

The description in this chapter of the key elements of the ICC is drawn from both the NIA for the Statute and the ICC Statute itself.

4 It is anticipated that the election of judges to the ICC will occur during the second meeting of the assembly of states parties which is likely to be in January 2003. Joanne Blackburn (Attorney-General's Department), *Transcript of Evidence*, 10 April 2002, p. TR 289.

5 Article 36 details the election process for judges.

36 (6)(a) states that: 'The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting'. Article 36(6)(b) states that: 'In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled'.

1.9 Article 36(3) describes the qualities to be possessed by judicial candidates in the following terms:

> 36(3) (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
>
> (b) Every candidate for election to the Court shall:
>
> (i) have established credentials in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
>
> (ii) have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.[6]

1.10 The ICC Statue also provides that the judges shall elect a President, who shall assign judges to an Appeals Division, a Trial Division and a Pre-Trial Division of the Court. Judges assigned to the Appeals Division shall serve in that Division for the entire term of their office (Article 39).[7]

1.11 The independence of the judiciary is described in Articles 40 and 41, which provide, *inter alia*, that:

> Judges shall be independent in the performance of their functions.
>
> Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
>
> Judges required to serve on a full time basis ... shall not engage in any other occupation of a professional nature.

The first meeting of the States Parties in September 2002 is expected to discuss among other things, the procedures for the election of judges (Joanne Blackburn (Attorney-General's Department), *Transcript of Evidence*, 10 April 2002, p. TR 289).

6 Article 36(8) provides that in selecting judges for the ICC, the States Parties should take into account the need for representation of the principal legal systems of the world, equitable geographic representation, a fair representation of female and male judges and for expertise on specific issues, including, but not limited to, violence against women or children.

7 Judges assigned to the Trial or Pre-Trial Divisions may, at the discretion of the President, be temporarily transferred from one Division to the other should management of the Court's workload so require (Article 39(4)).

> A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.

1.12 Judges may be removed from office either for serious misconduct, serious breach of duty, or for inability to exercise their functions (Article 46).

The Prosecutor

1.13 The Office of the Prosecutor is a separate organ of the ICC, independent of the judiciary.

1.14 The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court (Article 42(1)).

1.15 The Prosecutor and one or more Deputy Prosecutors are also to be elected by the Assembly of State Parties, shall hold officer for no longer than 9 years and shall not be eligible for re-election. (Article 42(4)).

1.16 The Statute does not specify the number of Deputy Prosecutors to be appointed. This may be dependent on the work demands on the Court at a particular time. Under Article 42 (4) 'The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled'. Article 42 (2) specifies that the Prosecutor and the Deputy Prosecutors shall be of different nationalities.

1.17 Article 42(3) establishes that to be eligible for election the Prosecutor and the Deputy Prosecutors must be:

> ... persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases.

1.18 The Statute contains similar provisions relating to the independence, disqualification and removal of the Prosecutor as are provided for judges. (see Articles 42(5) to 42(8)).

Jurisdiction of the Court

1.19 Article 5 of the ICC Statute limits the jurisdiction of the Court to 'the most serious crimes of concern to the international community as a whole':

- the crime of genocide;

- crimes against humanity;
- war crimes; and
- the crime of aggression.

1.20 Each of these crimes (with the exception of the crime of aggression) is defined in the Statute. The crime of aggression has not yet been defined and the Court will not be able to exercise jurisdiction over this crime unless and until the States Parties adopt a provision defining the crime and setting out the conditions under which the Court's jurisdiction may be exercised (see Article 5(2)).

1.21 Adoption of an amendment to the Statute, which involved incorporating a definition of aggression, would require a two-thirds majority of States Parties (Article 121(3)). The next step would consist of a ratification or acceptance process outlined in paragraph 4 of Article 121, entailing the approval of seven-eighths of the States Parties. These amendments enter into effect for all States Parties at that point. As amendments have the potential to effect a major change in a State Party's relationship to the Court, any State Party not in agreement with a given amendment of this type has a right to withdraw from the Statute with immediate effect (Article 121(6)).

1.22 The definitions of genocide, crimes against humanity and war crimes appear at Articles 6, 7 and 8 of the ICC Statute.[8] These primary definitions (which in the case of crimes against humanity and war crimes are themselves lengthy) are expanded upon considerably in the *Elements of Crimes*, a document drafted by the Preparatory Commission for the ICC.[9]

1.23 The crimes described in the ICC Statute and the *Elements of Crimes* are not new crimes, rather they reflect and codify international law that has developed over the last century. For example, the ICC definition of genocide is identical to that contained in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. Likewise, the definitions

---

8 A copy of the Statute can be obtained from the Treaties Secretariat, or from a link on the Committee's web site at: http://www.aph.gov.au/house/committee/jsct/ICC/links.htm

9 A copy of the draft *Elements of Crimes* adopted by the Preparatory Commission for the International Criminal Court on 30 June 2000 can be found at www.un.org/law/icc/statute/elements/elemfra.htm The *Elements of Crimes* will come into effect after they are approved by the Assembly of States Parties at its first meeting following the establishment of the ICC. See also Joanne Blackburn (Attorney-General's Department), *Transcript of Evidence*, 10 April 2002, p. TR289, '... the first meeting of the assembly [of parties] is likely to be held in September 2002. This assembly is expected to consider, and is likely to adopt, the rules of procedure and evidence for the ICC, the document setting out the elements of crimes and the court's first year budget.'

of crimes against humanity and war crimes draw heavily on customary international law (especially that established by the post-World War II Nuremberg Tribunal) and on the 1949 *Geneva Conventions* (as amended) and the 1984 *Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment.*

1.24 The Statute is clear in applying the Court's jurisdiction only to natural persons (Article 25) over the age of eighteen (Article 26) and in respect of crimes committed after the Statute enters into force (Article 11).

1.25 There are three ways in which the ICC's jurisdiction can be invoked:

- a referral to the Prosecutor by a State Party;
- a referral to the Prosecutor by the Security Council of the United Nations; or
- the initiation of an investigation directly by the Prosecutor (Article 13).

1.26 The Statute also establishes a pre-condition to be satisfied before the ICC can exercise its jurisdiction in relation to referrals by a State Party or investigations initiated by the Prosecutor, namely that:

(a) the conduct in question occurred on the territory of a State Party;

(b) the person accused of the crime is a national of a State Party; or

(c) a non-State Party agrees to accept the Court's jurisdiction (Article 12).

Conduct of investigations and the complementarity principle

1.27 If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation into a matter (irrespective of how the matter was initiated), he must seek agreement from the Pre-Trial Chamber to commence the investigation (Article 15).[10]

---

10 If a crime appears to have been committed a referral to the Prosecutor can be made by a State Party (under Article 14), by the Security Council, acting under Chapter VII of the Charter of the United Nations. Under Article 15 the Prosecutor can initiate proceedings *proprio motu.* Under Article 15 (4), if the Pre-Trial Chamber, upon examination of the request and the supporting material, considers there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

1.28 A key factor to be considered in deciding whether an investigation should be commenced is whether the case is admissible under Article 17 of the Statute. This article gives force to the *principle of complementarity*, the foundation upon which the operation of the Court is predicated.

1.29 The principle of complementarity is first mentioned in the preamble to the Statute, which introduces the agreement by:

> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
>
> ... [and]
>
> Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

1.30 The principle is also mentioned explicitly in Article 1 of the Statute, which states that the ICC 'shall be complementary to national criminal jurisdictions'.

1.31 It is in Article 17 that the practical application of the principle is described. It provides that the ICC shall determine a case is inadmissible where:

> 17(1) (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling or unable* genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the *unwillingness or inability* of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint and trial of by the Court is not permitted under Article 20 [see the first dot point in paragraph 1.38 below];
>
> (d) The case is not of sufficient gravity to justify further action by the Court.[11]

1.32 The Statute goes on describe the matters the Court must consider in determining whether a State is *unwilling* or *unable* in a particular circumstance to genuinely carry out an investigation or prosecution.

---

11 Emphasis added.

1.33 In determining *unwillingness* the Court shall consider whether one or more of the following circumstances exist:

> 17(2) (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility ... ;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

1.34 In order to determine *inability* the Court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings (Article 17(3)).

1.35 The ICC's *Rules of Procedure and Evidence* (which, like the *Elements of Crimes*, have been drafted by the Preparatory Commission) set out further information the Court may consider in determining these matters. For example, a State may submit to the Court information showing that its national courts meet internationally recognised norms and standards for the impartial prosecution of similar conduct.[12]

1.36 The Statute and the *Rules of Procedure and Evidence* also establish processes by which the Court and a State can engage in dialogue about the progress of national proceedings (Article 18 and Rules 51-56 and 58).

Principles of law

1.37 Part 3 of the Statute describes the general principles of criminal law to be applied by the Court. These principles represent an attempt to meld the criminal law doctrines of different legal systems.

1.38 Some of the key principles underpinning the operation of the ICC are:

---

12 A copy of the draft *Rules and Procedures of Evidence* adopted by the Preparatory Commission for the International Criminal Court on 30 June 2000 can be found at www.un.org/law/icc/statute/rules/rulefra.htm. These rules describe in practical, operational terms how the ICC Statute will be applied. The *Rules of Procedure and Evidence* will come into effect after they are approved by the Assembly of States Parties at its first meeting following the establishment of the ICC.

- a person shall not be tried for crimes if they have already been convicted or acquitted by the ICC or by a national court, unless the proceedings in the other court were conducted for the purpose of shielding the person from the jurisdiction of the Court or were inconsistent with an intent to bring the person to justice (Article 20);
- the definition of a crime shall be strictly construed, shall not be extended by analogy and, in the case of ambiguity, shall be interpreted in favour of the person being investigated, prosecuted or convicted (Article 22(2));
- the Statute shall apply equally to all persons without any distinction based on official capacity and without regard to any immunities or special procedural rules that might otherwise apply to the official capacity of a person (Article 27);
- the crimes within the jurisdiction of the Statute shall not be subject to any statute of limitations (Article 29);
- a person shall be criminally responsible only if the material elements of the crime are committed with intent and knowledge (Article 30);
- a person shall not be criminally responsible if they can demonstrate any of the following circumstances: insanity, intoxication, self-defence or the defence of others, or duress (Article 31);
- the defence of acting pursuant to superior orders is not available unless the accused was under a legal obligation to obey the orders, the accused did not know the order was unlawful and the order was not manifestly unlawful (for the purposes of the Statute orders to commit genocide or crimes against humanity are manifestly unlawful) (Article 33);
- all accused persons shall be presumed innocent until proved guilty (Article 66);
- the onus is on the Prosecutor to prove guilt and, in order to convict, the Court must be convinced beyond reasonable doubt of the guilt of the accused person (Article 66); and
- an accused person is entitled to a fair public hearing conducted impartially and to a range of guarantees intended to ensure natural justice, including the right to appeal a decision of the Court and to apply for revision of a judgement or sentence in the light of new evidence (Articles 67, 81 and 84).

1.39 The Court may impose a term of imprisonment not exceeding 30 years or a term of life imprisonment, when justified by the extreme gravity of the

crime. In addition to imprisonment, the Court may order a fine and forfeiture of the proceeds of a crime (Article 77). Moreover, the Court may order reparations to victims, including restitution, compensation and rehabilitation (Article 75).

General obligations

1.40 The ICC Statute imposes on States Parties a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes (Article 86).

1.41 In particular, States Parties are obliged:

- upon receipt of a request from the Court for provisional arrest, or for arrest and surrender, to take immediate steps to arrest a person, in accordance with its national laws and the ICC Statute (Article 59); and
- to assist in the gathering, preservation and production of testimonial, physical and documentary evidence, the protection of witnesses and victims, the execution of searches and seizures, and the service of documents (Article 93).

1.42 Articles 89, 90 and 91 contain detailed provisions relating to the surrender of persons to the Court – describing, in particular, the relationship between the surrender procedures in the Statute, in domestic law, and in existing bilateral and multilateral extradition arrangements.

1.43 Among other matters, the Statute provides that requests for the arrest and surrender of a person shall be accompanied by:

> 91(2) (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the request State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

Evolution of the Court

1.44 The creation of an international court to enforce the principles of international law has been canvassed for many, many years. Some academics trace the development of the Court back to 1874.[13]

1.45 The roots of the present proposal go back as far as the 1907 Hague Peace Conference and following the Versailles Peace Conference in 1919 where there had been discussion of establishing such a court.[14] During the life of the League of Nations, further attempts were made to raise the issue but the Second World War overtook the process.

1.46 It was not until 1948 after the creation of the United Nations that any serious efforts were made to further the process. In resolution 260

> the General Assembly, 'Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required', adopted the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> Article I of that convention characterizes genocide as 'a crime under international law', and Article VI provides that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . .'
>
> In the same resolution, the General Assembly also invited the International Law Commission 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . .'[15]

1.47 At the conclusion of WWII, the London Charter created the Nuremberg Tribunal under which 'crimes against humanity' were for the first time defined. Under this charter criminal responsibility attached not just to States, but to individuals, its provisions stated that

> '.... crimes against international law are committed by men not abstract entities' and in determining individual responsibility the

13 See Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of the *Rome Statute* for the New International Criminal Court' in Melbourne University Law Review, Vol 23, No.3, 1999, p. 1

14 Justice Perry, *Submission 8*, 'The International Criminal Court', 4-10 July 1999, p. 2

15 International Criminal Court Home Page, *Overview*, United Nations 1998-1999, at http://www.un.org/law/icc/general/overview.htm, 7/05/01

Charter specified that superior orders would be no defence but would go in mitigation of penalty only.[16]

Another related issue arising from the Nuremberg Tribunal was that individuals had a duty to comply with international law, and that the duty transcends obligations of a nationalistic character, persuasion or motive.[17]

1.48 With the conclusion of the Nuremberg Tribunal in 1951, a proposal was circulated among members of the UN to create a permanent standing court which would be responsible for prosecuting grave crimes of international concern committed in armed conflict. In addition, a committee of the General Assembly was appointed to prepare proposals relating to the establishment of a court. A draft statute was prepared and revised in 1953. For the ensuing 3 decades, no further progress on the ICC was achieved.[18]

1.49 By the 1980's, international customary law had developed to the degree that it imposed on States and individuals certain universal minimum standards of civilised behaviour in war. These standards were reflected in international agreements like the Protocols to the Geneva Conventions and Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment.[19] Although the principle of individual accountability had become well established, there was no progress in creating a mechanism to enforce that principle.[20]

1.50 In 1989, Trinidad and Tobago raised the proposal to establish an international judicial body capable of dealing with crimes related to international drug trafficking.[21] While the International Law Commission (ILC) began work drafting an ICC statute the UN established the two ad hoc tribunals to adjudicate on war crimes, crimes against humanity and genocide committed during the conflicts in Rwanda and Yugoslavia.

1.51 By 1994, the ILC had submitted a draft proposal to the UN that recommended that an international conference be convened to finalise a treaty. A preparatory committee was set up to undertake the negotiations

---

16 Amnesty International, *Submission No. 16*, November 2000, p. 3

17 Nicole McDonald, *Submission No. 10*, 29 November 2000, p. 4

18 International Criminal Court Home Page, *Overview*, United Nations 1998-1999, at http://www.un.org/law/icc/general/overview.htm, 7/05/01

19 Amnesty International, *Submission No. 16*, November 2000, p. 4

20 Lawyers Committee for Human Rights, The International Criminal Court - 'The case for US Support':: Executive Summary, p. 4

21 Dempsey G T, *Exhibit 14*, 'Reasonable Doubt – The case against the Proposed International Criminal Court', p. 2

with UN member states and non-government organisations (NGOs) on the text of a Statute. By 3 April 1998, a draft Statute was presented.

1.52 At its fifty-second session, the General Assembly decided to convene the *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. The conference was subsequently held in Rome in July 1998. Of the 160 states present, 120 voted in support of the Statute's final text, seven voted against and there were 21 abstentions. A list of signatories and parties to the ICC Statute is at Appendix D.[22]

Australian involvement in developing the Court

1.53 Australian officials, non-government organisations, academics and legal practitioners have been closely involved in negotiating and drafting the text of the ICC Statute.

1.54 Australia chairs the 'Like-Minded Group' of over 60 nations (see Appendix C), dedicated to the establishment of the ICC. This Group was instrumental in the success of the Rome conference. Australian representatives continue to play a leading role in work of the ICC Preparatory Commission, which has been negotiating and drafting the related instruments necessary for the effective functioning of the Court (such as the Elements of Crimes and the Rules of Procedure and Evidence).

Purpose of this review

1.55 The Committee's review of the ICC Statute began on 10 October 2000, when the Government presented to Parliament the text of the ICC Statute, together with a national interest analysis describing the obligations, costs and benefits that would result should Australia ratify the Statute.

1.56 The Committee sought written submissions and took evidence at public hearings from members of the public, academics, community and non-

22 Justice Perry noted in his submission that, as the vote [to adopt the Statute] was taken by secret ballot, it is not possible to identify with confidence those who opposed the Statute's adoption (The Hon Justice Perry, *Submission No. 8*, p. 5). See also the homepage of the International Criminal Court for an up to date listing of signatures and ratifications at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp.

government organisations, and representatives of the Government on whether ratification of the Statute would be in the national interest.[23]

1.57 On 30 August 2001 the Attorney- General referred the implementing legislation for the Statute to the Committee as part of its review. Two Bills were proposed, the *International Criminal Court Bill 2001* and the *International Criminal Court (Consequential Amendments) Bill 2001*. This legislation is designed to fulfil Australia's obligations under the Statute and allow Australia to ratify the Statute.

1.58 The International Criminal Court Bill 2001 sets out the procedures that allow Australia to cooperate with the ICC and covers a range of areas including arrest and surrender of suspects, obtaining evidence in Australia, serving documents in Australia and the confiscation of proceeds in Australia. The Bill also provides safeguards to protect Australia's national security interests.

1.59 The second Bill, the International Criminal Court (Consequential Amendments) Bill 2001, creates new crimes in the Commonwealth Criminal Code that cover all of the crimes in the ICC statute to ensure that Australia always has the ability to prosecute persons charged with offences within the jurisdiction of the ICC in Australian courts under Australian law.

1.60 There is a wide range of opinion within the community about the likely value and impact of the ICC. Strong opinions have been expressed in evidence both for and against the Court. These are expanded on in Chapter 2.

---

23 Appendix B contains a description of the inquiry process and lists the written submissions and exhibits received, and the witnesses who gave evidence at public hearings.

2

Issues raised in evidence

Introduction

2.1 There were five main concerns raised in the evidence presented to the Committee:

- the potential impact of ratification of the ICC Statute on Australia's sovereignty;
- whether ratification would be unconstitutional;
- the 'vagueness' with which the Statute defines the crimes within its jurisdiction and their definition if the proposed implementing legislation;
- the role of the Prosecutor and the accountability of the Court; and
- the potential impact of ratification on the ability of the Australian Defence Force to participate in peacekeeping and other operations.

2.2 While the Committee took a considerable amount of evidence on the Statute it was unable to review the proposed implementing legislation until quite late in its scrutiny process. On 31 August 2001 the Attorney-General referred two bills to the Committee designed to implement the Statute into Australian law. As with the Statute these bills have generated a considerable degree of debate on their impact and content. The proposed legislation will be discussed later in the Chapter.

2.3 In addition, there was some debate in the evidence the Committee received about whether it is preferable for the international community to establish a permanent international criminal court or to continue the practice of appointing *ad hoc* tribunals as the need arises.

2.4 Each of these issues, and a number of other matters, are explored in greater detail below. The conclusions the Committee has drawn on each issue are described in Chapter 3.

Impact on national sovereignty

2.5 Much of the debate in evidence to the review centred on the importance and meaning of national sovereignty in a rapidly changing global environment.

2.6 Specifically, many submissions, particularly from individual members of the public, expressed grave concern that ratification of the ICC Statute would diminish the control that Australians exercise over their own affairs by ceding judicial authority to a foreign court, over which Australia's citizens and governments would have no control.

2.7 The position put in many submissions was that ratification of the Statute would:

> ... licence an alien body to interfere directly and powerfully in Australia's domestic affairs, to the extent of being able to arrest, try and imprison Australian citizens for alleged crimes committed on Australian soil.[1]

2.8 The National Civic Council (WA), made a similar point, arguing that judicial power is a key aspect of national sovereignty and that:

> ... a well-functioning, independent, sovereign democracy has no valid reason for surrendering its sovereignty ...

---

1 C J McCormack, *Submission No. 194*, p. 1 This view, and variations upon it, was also put in submissions from Jim Kennedy, Andrew Anderton, Carrie Barrick, Alan Barron, Dawn Brown, Klaus Clapinski, Stewart Coad, Patrick Healy, Allen Kingston, Anthony Grigor-Scott, Michael Kearney, Ken Lawson, Peter Murray, Marlene Norris, Valerie Staddon, National Civic Council (WA) and the Vigilance Committee. A similar sentiment was expressed by John Stone (see John Stone, *Transcript of Evidence*, 13 February 2001, p.TR87-90). June Beckett spoke in support of this view, citing correspondence she had received from a former Chief Justice of the High Court of Australia, Sir Harry Gibbs. Sir Harry is quoted as saying 'that if Australia ratifies the Treaty, the result will be that Australia would have surrendered part of its sovereignty.' (See June Beckett, *Transcript of Evidence*, 13 February 2001, p. TR76, and June Beckett, *Submission No. 11.2*, to which is attached two letters from Sir Harry Gibbs to Mrs Beckett (the first dated 19 January 2001 and the second 2 February 2001).) Professor George Winterton also referred to Sir Harry Gibbs in observing that while 'all treaties involve some surrender of 'sovereignty' (in the sense of national power to act autonomously) ... the [ICC] Statute would do so to a greater degree than most' (see *Submission No. 231*, p. 1).

> In the judicial sphere Australia, as a functioning and free democratic nation, should be and is capable of exercising the judicial function without let or hindrance, and without assistance from any alien court.[2]

2.9 Some submitters described the ICC as a 'supranational' court, with universal jurisdiction, and claimed that:

> The process [leading to the establishment of the ICC] reeks of an agenda of globalism and a world dictatorship of which we should have no part.[3]

2.10 The National Civic Council (WA) encapsulated the concerns of many when they concluded that ratification of the ICC Statute would not only be 'unwarranted, unjustified, undemocratic and un-Australian'. They also said:

> It appears to border on treason by the Executive Government against the people of Australia.[4]

2.11 On the other hand, the Committee received submissions from those who argued that ratification of the ICC Statute would neither diminish the rights of Australian citizens nor infringe upon Australia's sovereignty.

2.12 In summary, those who hold this view argued that:

- establishment of the Statute would represent the cooperative exercise of independent sovereign power, enabling States to achieve collectively what no individual sovereign State can achieve on its own;[5]
- the crimes proposed to be within the jurisdiction of the ICC are not new crimes and the potential of Australian citizens being tried by foreign courts for war crimes has existed since 1949 when the *Geneva Conventions* were established;[6]

---

2 National Civic Council (WA), *Submission No. 1*, p. 3.

3 P J Keogh, *Submission No. 182*, p. 1. Similar views were expressed by Arthur Hartwig, Festival of Light, Howard Bates, W Mitchell, Julie Beare, Mr Peter McDonald, Bruce Mitchell, Gareth Kimberley and June Beckett.

4 National Civic Council (WA), *Submission No.1*, p. 3.

5 James Cockayne, *Submission No. 217*, pp. 1-2 and 5 See Sydney University Law School Amnesty Group, *Submission No. 224*, p. 1 for a similar view.

6 UNICEF Australia, *Submission No. 34*, pp. 1 and 8; the Hon Daryl Williams AM QC MP, *Speech to the Western Australian Division of the Australian Red Cross*, 21 April 2001, p. 4. The Attorney recently restated this point, saying: 'In the last 52 years I have never heard anyone who thinks that adhering to the Geneva Conventions is an impost on our national sovereignty!' (The Hon

- the ICC is a specialised form of international dispute settlement, albeit in relation to criminal matters, but not unlike the International Court of Justice and the dispute settlement system of the World Trade Organisation, neither of which have posed a threat to State sovereignty;[7]
- the ICC Statute recognises and respects national sovereignty by *obliging* State Parties to conduct their own investigations and prosecutions where it appears that their own nationals may have been involved in genocide, crimes against humanity or war crimes;[8]
- the principles underpinning the ICC Statute ensure that the Court will only ever be a 'court of last resort', whose jurisdiction is invoked only when a State Party is genuinely unable or unwilling to investigate and prosecute a crime;[9] and
- ratification of the ICC Statute (like ratification of any other international agreement) is an expression of national sovereignty that can be withdrawn at any time.[10]

2.13 Justice John Perry, from the South Australian Supreme Court, offered another perspective on this issue by suggesting that there is no loss of sovereignty in establishing a court of last resort to try a person who might otherwise not be brought to justice.

> If an act of genocide, a crime against humanity or a war crime, as defined in the statute, were to be committed by an Australian national abroad, it may be committed in circumstances in which Australian courts would exercise jurisdiction over that person, in which event our ability to do so would be completely unaffected by this statute. If on the other hand it was not justiciable in

---

Daryl Williams AM QC MP, *Speech to the ACT Division of the Australian Red Cross*, 9 August 2001, p. 4).

7 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, pp. 8-9.

8 World Vision, *Submission No. 104*, p 5 See also Chris Hodges (Ags) , *Transcript of Evidence*, 30 August 1999, p. TR5.

9 See also submissions from Elizabeth Bennett (on behalf of a group of 12 university students), Helen Brady, Human Rights Watch, Australian Lawyers for Human Rights and the New South Wales Bar Association.

10 Graham Riches (Legacy Coordinating Council), *Transcript of Evidence*, 14 March 2001, p. TR146 This point was also made in Department of Foreign Affairs and Trade, *Australia and International Treaty Making: Information Kit*, July 2000, p. 9.

> Australia ... we have not lost any national sovereignty by countenancing a situation in which some other country, if it is committed on the soil of that country, might prosecute or if the International Criminal Court might.[11]

2.14 On a related point, James Cockayne submitted that every nation has the right, in accordance with its constitutional and legislative norms to transfer jurisdiction over an accused person to another jurisdiction. This type of jurisdictional transfer, known as extradition, is, it was argued, 'an entirely valid exercise of national sovereignty.'[12]

2.15 The Hon Justice John Dowd, President of the Australian Chapter of the International Commission of Jurists, referred to the international network of extradition agreements, agreements on mutual assistance in criminal matters and on the confiscation of assets as current examples of the type of arrangements proposed by the ICC Statute. Justice Dowd submitted that:

> The wheels have not fallen off Australia every time we have signed an extradition treaty or a mutual assistance treaty. These operated in our courts, before my court [that is, the NSW Supreme Court], all the time.[13]

2.16 The Attorney-General, on behalf of the Government, noted that all countries around the world are concerned to protect their national sovereignty and that the number of 'democratic nations that have committed themselves to the ICC should be of comfort to those concerned that the Court might interfere with national sovereignty.'

> One can safely assume that ensuring that the ICC does not threaten national sovereignty is of as much concern to Canada, New Zealand, France, Germany, South Africa and Italy. Those

---

11 Justice John Perry, *Transcript of Evidence*, 14 March 2001, p. TR161 Sydney Law School Amnesty Group made a similar point (see *Submission No. 224*, p. 1).

12 James Cockayne, *Submission No. 217*, p. 3. See also Sydney Law School Amnesty Group, *Submission No. 224*, p. 1.

13 The Hon Justice John Dowd (International Commission of Jurists), Transcript of Evidence, 13 February 2001, p. TR103-104. The Rt. Hon. Sir Ninian Stephen, a former judge of the Australian High Court, has stated that: 'if such a permanent international tribunal indeed comes into existence this will be a great step forward for the rule of Law internationally as regards war crimes and such other areas of international law as are placed within its jurisdiction. It will also necessarily involve to a degree some voluntary surrender, by nations who become parties to the convention, of exclusive criminal jurisdiction, a matter very much at the heart of sovereignty (Rt. Hon. Sir Ninian Stephen, 'Judging War Crimes', *Res Publice*, Vol. 7, No. 1, 1998, p. 5).

countries are clearly satisfied on that front and have ratified the Statute.[14]

2.17 At the core of the debate about the impact of the ICC Statute on national sovereignty are differing views about the effectiveness of the complementarity principle.

Effectiveness of the complementarity principle

2.18 As noted in Chapter 1, the complementarity principle is fundamental to the operation of the ICC.[15]

2.19 Supporters of ratification argued that the complementarity principle would ensure the primacy of national systems of law and of national courts.

2.20 Helen Brady submitted that:

> Complementarity means that the country concerned ... will continue to have the primary duty to investigate alleged crimes (and prosecute, if the evidence supports charges). The ICC can only 'step in' if [the country concerned] ... fails to do so, or does so in a manner inconsistent with an intent to bring the person to justice or to shield the person from criminal responsibility.
>
> Australia will be – *and indeed already is* – responsible for investigating and prosecuting these crimes. If Australia becomes a party to the ICC and if crimes of genocide, crimes against humanity or war crimes were in the future committed on Australian soil or by an Australian national, the Court will be *obliged* to defer to Australian national criminal proceedings ...
>
> ...
>
> The Court could only assume jurisdiction where Australian ... authorities or courts decided not to prosecute *for the purpose of* shielding the person from criminal responsibility or in a manner inconsistent with an intent to bring the person to justice.[16]

2.21 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) took a similar view, claiming that:

---

14 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 4.

15 See paragraphs 1.27 to 1.36 of Chapter 1.

16 Helen Brady, *Submission No. 7*, pp. 4-5.

> As long as proper judicial proceedings are followed and appropriate sentences awarded in any such case tried in Australian courts, the principle of complementarity guarantees that the International Criminal Court does not usurp the administration of Australian Criminal Law.[17]

2.22 Moreover, according to Justice Perry, once a properly conducted prosecution is completed in Australia (either with a conviction or an acquittal) that would be the end of the matter: 'the ICC could not examine the authenticity of an acquittal or a conviction'. Justice Perry's view was that ratification of the ICC Statute would keep Australia's legal structure completely intact :

> All our courts will still be there ... the High Court will still be our ultimate court of appeal. There could be no question of any case going from our High Court to the International Criminal Court.[18]

2.23 The Australian Government is also firmly of the view that the complementarity principle will secure the primacy of national courts. In a recent speech, the Attorney-General remarked that State Parties to the ICC Statute will have the primary opportunity and the primary obligation to prosecute war criminals within their jurisdiction.

> This has always been the case – it is critical to understand that the ICC will not take away the responsibility of countries to carry their own prosecutions. If a crime falls under national law and it is being or has been investigated or prosecuted under that law, the Court is conclusively prevented from pursuing it.
>
> The ICC will only act when a country is either unwilling or unable genuinely to act.
>
> The sovereignty of countries will in no way be challenged by the ICC.[19]

---

17 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 4. Similar submissions, endorsing the view that the ICC will neither replace, nor override national courts, have been received from the Law Council of Australia (International Law Section), Australian Lawyers for Human Rights and Sandy and Betty Reid.

18 Justice John Perry, *Transcript of Evidence*, 14 March 2001, p. TR161. A similar position was advanced by representatives of the NSW Bar Association – see Tim Game (NSW Bar Association), *Transcript of Evidence*, 13 February 2001, p. TR37.

19 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 3.

2.24 In a written submission the Attorney-General and the Minister for Foreign Affairs noted that the ICC would not consider a State to be 'unable' unless its system of justice had 'collapsed.' In relation to determining whether a State is 'unwilling' to act, the Ministers submitted that:

> ... if a State's national investigation and prosecution is carried out in good faith, expeditiously, in accordance with internationally accepted standards of due process, and recognising the seriousness of the offence then it is most unlikely that the ICC would seek to act itself. It is considered that Australian processes clearly meet these standards. On this basis there is very little scope for the ICC to act in a case being dealt with by Australia.[20]

2.25 Some other submitters suggested that not only is it 'highly unlikely' that crimes of genocide, crimes against humanity and war crimes would ever be committed in Australia, or by an Australian national, but that it is 'inconceivable' that the ICC would not recognise that Australia's judicial system functions well and with integrity.[21]

2.26 The Australian Red Cross argued that:

> Given Australia's independent and well-functioning investigative, prosecutorial and judicial agencies and processes, any trial conducted according to our criminal justice system will always satisfy the inadmissibility tests in Article 17 of the Rome Statute precluding the ICC from overriding Australian jurisdictional competence. Similarly, a proper trial under Australian criminal law would preclude the ICC from dealing with the same case on the basis of the *ne bis in idem* [double jeopardy] protection for the accused in Article 20 of the Statute.[22]

2.27 Moreover, the question has been put by some that if Australian society breaks down to the point where our judicial system seeks to 'deliberately

---

20 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, pp. 8-9. In a recent speech the Attorney-General emphasised the limited scope for the ICC to intervene by saying: 'It is true that the ICC would be able to act if Australia were shielding a war criminal from trial. But Australia has never – and will never – be in the business of protecting war criminals, so such a situation is not going to happen' (The Hon Daryl Williams AM QC MP, *Speech to the ACT Division of the Australian Red Cross*, 9 August 2001, p. 4).

21 See submissions from Elizabeth Bennett, Helen Brady, NSW Bar Association, Human Rights Watch, Australian Red Cross (National Advisory Committee on International Humanitarian Law) and Australian Lawyers for Human Rights.

22 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.2*, p. 2.

shield a national from criminal responsibility then why, it may be asked, should international justice not intervene.'[23]

2.28 The proposed legislation to implement Australia's responsibilities under the Statute is intended to establish a significant degree of parity between Australia's criminal law and the ICC Statute crimes, thereby affirming the primary role of Australian courts in trying ICC crimes.[24] This legislation will be discussed in more detail below.

2.29 Those opposed to ratification of the ICC Statute drew no comfort from the complementarity principle, suggesting that it is 'naïve and unduly optimistic' to expect that the principle will operate to protect Australia's sovereign interests.[25]

2.30 Dr Ian Spry QC argued that the 'alleged protection [afforded by the principle] is largely illusory, since it is the ICC itself which would determine whether a State is unwilling or unable genuinely to carry out an investigation or prosecution.'

> If the ICC on some slight or tenuous ground – such as the adoption of a local procedure which might in some respect differ from its own – held that Australian proceedings were not 'genuinely' carried out there would be no remedy for Australia. Australia would be required to arrest and extradite its own nationals.[26]

2.31 Emeritus Professor Geoffrey Walker was similarly sceptical about the operation of the complementarity principle submitting that:

---

23 Amnesty International, *Exhibit No. 58*, p. 2, provided to the inquiry into Australia's relationship with the United Nations conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade. See also submissions from Human Rights Watch, New South Wales Bar Association and Helen Brady, for similar comments. The Australian Red Cross' National Advisory Committee on International Humanitarian Law remarked that if an Australian Government ever sought to shield an alleged war criminal the ICC should step in: 'the Australian public would rightly demand that those responsible for such an atrocity be brought to account' (see Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.2*, p. 3).

24 The joint media statement issued by the Attorney-General and the Minister for Foreign Affairs on 25 October 2000 stated that 'the Government has taken an approach which recognises that it would be desirable to have the offence provisions [in Australian law] framed consistently with the Statute crimes. This will enable us to ensure the benefit of complementarity in specific cases'.

25 See Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR152. See also John Stone, *Transcript of Evidence*, 13 February 2001, p. TR89 and Council for the National Interest (WA), *Submission No.19*, p. 3.

26 Dr I C Spry QC, *Submission No. 18.2*, p. 2.

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

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

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

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

Concerns about constitutionality

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

2.36 A number of specific claims were made:

---

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

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

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

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

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

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

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

32 Article 21 of the ICC Statute provides that 'the Court shall apply:
(a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) failing that, general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

The proposed implementing legislation and the ICC crimes

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

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

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

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

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

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

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

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

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

> Australia's relationship with the new International Criminal Court if and when Australia chooses to ratify the *Rome Statute*.[55]

2.60 The Australian Red Cross also raised a number of concerns about several aspects of the legislation: the use of the term 'primary' in referring to Australia's national jurisdictional competence; the repealing of Part II of the *Geneva Conventions Act 1957;* the definition of crimes of a sexual nature; and the repetition of certain war crimes found in Subdivision H of the consequential amendments bill.

2.61 To avoid the situation exhibited with the two ad hoc tribunals, which have primacy over national jurisdictions, clause 3 of the ICC bill acknowledges the fundamental rejection in the *Rome Statute* of the model of interaction between the International Criminal Tribunals for the Former Yugoslavia and Rwanda and their respective relevant national criminal jurisdictions.[56] Clause 3 (1) emphasises that the jurisdiction is complementary to the jurisdiction of Australia; however, the Australian Red Cross stated that Clause 3 (2) does not convey the pre-eminence of Australian jurisdiction, and should be rephrased in the following manner:

> "Accordingly, this Act does not affect the primacy of Australia's right to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC."[57]

2.62 In this context, the Australian Red Cross was of the view that clause 268 (2) of the consequential amendments bill should also be strengthened in the same manner with the inclusion of the same wording.[58]

2.63 The Red Cross's National Advisory Committee on International Humanitarian Law suggested that the Government should 'deposit a Declaration of Australia's understanding of the interpretation of preambular paragraph 9 and Article 1 [of the ICC Statute, which establish

55 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 1.

56 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 2.

57 The Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 2. Section 3 (2) in the Bill currently reads: 'Accordingly, this Act does not affect the primary right of Australia to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC'.

58 Clause 268 (2) of the consequential amendments bill currently states: 'It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court'.

the complementarity principle].' Such a declaration, to be made upon ratification of the Statute, would:

> ... not alter Australia's position at law – that is, the Declaration would not increase Australia's primacy of jurisdiction in respect of acts committed in its own territory or by one of its own nationals. However, the Declaration would constitute a clear statement to other States and to the ICC itself of the level of Australia's resolve to insist on its primary national jurisdiction in specified situations.[59]

2.64 The Australian Red Cross was also concerned about the proposed amendment to the *Geneva Conventions Act 1957*, involving the repeal of Part II of the Act, which will occur as a result of the passage of the ICC legislation. The Australian Red Cross was concerned that:

> the jurisdictional competence of Australian Courts in respect of grave breaches of the Geneva Conventions will continue in respect of the period from 1957 until the enactment of the *International Criminal Court (Consequential Amendments) Bill* and subsequent repeal of Part II of the *Geneva Conventions Act 1957*.
>
> [The Australian Red Cross therefore recommends:]....
>
> If this interpretation is correct, ... that the *Explanatory Memorandum* to accompany the legislation explicitly indicate this interpretation of Section 8(b) of the *Acts Interpretation Act 1901*.[60]

2.65 A third area of concern for the Australian Red Cross was that the consequential amendments legislation should reflect more closely the crimes of rape as laid out in the *Elements of Crimes* in relation to the victim's lack of consent. The Australian Red Cross suggested that

> The proposed Sections 268.13 (crime against humanity of rape); 268.58 (war crime of rape in an international armed conflict); and 268.81 (war crime of rape in a non-international armed conflict), for example, restrict sexual penetration for the purposes of the definition of rape to certain specified body parts of the victim –

---

59 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.1*, p. 3. The Red Cross argued that, while the ICC Statute prohibits the making of Reservations, a Declaration of this type would be 'entirely consistent with the treaty's [that is, the ICC Statute's] terms – it would be, in effect, an affirmation of one of the treaty's existing provisions'.

60 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 3.

> namely the genitalia, anus or mouth. In contrast, the Elements of Crimes defines rape to include '...penetration, however slight, of any part of the body of the victim *or of the perpetrator* with a sexual organ...' (Article 7(1)(g)-1; Article 8(2)(b) (xxii)-1; and Article 8(2)(e)(vi) – 1). This definition in the Elements of Crimes envisages the possibility that the victim might be forced against their will to engage in the sexual penetration of another person – whether or not that other person is consenting to the penetration. The proposed Australian definition of rape simply does not include that possibility.[61]

2.66 Human Rights Watch also raised this issue and recommended that consideration should be given to harmonising these provisions according to the *Elements of Crimes* paper and includes a less restrictive definition for rape in the consequential amendments bill.[62] Human Rights Watch also believed that Sections 268.63 and 268.86 should reflect more closely the terminology used in the *Elements of Crimes* paper Articles 8(2)(b)(xxii) and 8(2)(e)(vi).[63]

2.67 The Australian Red Cross also highlighted inconsistencies under Section H of the consequential amendments bill dealing with grave breaches of Protocol I of the Geneva Convention. It contended that, while Sections 268.96 and 268.47 enumerated 5 similar elements of the specific offence, those elements are not identical and such:

> inconsistency in specifying elements could easily cause problems, as future defendants would justifiably raise objections if they were charged with a specific war crime appearing twice in the legislation with the prosecution choosing the specific offence with the less onerous elements.[64]

2.68 The Australian Institute for Holocaust and Genocide Studies in recommending ratification of the Statute also suggested that:

> Given the fact that pre-existing legislation is insufficient in prohibiting and punishing the international crimes that the ICC purports to cover ... implementation of the *International Criminal*

---

61 Australian Red Cross (National Advisory Committee on International Humanitarian Law), Submission No. 26.3, p. 4.

62 Human Rights Watch, Submission No. 22.1, pp. 3-4.

63 Human Rights Watch, Submission No. 22.1, pp. 4-5.

64 Australian Red Cross (National Advisory Committee on International Humanitarian Law), Submission No. 26.3, p. 6.

> *Court Bills* is an ideal way of strengthening Australia's legislative and definitional framework for the apprehension and prosecution of persons committing genocide, war crimes and crimes against humanity.[65]

2.69 In addition, the Institute argued that, while the crimes encompassed under the proposed legislation will allow prosecutions after it comes into force, because the laws do not currently exist in Australia, retrospective antigenocide legislation should be considered. Such legislation should operate from the time that genocide acquired the status of international customary law – 11 December 1946.[66]

2.70 In supporting strongly the establishment of the ICC, the Castan Centre for Human Rights Law suggested that the legislation sets out thoroughly and precisely Australia's obligations under the Statute and further that:

> The definitions given to the ICC crimes are highly progressive, often duplicating the Statute's own definitions. At the same time, the draft Bills amply provide for the protection of Australia's national interests and its primary right to exercise its own criminal jurisdiction.[67]

2.71 The Castan Centre suggested several minor amendments to the proposed legislation. These are summarised below:[68]

- there should be time constraints on issuing arrest warrants – cl 21 and 22 of the Statute Bill are deficient because they do not impose time limitations like those under Article 59 of the Statute;[69]
- that cl 102 be amended to extend privileges and immunities to ICC officials not named in Article 48(2) of the Statute;
- that the legislation should articulate a position on the statute of limitations and immunities attaching to official capacities, as sought under Articles 27 and 29 of the Statute. The Castan Centre saw the possibility arising that application of these barriers might lead the ICC

---

65 The Australian Institute for Holocaust and Genocide Studies, Submission No. 46, p. 27.

66 The Australian Institute for Holocaust and Genocide Studies, Submission No. 46, p. 10.

67 The Castan Centre for Human Rights Law, Submission No. 239, p. 4.

68 The Castan Centre for Human Rights Law, *Submission No. 239*, p. 6.

69 Article 59 of the Statute covers the arrest proceedings in the custodial State and s(1) states that a State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question.

to determine that under Article 17, Australia was unwilling to investigate a case itself;

- that in defining torture as a war crime the consequential amendments bill has the effect of broadening the crimes ambit rather than following the approach in the Statute; and
- the need for consideration of Australia's commitment to the minimum age for conscription, which is set at 15 under the Statute and the consequential amendments bill, although Australia's commitment under the Convention on the Rights of the Child sets the age at 18 years.

2.72 In recommending that the Committee endorse the legislation, Amnesty International recognised that some improvements could be made. They were particularly concerned about the coverage of Article 27 of the Statute under the draft legislation.[70] Amnesty suggested that the legislation as currently drafted, does not reflect the intent of Article 27 which provides that the official capacity of a government official shall not exempt that person from criminal responsibility under the Statute.

2.73 In Amnesty's view:

> The government, in omitting Article 27 from the legislation, may take the view that, because the statute renders the crimes specified in it enforceable, they could not be characterised as official acts. This may be so but it is undesirable for that aspect to be left in doubt—but it would, in any event, leave an official immune by virtue of his status, and thus exempt from liability whilst he remains an official. We say it is far too late in the day for some future Hitler to extend his cover of immunity by some future enabling law. The quintessential feature of these crimes is that they are committed by or authorised by government officials. In our view, there should be no immunity, and Article 27 should be introduced into the legislation.[71]

---

70 See also Human Rights Watch supplementary submission which also commented on Article 27 and recommended: 'it would be best to explicitly provide that immunities and other barriers to prosecution do not apply to crimes covered in the ICC Crimes Bill, either in relation to arrest and surrender of persons to the ICC or for the purpose of prosecution of the ICC Crimes Bill offences in Australian Courts. Both bills should be amended to include a provision expressly excluding the application of the immunities in the *Foreign States Immunities Act 1985* and the *Diplomatic Privileges and Immunities Act 1961* (*Submission No. 22.1*, p. 3).

71 Amnesty International Australia, *Transcript of Evidence*, 10 April 2002, p. TR273.

2.74 Amnesty also highlighted their view that the implementing legislation enhances Australia's sovereignty by conferring on Australian courts the jurisdiction to try persons accused of crimes subject to the Statute, in circumstances where Australian courts would previously have lacked the power.[72]

2.75 Several submissions expressed strong reservations, not only about the possible ratification of the Statute, but also about aspects of the legislation. Organisations including the Council for the National Interest (WA) (CNI), the National Civic Council (WA) (NCC) and the Australian Patriot Movement (APM) were of the view that to ratify the Statute and implement the proposed legislation would endanger Australia's sovereignty.[73]

2.76 CNI was 'implacably' opposed to ratification of the Statute and considered that Australia would find its law being circumvented by the ICC. CNI believed that the implementing legislation, although closely modelled on the Statute crimes, would only ensure 'total compliance' with all requests of the ICC and that complementarity is only 'an exercise in semantics'. CNI further suggested that the legislation is 'unconstitutional, undemocratic and an abrogation of Australia's sovereignty'. [74]

2.77 CNI was also critical of a number of the definitions of crimes in the consequential amendments bill which it suggested are written in vague and imprecise terms and could leave the way open for future initiatives in international law to be inserted into Australian law without the approval of the Australian Parliament.[75] CNI cited as examples of this problem in the definitions of crimes such as 'causing serious mental harm'; and 'causing great suffering'; and 'serious injury to physical health'. CNI suggested that:

> The offence of persecution, "severely deprives, contrary to international law, one or more persons of fundamental rights" and "on grounds that are universally recognised as impermissible under international law". This would appear to open the way for

72 Amnesty International Australia, *Submission No. 16.4*, p. 6.

73 Australian Patriot Movement, *Submission No. 241*, p. 1.

74 Council for the National Interest, *Submission No. 19.2*, p. 2.

75 Council for the National Interest, *Submission No. 19.2*, p. 2

> future initiatives in international law to be inserted into Australian law without the approval of the Australian Parliament.[76]

2.78 Similar views about the legislation were expressed by the NCC in relation to 'absolute compliance'. The NCC went further in suggesting that under the ICC bill the ICC could be seen as a superior court because of its capacity to issue binding directives to the Attorney General.[77] The NCC was also critical of the consequential amendments bill in its definitions of two offences that they believed could lead to quite frivolous charges - namely 'genocide by causing mental harm' and 'persecution by severely depriving'. Like the CNI, the NCC believed that inclusion of the latter offence in the federal criminal code would create:

> .. an open-ended means of importing developments in international law into Australian criminal law without any parliamentary debate.[78]

Definition of ICC crimes

2.79 Many of those who argued against ratification of the ICC Statute expressed concern about the manner in which the crimes proposed to be within the ICC's jurisdiction are defined. It was suggested that the definitions are too vague and thereby open to wide interpretation and, potentially, abuse.

2.80 Dawn Brown suggested that the definitions of genocide, war crimes and crimes against humanity are 'so breath-takingly elastic and wide open to manipulation' that the ICC will become not just a war crimes tribunal but a human rights court.[79]

2.81 The Festival of Light likewise referred to the 'elastic terms' and 'sweeping language' of the Statue in doubting that the Court will ultimately restrict its activities to the most serious crimes of international concern. In commenting on the crime of genocide (the definition of which refers, in

---

76 Council for the National Interest, *Submission No. 19.2*, p. 2. See also comments from James Crockett who raised similar terminological issues with the draft legislation, *Submission No. 174.1*, p. 2. The Australian Patriot Movement voiced similar sentiments towards the legislation and cited a number of clauses which it considered might lead to unforseen outcomes if passed into Australian law. Australian Patriot Movement, *Submission Nos. 241 and 241.1*.

77 National Civic Council (WA), *Submission No. 1.1*, p. 1.

78 National Civic Council (WA), *Submission No. 1.1*, p. 1.

79 Dawn Brown, *Submission No.21*, p. 2.

part, to 'causing serious mental harm to a members of a national, ethnic, racial of religious group') the Festival asked whether:

> those Australians who were involved in helping care for Aboriginal children a generation ago [a practice which the 1997 Human Rights and Equal Opportunities Commission report *Bringing Them Home* described as causing mental anguish akin to genocide] ... [could] find themselves transported to The Hague to be prosecuted in the International Criminal Court for the crime of genocide?[80]

2.82 The Festival of Light also questioned the language used to define some aspects of crimes against humanity.

> These crimes [being murder, extermination, enslavement, forcible transfer of population, torture, sexual slavery, persecution and other inhumane acts] certainly *sound* terrible but the ICC Statute gives very little guidance as to what these words *actually proscribe.*
>
> For example, the crime of 'persecution' as set out in the Statute and as further defined in the recently issued '*Elements of Crimes*', condemns the 'severe deprivation' of a group's 'fundamental rights'. The crime of 'inhumane acts' criminalises the infliction of 'great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.' What do these terms proscribe? At present it is impossible to say definitively.[81]

2.83 Geoffrey Walker shared some of these concerns, submitting that the 'list of offences punishable by the court extends to acts that are not normally regarded as major crimes, such as "outrages upon personal dignity"'. Moreover, the provisions are:

> ... capable of expansion to cover conduct far beyond anything most people would regard as the 'most serious crimes of international concern'. The range of acts that could be treated as constituting an attempt to commit 'cultural persecution' (Art.7(1)(k)) or an attempt to outrage human dignity might be limited only by the imagination of the prosecutors and their NGO-supplied helpers.[82]

---

80 Festival of Light, *Submission No. 30*, pp.5-6. See also Dr I C Spry QC, *Submission No.18.2*, p. 2 and June Beckett, *Submission No. 11*, pp. 3-5; Australian Family Association (Mildura Branch) *Submission No. 210*, p. 1.

81 Festival of Light, *Submission No. 30*, p. 6.

82 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 8.

2.84 The 'imprecise' manner in which these crimes are defined allows for the possibility, according to the Festival of Light and many other submitters, that the ICC could be used to 're-engineer social policies throughout the world.' The Festival of Light was especially concerned about what it saw as the potential for the Court to be used to force changes to national family, gender and abortion policies.[83]

2.85 The Council for the National Interest (WA) endorsed these concerns, suggesting that the language in the Statute is 'so vague that at some point down the track – maybe 10 to 15 years out – other interpretations will be placed on that language.'[84]

2.86 June Beckett mentioned also that whatever definition is ultimately agreed for the crime of aggression 'must necessarily be loose, open-ended and wide open to criminal misinterpretation.'[85]

2.87 In response to these concerns the Committee received submissions from a number of individuals including the New South Wales Bar Council, Justice Perry, Human Rights Watch, Nicole McDonald and others arguing that the crimes within the jurisdiction of the ICC are, in fact, comprehensively defined and draw on long established principles of law.[86]

2.88 For example, the NSW Bar Association submitted that, read together, the ICC Statute and the accompanying *Elements of Crimes*:

> Codify existing customary international law and incorporate the provisions of treaties including the Genocide Convention, the

---

83 Festival of Light, *Submission No.30*, pp. 6-7. These argument were presented in a number of other submissions, including those from Fay Alford, Council for the National Interest (WA), Endeavour Forum, Richard Gellie, Arthur Hartwig, National Civic Council (Isaacs Federal Electorate Group), Catharina O'Connor, Youth Concerned and Davydd Williams. All of these submissions drew heavily on a paper entitled *Doing the Right Thing: The International Criminal Court and Social Engineering* prepared by Professor Wilkins, who is the Director of the World Family Policy Centre at Brigham Young University, USA. George Winterton also sees merit in Wilkins' argument that the 'sweeping language' of the Statute is 'limited largely by the imagination of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges on the ICC' (see GeorgeWinterton, *Submission No. 231*, p. 1).

84 Denis Whitely (Council for the National Interest (WA)), *Transcript of Evidence*, 19 April 2001, p. TR200.

85 June Beckett, *Submission No. 11*, p. 4.

86 See the submissions from the NSW Bar Association, the International Commission of Jurists, UNICEF Australia, Justice John Perry, Helen Brady, Phillip Scales, Nicole McDonald, Australian Red Cross, Australian Lawyers for Human Rights, World Vision and Ben Clarke.

> Apartheid Convention, the Torture Convention and the Geneva Conventions are 'strictly, rather than broadly defined.'[87]

2.89 Further, and by way of example, the NSW Bar Association referred to the various elements of the proposed definition of 'genocide by killing', concluding ultimately that the 'definition is anything but broad':

> ... 'genocide by killing ... contains the following elements, each of which must be proved. These are: the perpetrator must kill more than one person; the persons must belong to a 'particular national, ethnical, racial or religious group'; the perpetrator must have intended to destroy in part or in whole that 'national, ethnical, racial or religious group'; and the conduct must have taken 'place in the context of a manifest pattern of similar conduct directed against that group or was the conduct that could itself effect such destruction'.
>
> ... It is clearly directed to conduct such as 'ethnic cleansing' and the events in Kosovo obviously are within this proposed definition. The offence is strictly rather than broadly defined.[88]

2.90 Helen Brady emphasised that the definitions contained in the Statute must be read in conjunction with the further descriptions contained in the *Elements of Crimes.*

---

87 NSW Bar Association, *Submission No. 20*, p. 6. The International Commission of Jurists noted that 'These offences already exist in the international calendar.' (*Submission No. 24*, p. 6). Justice Perry likewise noted that all of the ICC crimes are 'based upon definitions already established in international law' (*Submission No. 8.3*, p. 4). UNICEF Australia noted that the 'jurisdiction of the ICC goes no further than that already in existence and already endorsed by Australia including:

- the Convention on the Rights of the Child;
- the International Covenant on Civil and Political Rights (particularly Articles 23 and 24);
- the International Covenant on Economic, Social and Cultural Rights (particularly Article 10);
- the Convention on the Elimination on All Forms of Discrimination Against Women; and
- the Geneva Conventions and their additional protocols. (Submission No 34, p. 8).

Many elements of the crimes within the ICC's jurisdiction, although not all, have been offences under Commonwealth law for many years – see the *War Crimes Act 1945* (as amended in 1988), the *Geneva Conventions Act 1957*, the *Defence Force Discipline Act 1982* and a series of related laws which outlaw the use of weapons which may, in certain circumstances, offend the ICC's war crimes provisions, including: the *Chemical Weapons (Prohibition) Act 1994*, the *Crimes (Biological Weapons) Act 1976*, the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* and the *Anti-personnel Mines Convention Act 1998.*

88 NSW Bar Association, *Submission No. 20*, p. 6.

> The Elements of Crimes paper sets out each of the crimes and their elements. They are designed to assist and guide the Court ... The extensive definitions of the crimes ensure that both the Prosecutor and the defence will be clearly aware of the exact elements of the crimes.[89]

2.91 Justice Perry agreed that while the definitions contained in the ICC Statute itself might not be fully prescriptive, the definitions contained in the *Elements of Crimes* are sufficiently detailed to overcome any concerns.[90]

2.92 The ICC crimes are defined comprehensively in the Government's proposed implementing legislation discussed later in this Chapter. In a recent speech to the International Society for the Reform of Criminal Law, the Attorney-General stated that the legislation will 'result in the enactment of all the crimes within the Court's jurisdiction as crimes in Australian law ... [to] be contained in a new Division of the Criminal Code'.[91]

2.93 The Australian Red Cross and others noted that, as the jurisdiction of the ICC is prospective (see Article 11), claims that those involved in the policies which lead to the 'stolen generation' of aboriginal children might be exposed to prosecution for genocide are 'completely unfounded'.[92]

2.94 The Attorney-General was dismissive of claims that the ICC would be used as an instrument of 'social engineering', describing them as 'totally false and absurd ... to suggest otherwise is to engage in deliberate scare mongering.'[93]

2.95 In relation to the crime of aggression, advice from the Attorney-General and the Minister for Foreign Affairs was that the crime has not yet been defined and that it cannot be added to the Court's jurisdiction until a

---

89 Helen Brady, *Submission No. 7*, p. 11. See also the *Elements of Crimes* paper which states that the elements of crimes will assist the court in the interpretation and application of Articles 6, 7 and 8, consistent with the Statute. The *Elements of Crimes* paper focuses on the conduct, consequences and circumstances associated with each crime. (*Elements of Crimes*, United Nations, PCNICC/2000/1/Add.2, p. 5). See also comments in Chapter 1, paragraph 1.27.

90 Justice John Perry, *Submission No. 8.3*, p. 4.

91 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 9.

92 Australian Red Cross (National Advisory Council on International Humanitarian Law), *Submission No. 26*, p.5. See also Nicole McDonald, *Submission No. 10*, p. 4 and Helen Brady, *Submission No.7*, p. 1.

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

definition is adopted by the State Parties. The earliest that the crime could be added to the Court's jurisdiction is 7 years after the establishment of the Court. At this time, a State Party may decline to accept the definition, in which case the Court may not exercise jurisdiction over that crime when committed by the nationals of that State Party or on its territory.[94]

Role and accountability of the Prosecutor and Judges

2.96 Some of those opposed to ratification of the ICC Statute pointed to the differences between the judicial system described in the Statute and the common law traditions in Australia and claimed that the ICC's standard of justice will be both 'alien' and 'inferior'.

2.97 Some of the particular concerns raised were that the Statute:

- by requiring that State Parties take into account a 'fair representation of female and male judges' and 'legal expertise on specific issues, including ... violence against women and children' when selecting judges, encourages the selection of 'ideological' judges;
- by allowing the Prosecutor to initiate investigations without governmental oversight or control and accept 'gratis personnel offered by State Parties, intergovernmental organizations or non-governmental organizations', allows for the possibility that the Prosecutor will be supported and influenced by 'well-funded international NGOs who are hostile to religion and traditional values';
- by providing that the one institution will investigate crimes, prosecute, pass judgement, sentence and hear appeals, concentrates rather than separates power and ignores the 'hard-won safeguards of our common law system and instead adopts trial by inquisition, which is common in European countries and dictatorships'; and
- removes or modifies some of the important features of our common law system of justice, such as the right to trial by jury, the inadmissibility of hearsay evidence and the right of an accused to know and confront his or her accusers.[95]

---

94 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 9.

95 Festival of Light, *Submission No. 30*, pp. 7-10. Some or all of these concerns were shared by the Council for the National Interest (WA), National Civic Council (Isaacs Federal Electorate Group), National Civic Council (WA), Alan Barron, Stewart Coad, Richard Gellie, Mary

2.98 According to the Festival of Light, reliance on an inquisitorial system and the absence of some common law safeguards means that 'opportunities for collusion and corruption abound' and that 'the innocent will suffer.'[96] The Council for the National Interest suggested that 'the broad prosecutorial power [provided for by the Statute] may be particularly subject to ... corrosive kinds of political influence.'[97]

2.99 On the other hand, the Committee received evidence from Justice Perry, Nicole McDonald, Phillip Scales and others arguing that the ICC Statute contains sufficient safeguards to prevent politically motivated prosecutions, to ensure that judges are of the highest calibre and integrity and to protect the rights of the accused.

2.100 The NSW Bar Association was satisfied that the Statute and its draft *Rules of Procedure and Evidence* provide 'probably the most sophisticated and comprehensive codified right to a fair trial of any court system in the world.'

> The Statute contains fundamental rights for the accused common to common law countries, including a presumption of innocence (art 66); the right to a speedy trial; a right of silence; a right to make an unsworn statement; the right to legal assistance if the accused lacks sufficient means to pay for legal representation (art 67). It mandates important procedural rights during the trial. The prosecutor must also disclose exculpatory material to the defence (art 67(2)).
>
> The Statute also provides victims with significant rights, including some rights of participation in the trial process (art 68) (which is closer to the civil rather than common law model) and empowers the Court to make reparation orders against accused persons (art 75) - common to both systems.
>
> ...
>
> The draft rules [of procedure and evidence] also contain highly sophisticated rules for the acceptance of evidence in the new Court, which are consistent with Australia's own procedures. The Court too has a comprehensive appeals mechanism, the Court's

---

Hertzog, Michael Kearney, Jim Kennedy, Brenda Lee, David Mira-Batemen, Marlene Norris, Dr I C Spry QC, Valerie Staddon, and Davydd Williams.

96 Festival of Light, *Submission No. 30*, p. 9.

97 Council for the National Interest (WA), *Submission No. 19*, p. 4.

> Appeals Chamber. The main difference between the world's common law and civil law systems is the right under Article 81 of the prosecutor to appeal and acquittal.
>
> A major right, missing from our own system, is an enforceable right to compensation for unlawful arrest or detention or an acquittal on appeal on the grounds of a miscarriage of justice after the discovery of new evidence unknown at the time (art 85 and Chapter 10 of the rules).[98]

2.101 The Committee also received lengthy submissions from Helen Brady and from the Attorney-General and the Minister for Foreign Affairs on the safeguards contained in the ICC Statute to prevent politically motivated prosecutions.

> If the Prosecutor wishes to initiate an investigation, ... the three judge Pre-Trial Chamber must authorise the investigation. The Pre-Trial Chamber can only do so if it believes there is a reasonable basis to proceed with the investigation and the case appears to fall within the jurisdiction of the court.
>
> After that ... the Court must inform countries that would normally exercise jurisdiction. If a country informs the Court that it is investigating or has investigated, its nationals or others within its jurisdiction for criminal acts which may constitute crimes in the Court's jurisdiction, the Prosecutor *must defer* to that countries national proceedings, unless the Pre-Trial Chamber authorises the Prosecutor to commence the investigation on the basis that the country is unable or unwilling genuinely to proceed. The State (and the Prosecutor) may appeal this decision.
>
> ...
>
> In deciding whether to initiate an investigation or prosecution the Prosecutor must consider whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; the case is or would be admissible (ie,

98 NSW Bar Association, *Submission No. 20*, p. 5. Human Rights Watch also submitted that the 'Rome Statute guarantees the highest international standards for fair trial and the protection of the rights of accused persons. The guarantees are ... comprehensive and extensive' (*Submission No. 23*, p. 3). The International Commission of Jurists (Australian Section) submitted that the 'legal tests to be met in the course of proceedings are the most stringent tests extracted from both common law and civil law systems' (*Submission No. 24*, p. 5). James Cockayne submitted that the ICC's proceedings will be consistent with 'internationally established norms and standards for judicial process, including common law standards' (*Submission No. 217*, p. 4).

> complementarity does not stand in the way); and interests of justice factors do not militate against proceeding. To issue an arrest warrant the Court must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.
>
> The confirmation proceedings are a further filter. The Pre-Trial Chamber must determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.[99] If it is so satisfied, the charge or charges are sent to trial. At trial, the onus is on the Prosecutor to prove the guilt of the accused. To convict, the Court must be convinced of the accused's guilt beyond reasonable doubt. Both the Prosecutor and the accused can appeal against the decision of conviction or acquittal and against any sentence imposed.[100]

2.102 In Ms Brady's opinion, these features make it 'almost impossible for the Prosecutor to even *begin* an investigation or prosecution that is not without great merit'.[101]

2.103 The Attorney-General has acknowledged that the ICC will be, of necessity, a blend of different legal systems. Nevertheless, he was confident that it will apply the standards of justice that Australians expect from a court.

> ... the Court will respect the basic legal principles that are applied in Australia and throughout the world. The presumption of innocence, the need to establish guilt beyond reasonable doubt and the observation of due process will all apply at the ICC.
>
> The ICC won't operate in exactly the same way as an Australian Court, but ... it will operate in a completely fair and just way.[102]

2.104 The Attorney- General also argued that the rigorous processes to be followed for the selection of judges will ensure that only persons of the highest quality will be appointed.

> The composition of the benches of the Tribunals for the former Yugoslavia and Rwanda suggests that persons of the highest

99 Under Article 58 of the Statute the Pre-Trial Chamber can only issue an arrest warrant if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

100 Helen Brady, *Submission No. 7*, pp. 6-7.

101 Helen Brady, *Submission No. 7*, p. 7.

102 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, pp. 4-5.

> calibre are likely to be selected. For example, Australia has been represented at these Tribunals by Sir Ninian Stephen and Justice David Hunt.[103]

2.105 Justice John Perry argued in a similar vein, stating that:

> There is no reason to suppose that the bench of the International Criminal Court will be composed of judges who are any less eminent and qualified for the role expected of them than is the case with judges of the International Court of Justice, which decides civil disputes arising between States and has sat successfully for many years at The Hague.[104]

Impact on the Australian Defence Force

2.106 Some witnesses were concerned also about the potential impact of ratification of the ICC Statute on the ability of the Australian Defence Force (ADF) to participate in peacekeeping and other operations.

2.107 Ian Spry QC submitted that the ICC Statute, if ratified, would place the ADF 'under reasonable threat of constraint'. This point was supported by Bruce Ruxton, Victorian State President of the Returned and Services League:

> Ratification would ham-string our Defence Force, who would be prevented from acting effectively by the threat of false and contrived crimes.[105]

2.108 Ian Spry argued that the 'uncertainty' attaching to the definitions of genocide, crimes against humanity and war crimes (an issue discussed

---

103 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5. In its submission the NSW Bar Association noted that 'Australian judges, lawyers and investigators have been prominent in both the current ad hoc tribunals and the post-World War II War Crimes Tribunals. Presently in the [ICTY] ... the Deputy Prosecutor Graeme Blewitt and senior appeals chamber judge, Justice David Hunt, are Australian. A former AFP officer is the head of investigations. The NSW Bar Association has two members working as senior prosecutors at the tribunal' (*Submission No. 20*, p. 2).

104 Justice John Perry, *Submission No. 8.3*, p. 3. The Hon Justice John Dowd submitted that the qualifications for the selection and election of ICC judges are 'a lot more comprehensive' than the requirements for appointment as judge to an Australian court (see Hon Justice John Dowd (International Commission of Jurists), *Transcript of Evidence*, 13 February 2001, p. 100).

105 Mr Bruce Ruxton, *Submission No. 250*, p. 1.

above) is particularly troublesome for an ADF member required to engage in armed combat, pursuant to orders.

> The threat of proceedings in the ICC would be capable of constituting a significant inhibiting factor in relation to the use of Australia's armed forces, and in relation to particular actions by members of those armed forces. The existing strains of warfare would be added to by the further important consideration in the mind of ADF members that they might be subjected to prosecution in an ICC.
>
> This matter is made worse because, in effect, any defence of superior orders would be effectively ruled out. The defence of superior orders would not apply to prosecutions for 'genocide' or 'crimes against humanity', and it would be extremely limited in other cases.[106]

2.109 Ian Spry also suggested that the threat of making false charges against Australian citizens and 'complaints to the ICC against Australian forces would be a powerful weapon, and would be particularly relevant where peacekeeping operations are concerned.'[107] These concerns were endorsed by Major-General Digger James and by the Returned Services League of Australia.[108]

2.110 Similar concerns were expressed in a letter from five retired senior military officials published in the *Australian Financial Review* on 13 March 2001. The letter argued that the 'wide jurisdiction of the ICC 'and the 'ambiguity of its provisions' means that:

> ... Australian servicemen would not be protected against charges which could not be sustained under the provisions of the Australian Defence Force Discipline Act.[109]

2.111 The Government is of the view that ratification of the ICC Statute will potentially be of benefit to the ADF when deployed into environments

---

106 Dr I C Spry QC, *Submission No. 18*, p. 2. See also Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, pp. TR151-4.

107 Dr I C Spry QC, *Submission No. 18.2*, p. 2.

108 See Major-General WB (Digger) James, *Submission No. 9*, p. 1 and Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR151.

109 Major-General DM Butler (rtd), Major-General WB (Digger) James (rtd), Air Vice Marshall JC (Sam) Jordan (rtd), Rear Admiral PGN Kennedy (rtd), Major-General KJ Taylor (rtd), 'International court will limit our freedom' (letter to the Editor), *Australian Financial Review*, 13 March 2001. Support for this letter was expressed in a number of submissions, including those from Fay Alford and Robert Doran.

where effective law enforcement and judicial systems do not exist (as was the case in Somalia).

> [Ratification] ... will ensure that the UN or multinational force to which we contribute does not have to fill the vacuum and assume responsibilities involved in bringing to justice the perpetrators of war crimes and crimes against humanity.[110]

2.112 Ratification will also afford protection for ADF personnel who may be the victims of war crimes. In such instances, the ICC may be able to investigate and prosecute these crimes if the State of the perpetrator is unwilling or unable to do so.[111]

2.113 The Attorney-General and the Minister for Foreign Affairs were confident also that the principle of complementarity (underwritten by the Government's proposed implementing legislation)[112] would ensure that:

> ... the Australian Government will retain full jurisdictional authority over the activities of the ADF abroad and therefore always be able itself to investigate and, if necessary, prosecute allegations of the commission of Statute crimes by such personnel.[113]

2.114 Admiral Chris Barrie, the Chief of the Defence Force, was reported in the *Army* newspaper (dated 7 June 2001) as having welcomed moves by the Government to ratify the ICC Statute, stating that it would 'provide Australia with a mechanism to hand over alleged war criminals.' Admiral Barrie also endorsed the complementarity principle and stated that:

---

110 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 1. The Australian Red Cross made the same point in relation to the ADF's deployment in East Timor claiming that 'the ADF was forced to allocated substantial resources to the detention of alleged criminals pending their proper trial. It would have been much less expensive, less dangerous and more efficient for ADF personnel to have transferred custody of individuals to the ICC ... The ICC will substantially reduce the responsibilities of militaries such as the ADF in Peace Operations' (Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 2).

111 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 1.

112 Section 3 of the Exposure Draft of the of the *International Criminal Court Bill 2001* states:
S3(1) It is the Parliament's intention that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia.
S3(2) Accordingly, this Act does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

113 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 2.

> The ADF will always investigate and, where necessary, prosecute any serving member of the ADF accused of committing genocide, crimes against humanity.[114]

2.115 In evidence to an inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade, representatives of the ADF reported that the Defence Organisation had been 'an active participant in the Government's efforts to establish the ICC'. They advised that ratification would 'not have any effect [on ADF operations] because we will be asserting national jurisdiction over our servicemen'.

> It is not a threatening issue for members of the Australian Defence organisation and all members of the defence organisation who operate in accordance with the Defence Force Discipline Act and the normal acceptable law of the country.[115]

2.116 The Australian Defence Association and the Australian Legion of Ex-Servicemen and Women both support ratification of the ICC Statute, with the Australian Defence Association stating that it 'perceives no aspect of the Statute upon which we would have reservations'.[116]

2.117 The Legacy Coordinating Council also supported ratification, although it admitted to some reservations about aspects of the ICC definition of war crimes.[117] In oral evidence, Graham Riches, on behalf of the Council, discussed some of the definitional problems in the context of his military service in Vietnam as a legal officer. While expressing some reservations, Mr Riches noted that 'these sorts of definitional problems are faced all the time by courts and judges around the world' and that the principle of complementarity means that any allegations involving Australian servicemen would be investigated and prosecuted by Australian authorities. Mr Riches concluded that:

---

114 'Australia courts international war crimes statute' in *Army: the newspaper for soldiers*, 7 June 2001. On 12 December 1999, the then Minister for Defence, the Hon John Moore MP, issued a press release (jointly with the Minister for Foreign Affairs and the Attorney-General) saying, in part, 'I am confident that the ICC will prove to be an effective instrument for the enforcement of international humanitarian law.'

115 Shane Carmody (Department of Defence) and Group Captain Ric Casagrande (Department of Defence), *Transcript of Evidence*, 22 March 2001, pp. FADT517 and 520. This evidence was presented to the inquiry into Australia's relationship with the United Nations, recently conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade.

116 See Australian Legion of Ex-Servicemen and Women, *Submission No. 147*; and Australian Defence Association, *Submission No. 167*.

117 Legacy Coordinating Council, *Submission No. 32*, p. 1.

> Certainly the rights of our defence force must be protected. The best protection they can have is proper training and instruction ... so that they do understand right from wrong and for our legal criminal system to be such that it can cope with these situations.[118]

Other issues

Permanent vs ad hoc

2.118 Many of those opposed to ratification argued that the creation of a permanent international criminal court was unnecessary, as the United Nations' had demonstrated the capacity to establish *ad hoc* tribunals to prosecute violations of international humanitarian law.

2.119 The Festival of Light, the Council for the National Interest, Ian Spry and others argued that the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have not only been successful, but that they display the following advantages over a permanent court:

- their mandate is limited to specific purposes and circumstances;
- their mandate is defined and sanctioned by the United Nations' Security Council; and
- they will cease to exist when their task is completed.[119]

2.120 Rupert Sherlock suggested that the flexibility of ad hoc tribunals also allows different cultural values to be accommodated:

> An ad hoc committee could accommodate different levels of values according to the nation in which the matter they are dealing with occurs. For instance, if an ad hoc committee were set up to

118 Graham Riches (Legacy Coordinating Council), *Transcript of Evidence*, 14 March 2001, p. TR150.

119 See Festival of Light, *Submission No. 30*, p. 10; Denis Whitely (Council for the National Interest (WA)), *Transcript of Evidence*, 19 April 2001, p. 197; Dr I C Spry, *Transcript of Evidence*, 14 March 2001, p. 156. In a subsequent written submission the Council for the National Interest (WA) proposed that a permanent 'War Crimes Unit' should be established under the auspices of the Security Council of the United Nations and that this be activated 'as and when the need emerges subject only to the final approval of the Security Council' (Council for the National Interest (WA), *Submission No. 19.1*, p. 2).

See www.un.org/icty and www.un.org/ictr for information about the record of the Tribunals in relation to indictments, convictions and sentences passed.

> deal with a problem in Africa, it need not in any way concern China or Canada. In dealing with the matter of an offence committed on African soil, a different set of values from ours should be accommodated.[120]

2.121 Those who advocated the establishment of a permanent court acknowledged the success of the ICTY and the ICTR, but noted that on only two occasions since World War II had the Security Council agreed to establish such tribunals. In that time the world has seen:

> a myriad of atrocities in other parts of the world ... and a litany of ineffective prosecutions, cover-ups, token enquiries and court martials and often pathetically lenient sentences. Judicial processes have been followed in a small minority of cases.[121]

2.122 The Attorney-General and the Minister for Foreign Affairs noted that establishing *ad hoc* tribunals can be a time consuming and costly process, with the consequence that evidence may be destroyed, witnesses may no longer be available and victims may be forced to wait longer for justice.

> Generating the international political will and support to establish the ad hoc tribunals to investigate and prosecute atrocities in the former Yugoslavia and Rwanda was a very difficult task.
>
> To take a topical example, the UN has been concerned about war crimes committed in Cambodia by the Khmer Rouge and was considering setting up an ad hoc Tribunal. The Cambodian Government negotiated with the UN and it was decided that Cambodia should set up its own Tribunal under UN auspices. However, after two years of difficult negotiations between the UN and Cambodia, the Cambodian national legislation necessary to set up the tribunal has not yet been passed.[122]

---

120 Rupert Sherlock, *Transcript of Evidence*, 19 April 2001, p. 204.

121 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 3. Similar views were expressed by Human Rights Watch, Amnesty International, Elizabeth Bennett (on behalf of a group of 12 university students) and Ben Clarke.

122 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 4. John Greenwell (on behalf of Amnesty) emphasised the selective nature of ad hoc tribunals by suggesting that 'one might say it was largely because the atrocities got on the television screens of certain countries that [the ICTY and the ICTR] were established' (John Greenwell (Amnesty International), *Transcript of Evidence*, 13 February 2001, p. TR11). The United Nations pulled out of negotiations in February 2002 after failing to reach agreement with the Cambodian Government concerning the modalities and structure of the tribunal.

2.123 In addition, the following arguments have been advanced in support of a permanent court rather than *ad hoc* tribunals:

- because ad hoc tribunals are created retrospectively, their deterrent effect is diluted;[123]
- because ad hoc tribunals are established by the Security Council of the United Nations, political and diplomatic influences irrelevant to the prosecution of war crimes and crimes against humanity are brought to bear,[124] whereas under the ICC the Security Council must initiate actions through the prosecutor and the Pre-Trial Chamber; and
- a permanent court will facilitate the development and application of consistent judicial standards and procedures, and allow for the efficient administration of justice.[125]

Victor's justice

2.124 The suggestion that *ad hoc* tribunals can be perceived as lacking impartiality can give rise to accusations of 'victor's justice' – or the strong and powerful declaring who the criminals are and escaping prosecution themselves.

2.125 An example cited in some submissions was that neither the American President not the British Prime Minister had been charged for war crimes committed during the NATO campaign in Kosovo, yet former Yugoslav President Slobodan Milosovic is currently being prosecuted before the ICTY.

2.126 Advocates of the ICC argued the establishment of a permanent court, to apply widely accepted principles of law in a consistent manner without political influence from the powerful nations, is the best way of avoiding

123 Amnesty International, *Submission No. 16*, p. 5 and Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2.

124 See Tim Game (NSW Bar Association), *Transcript of Evidence*, 13 February 2001, p. TR31; Justice John Perry, *Submission No. 8.1*, p. 3; Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2 and John Greenwell (Amnesty International), *Transcript of Evidence*, 13 February 2001, p. TR11.

125 International Commission of Jurists (Aust), *Submission No. 24*, p. 5; International Commission of Jurists (QLD), *Submission No. 219*, p. 1, Amnesty International, *Submission No. 16*, p. 2; Elizabeth Bennett, *Submission No. 204*, p. 1; Benjamin Clarke, *Transcript of Evidence*, 19 April 2001, p. 211. Nicole McDonald referred to the advantages of a 'permanent body with administration and support apparatus, unlike the somewhat reactionary and *ad hoc* tribunals in Rwanda and the former Yugoslavia' (Nicole McDonald, *Transcript of Evidence*, 13 February 2001 pp. TR57-8).

accusations of 'victor's justice'. The chances of any one nation abusing the process of the Court are minimal as all State Parties have exactly the same rights and obligations and none of the State Parties will be involved in the day to day operation of the Court.

2.127 The Sydney University Law School Amnesty Group argued that the structure of the ICC will help ensure its impartiality and effectiveness, limiting the extent to which it could be manipulated for political ends:

> The establishment of a standing Court as opposed to further ad hoc tribunals will lessen the degree to which prosecutions are seen to be politicised and selective dispensers of 'victor's justice'.

2.128 The Secretary-General of the United Nations addressed this point when speaking at the Rome conference which endorsed the ICC Statute:

> Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them.
>
> Even when they were judged - as happily some of the worst criminals were in 1945 - they could claim that this is happening only because others have proved more powerful, and so are able to sit in judgement over them. Verdicts intended to uphold the rights of the weak and helpless can be impugned as 'victor's justice'.
>
> Such accusations can also be made, however, unjustly, when courts are set up only ad hoc, like the Tribunals in The Hague and in Arusha, to deal with crimes committed in specific conflicts or by specific regimes. Such procedures seem to imply that the same crimes, committed by different people, or at different times and places, will go unpunished.
>
> Now at last ... we shall have a permanent court to judge the most serious crimes of concern to the international community as a whole: genocide, crimes against humanity and war crimes.[126]

126 United Nations Press Release L/ROM/23, 'Secretary-General says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights Rule of Law', 18 July 1998 (at www.un.org/icc/pressrel/lrom23.htm).

The international position

2.129 Of the 19 NATO member countries, 12 have ratified the Statute, while of the 15 members of the Security Council, 6 members have ratified and 4 others signed it, including the United States of America. Of the permanent members of the Security Council the USA, China and Russia have not ratified the Statute while the United Kingdom and France have ratified.

2.130 The position of the USA has changed since the Committee commenced its inquiry. On 6 May 2002, in a letter to the Secretary-General of the United Nations, the USA provided notification that it will not become a party to the ICC, effectively reversing its previous decision to become a signatory.

2.131 The Under Secretary for Political Affairs, Marc Grossman, indicated that the USA had taken this action for several reasons:

- ...the ICC undermines the role of the United Nations Security Council in maintaining international peace and security...;
- ...The Rome Statute creates a prosecutorial system that is an unchecked power...;
- ...The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty...; and
- ...the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.[127]

2.132 The Secretary of Defense, Donald Rumsfeld, reiterated the above points and said:

> These flaws would be of concern at any time, but they are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction over U.S. service members, as well as civilians, involved in counter-terrorist and other military operations -- something we cannot allow. ...

2.133 The ICC's entry into force on July 1st means that our men and women in uniform -- as well as current and future U.S. officials -- could be at risk of prosecution by the ICC. We intend to make clear, in several ways, that the United States rejects the jurisdictional claims of the ICC. The United States will regard as illegitimate any attempt by the court or state parties to the

127 Under Secretary for Political Affairs, Marc Grossman, *Remarks to the Center for Strategic and International Studies*, Washington DC, May 6 2002, p. 1, URL: www.state.gov/p/9949.htm.

treaty to assert the ICC's jurisdiction over American citizens. ...[128]The Secretary of State, Colin Powell, is quoted in a transcript of an interview released by the State Department as saying on 5 May 2002:

> But the ICC, where prosecutors and a court beholden to no higher authority, not beholden to the Security Council, not beholden to anyone else, and which would have the authority to second guess the United States after we have tried somebody and take it before the ICC, we found that this was not a situation that we believe was appropriate for our men and women in the armed forces or our diplomats and political leaders.[129]

2.134 There are arguments for and against each of these stated reasons and, although there are differences in the debate occurring in the USA and Australia, the arguments are essentially as outlined in this report.

2.135 Amnesty International directly addressed the concerns raised about the impact of the ICC Statute on peacekeeping operations, arguing that the Statute clearly differentiates war crimes from activities which might arise in peacekeeping operations. In discussing the definition of war crimes at Article 8(2)(b)(ii), Amnesty noted that the definition refers to 'intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects', but then goes on to specify that such action must 'be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

> The offence thus applies where a military advantage is anticipated. In that event the prosecutor is required to prove not merely ... [the attack, the intention, knowledge that it will cause incidental loss of life or injury etc. to civilians but] the anticipated military advantage and that the loss of life etc. was 'clearly excessive' in relation to its attainment. This is a very heavy evidentiary threshold for any prosecution to meet.[130]

---

128 United States Department of Defense News Release, *Secretary Rumsfeld Statement on the ICC Treaty* 6 May 2002, www.defenselink.mil/news/May2002/b05062002_bt233-02.html.

129 Secretary of State, Colin Powell, Interview on ABC's *This Week* program, 5 May 2002, www.state.gov/secretary/rm/2002/9941pf.htm.

130 Amnesty International, *Submission No. 16.2*, p.2.

Application to non-State parties

2.136 Another issue of concern that has arisen in the USA debate about ratification is the potential reach of the ICC – its application not just to State parties.[131]

2.137 Professor Richard Wilkins, from the World Family Centre at Brigham Young University, argued that the 'jurisdiction claimed by the ICC is unquestionably novel – not since the Treaty of Westphalia in 1648 has a treaty ever purported to bind parties who are not signatories to the treaty. The ICC Statute, however, does just that'.[132]

2.138 A number of submissions drew on Wilkins' analysis in stating that 'by asserting that the ICC can claim jurisdiction over a non-signatory state and its citizens, the ICC Statute makes an unabashed claim of international supremacy over the actions of domestic policy makers'.[133]

2.139 Geoffrey Walker also raised concerns about the proposed application of the ICC Statute to non-State parties. He submitted that there is a strong argument to say the Statute is 'void' because it offends one of the recognised norms of international law:

> A fundamental rule of international law, enshrined in Art. 34 of the Vienna Convention, is that a treaty does not create obligations or rights for a state without its consent. Obligations can only be accepted by a third state in writing (art. 35). The rule that a treaty cannot violate the rights of a third state without its consent rests firmly on the sovereignty and independence of states, which is the whole basis for international relations.[134]

2.140 In response to these concerns, the Attorney-General and the Minister for Foreign Affairs submitted that the ICC Statute does not impose any obligations on States not party to it, unless such a State voluntarily accepts

131 The position of the current administration in the United States was explained by witnesses from the Department of Foreign Affairs and Trade in the following terms: 'Basically, the United States wishes to ensure that, as a non-state party, there will be provision for non-state parties which will guarantee them that none of their nationals engaged in official acts will be brought before the court without the consent of the non-state party. In other words, they are seeking an exemption from the jurisdiction of the court – a tightening of the complementarity regime' (see Richard Rowe (DFAT), *Transcript of Evidence*, 30 October 2000, p. TR14).

132 Professor Richard Wilkins, *'Doing The Right Thing: the International Criminal Court and Social Engineering'* p. 5.

133 See Festival of Light, *Submission No. 30*, p. 3 and Council for the National Interest (WA), *Submission No. 19*, p. 2.

134 Geoffrey de Q Walker, *Submission No. 228*, p. 12.

the Court's jurisdiction over a particular case, in writing. However, the Court can, in certain circumstances, seek to prosecute the nationals of non-State parties.

> Nationals of non-State parties may be liable for prosecution by the Court if they commit Statute crimes in the territory of a State party or in the territory of a non-State party that has recognised the Court's jurisdiction over the case in writing. ...
>
> The only exception to this is referrals by the [UN] Security Council. The Security Council can refer matters to the Court even if they were committed by a national of a non-State party in the territory of a non-State party. The Security Council has always had this power ... so in this respect the Statute is not conferring on the Court a power that is not already binding on all States.[135]

2.141 The Ministers make the additional point that non-State parties are protected by the complementarity principle in the same way as State parties: 'the Court is not able to hear a case if it has already been legitimately heard by a State, even if that State is not a Party to the Statute.'[136]

2.142 The Law Council of Australia and the Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also submitted that the ICC Statute does not impose obligations on non-State parties, but rather that it may be applied to the nationals of non-State parties who commit Statute crimes.[137]

2.143 Furthermore, both the Law Council and the Red Cross took issue with the view that the ICC Statute violates fundamental norms of international law, with the Law Council stating that:

- the House of Lords held in the Pinochet case that the 1984 Torture Convention confers universal jurisdiction;[138]

---

135 The Minister for Foreign Affairs and the Attorney-General, *Submission No. 41*, pp. 11-12.

136 The Minister for Foreign Affairs and the Attorney-General, *Submission No. 41*, p. 12.

137 Professor Tim McCormack, *Transcript of Evidence*, 14 March 2001, p. TR130 and the Law Council of Australia, *Submission No. 29*, p. 6.

138 Law Council of Australia, *Submission No. 29*, p. 6. This refers to the action taken by the Spanish Government for the extradition of General Pinochet, former ruler of Chile, to face charges relating to crimes allegedly committed in Chile. Refer to Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte (No. 3) (1999) 2 WLR 827.

- the United States has exercised universal jurisdiction in applying the 1970 Hijacking and 1979 Hostage Conventions to a Lebanese citizen accused of hijacking a Jordanian aircraft in the Middle East;[139] and
- the 1949 Geneva Conventions impose an obligation on all parties to prosecute war crimes, regardless of nationality.[140]

2.144 Some witnesses considered that the ICC Statute falls short of its full potential because it allows for the possibility that nationals of non-State parties might evade the jurisdiction of the Court – in other words, it fails to establish universal jurisdiction. On the other hand, the Committee also received evidence from a number of human rights organisations arguing that the ICC Statute is deficient because it does not propose universal jurisdiction for genocide, crimes against humanity and war crimes.

2.145 Amnesty International, for example, argued that:

> The restrictions imposed by Article 12 are not consistent with the principles of jurisdiction under international law. International law prescribes that jurisdiction for war crimes and crimes against humanity is universal ... not confined to offences committed on the territory of or by the nationals of a State.[141]

2.146 The practical consequence of limiting jurisdiction in the manner contemplated by the ICC Statute is that by 'remaining in or moving to jurisdictional "safe havens" offenders can evade justice. Amnesty suggested that this 'area of impunity' is significant because the nations 'most disposed to commit or allow crimes against humanity are the least likely to ratify the Statute'. To overcome this problem, Amnesty called upon the Government to ensure that the legislation:

> ... confers universal jurisdiction upon Australian courts in respect of the ICC offences. New Zealand has done so ... [and such a provision in Australia's implementing legislation] would be in line with the provisions of the Crimes (Torture) Act 1988 which confers jurisdiction upon our Courts in respect of 'any person present in

---

139 Law Council of Australia, *Submission No. 29*, p. 7. Note: the US District Court in US vs Yunis, 924 F2d 1086 (D.C. Cir. 1991).

140 Law Council of Australia, *Submission No. 29*, p. 6. See also Professor Tim McCormack, *Transcript of Evidence*, 14 March 2001, pp. TR129-130. We note that Richard Wilkins described the 'concept of inherent or universal jurisdiction' as 'highly questionable' (see Richard Wilkins, '*Doing The Right Thing: the International Criminal Court and Social Engineering*' p. 6).

141 Amnesty International, *Submission No. 16.1*, p. 1.

Australia' alleged to have committed extraterritorial torture as provided in the Act.[142]

2.147 On the issue of universal jurisdiction, witnesses from the Attorney-General's Department confirmed that the proposed consequential amendments legislation will, under cl 268.123, under the heading of 'Geographical Jurisdiction', provide such universal coverage for the crimes under the Statute.[143]

Extradition

2.148 In August 2001 the Committee tabled in Parliament *Report 40, Extradition: a review of Australia's law and policy*. In this report it was noted that international extradition arrangements (involving the formal surrender by one State, on request of another, of a person accused or convicted of a crime in the requesting State's jurisdiction) are extremely common - dating back to ancient times. Australia has an extensive network of extradition arrangements, including: arrangements inherited from the United Kingdom upon Federation; bilateral agreements negotiated pursuant to the *Extradition Act 1988* (which replaced the *Extradition (Foreign States) Act 1966*); and 12 multilateral conventions which contain extradition obligations for offences described in the conventions. The multilateral conventions with extradition provisions include: the *1929 Counterfeit Currency Convention*; the 1970 and 1971 *Hijacking Conventions*; the 1988 *Illicit Drugs Trafficking Convention*; and the 1984 *Torture Convention*.

2.149 As well as legislating to give effect to the extradition arrangements in these conventions, the Commonwealth has enacted the *International War Crimes Tribunal Act 1995* which, in part, allows for the arrest and surrender, to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, of persons in respect of whom the Tribunals have issued an arrest warrant. The Committee notes that the *War Crimes Amendment Act 1988* contained

142 Amnesty International, *Submission No. 16.1*, p. 2.

143 Geoff Skillen (AG) and Joanne Blackburn (AG), *Transcript of Evidence*, 10 April 2002, p. 293/ See also Section 268.123 entitled - Geographical jurisdiction

(1) Section 15.4 (extended geographical jurisdiction—Category D) applies to genocide, crimes against humanity and war crimes.

(2) Section 15.3 (extended geographical jurisdiction—Category C) applies to crimes against the administration of the justice of the International Criminal Court. (*International Criminal Court (Consequential Amendments) Bill 2002).*

specific provisions referring to the arrest and surrender of persons accused of committing war crimes in Europe during World War II. These provisions were repealed in 1999 to bring the extradition procedures for alleged war criminals into line with the standard arrangements described in the Extradition Act.

2.150 In *Report 40, Extradition: a review of Australia's law and policy* the Committee reported to Parliament that it did not favour the continuation of the 'no evidence' approach to extradition. The Committee concluded that Australia's model extradition arrangements should be amended to require a higher standard of proof before extradition is sanctioned. Should the Government accept the recommendations of that report on this matter, the Committee considers that the new, higher standard of proof should also be applied to requests for surrender from the ICC.

2.151 This would be consistent with the ICC Statute which provides that '[surrender] requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court' (Article 91(2)(c)).

2.152 Raising the standard of proof and applying it equally to requests from extradition partners and from the ICC will:

- ensure further protection against false accusations; and
- provide assurance that the ICC will operate in a manner consistent with Australian law and practice in this area.

'Opt out' clause

2.153 A number of human rights organisations have objected to the provision in the ICC Statute (Article 124) that allows State Parties to:

> ... declare that, for a period of seven years after the entry into force of this Statute ... it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.

2.154 UNICEF stated that this article has the potential to 'suspend the jurisdiction of the court, as it applies to the specific category of war crimes,

for up to seven years'.[144] The Australian Red Cross also believed that the 'opt out' clause is a great weakness in the Statute and hoped that Australia would not take advantage of it.[145]

2.155 UNICEF, along with World Vision, also recommended that the Government lobby other signatories to ensure they do not 'opt out', thereby delaying the jurisdiction of the ICC and extending impunity for the perpetrators of genocide, crimes against humanity and war crimes.[146]

The ICC and the United Nations

2.156 Many submissions were critical of the proposed ICC because, in the words of Gareth Kimberley, they considered it to be another element of the United Nations, an organisation that is 'bloated, incompetent ...[and] riddled with graft and nepotism'.[147]

2.157 The Isaacs Branch of the National Civic Council contended that:

> It is also already established that international agencies, especially within the United Nations umbrella, have increasingly promoted the political claims of social groups (groups based on ethnicity, or gender, or age, or socio-economic position), under the banner of ' human rights'. There is no reason why these groups and their supporters in the international agencies will not explore every opportunity to use the authority of the ICC to enforce their claims.[148]

2.158 As noted in Chapter 1, the ICC will not be part of the United Nations organisation, it will have independent legal personality (Articles 1 and 4).

2.159 The Attorney-General and the Minister for Foreign Affairs in describing the relationship between the two organisation noted the following elements:

- the Security Council of the United Nations will be able to refer a situation to the ICC Prosecutor (Article 13(b)) and to request the Court not to commence or proceed with an investigation or prosecution (Article 16); and

144 UNICEF Australia, *Submission No. 34*, p. 7.

145 Australian Red Cross, *Submission No. 25*, p. 3.

146 See World Vision, *Submission No. 104*, p. 2 and UNICEF, *Submission No. 34*, p. 7.

147 Gareth Kimberley, *Submission No. 36*, p. 2.

148 Gerard J Flood, *Submission No. 203*, p. 4.

- the ICC may also be funded by the United Nations, subject to the approval of the General Assembly of the UN, in particular in relation to expenses incurred as a result of Security Council referrals to the ICC (Article 115(b)).[149]

2.160 Further details of the relationship are to be provided in a *Relationship Agreement between the United Nations and the International Criminal Court*, a draft of which has been prepared by the Preparatory Commission for consideration by the Assembly of States Parties when the Court begins operation.[150]

Timing of ratification

2.161 Most of those who made submissions in support of ratification of the ICC Statute also urged that Australia aim to be one of the first 60 countries to ratify the Statute.

2.162 Justice John Dowd suggested that early ratification would allow Australia to participate in the first meeting of the Assembly of States parties, meaning that:

> Australia will be able to nominate candidates for judge, Prosecutor and Deputy Prosecutor. It will be able to be involved, through Australian nationals, in the work of the Court at all levels from its inception (in judicial, prosecutorial, investigatory and various support capacities – counsellors, psychologists, administrators, interpreters etc.)[151]

2.163 The Minister for Foreign Affairs and the Attorney-General suggested that 'the States that will exercise the most influence over this process [that is, the process of determining the principal officers and administrative arrangements for the Court] will naturally be those States that have ratified the Statute. States that have signed, but not ratified the Statute will have a lesser role.'[152]

---

149 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 5. See also Helen Brady, *Submission No. 7*, p. 8 who noted that the ICC 'is not a UN body and will not be a subsidiary organ of the UN'.

150 A copy of the draft *Relationship Agreement between the United Nations and the International Criminal Court* adopted by the Preparatory Commission for the International Criminal Court on 9 August 2000 can be found at www.un.org/law/icc/prepcomm/mar2001/english/rev1ad1e.pdf. The agreement will come into effect after it is approved by the Assembly of States Parties at its first meeting following the establishment of the ICC.

151 International Commission of Jurists, *Submission No. 24*, p. 2.

152 The Minister of Foreign Affairs and the Attorney-General, *Submission No. 41*, p. 4.

2.164 The Sydney University Law School Amnesty Group submitted that by being actively involved in the early stages of the ICC, Australia can help 'ensure that it complies with the high and impartial standards of justice for which Australia is generally known.'[153]

2.165 Another reason for early ratification expressed by the Australian Red Cross was

> The new Court will only be able to deal with alleged crimes which arise after the Court has been established. This limiting principle is one key reason for encouraging Australian ratification as soon as possible and for pushing for early entry into force of the Rome Statute. Each new atrocity perpetrated somewhere in the world prior to the establishment of the Court and which goes unpunished reconfirms the urgency of the need for an effective international criminal court.[154]

2.166 On the other hand, some of those who opposed ratification argued that claims concerning the benefits of early ratification are greatly exaggerated. Geoffrey Walker was sceptical of Australia's capacity to influence the establishment of the ICC, saying:

> Given ... [the] apparent inability [of the Australian delegation] to secure recognition of basic Australian constitutional democracy and the rule of law values to date, it would be naïve to expect that with only one vote in the Assembly, and a maximum of one judge on the Court, Australian representatives could bring about any significant improvement.[155]

2.167 As circumstances transpired with the late receipt of legislation and the intervention of a federal election, Australia was not in a position to be one of the first 60 parties to ratify the Statute. Nevertheless, as indicated in Chapter 3, if Australia is able to finalise all its local requirements before July 2002, it should still be able to participate in the initial meetings of the Court.

---

153 Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2.

154 [UNICEF argued along the same lines, suggesting that 'failure or delay in ratification means that current perpetrators of atrocities against children may never be brought to justice' (see, *Submission No. 34*, p. 56).

155 Geoffrey Walker, *Submission No. 228*, p. 13.

3

Conclusions

3.1 The Committee acknowledges the seriousness of a number of the concerns raised in evidence to the inquiry. The ICC is a hybrid of legal traditions and will operate with control and accountability mechanisms that, in some respects, differ from those in the Australian judicial system.

3.2 Undoubtedly there are risks associated with the establishment of the Court – in particular, that the Court will be subject to pressure from those seeking to pursue their own agenda. But the importance of the Court's objective - bringing those who commit the most heinous of crimes to justice - is undeniable.

3.3 Moreover, the Committee considers that in relation to the concerns:

- ratification of the ICC Statute will not limit the rights of Australian citizens, or diminish the independence of Australia, or alter our internal system of government in any significant way;
- the risk that the domestic implementing legislation would be judged to be unconstitutional is minimal;
- the crimes in the ICC Statute are not novel and, with the passage of the Government's proposed implementing legislation, are defined with the same degree of detail as other domestic criminal offences;
- the ICC will not operate in exactly the same way as an Australian court, but it will be based on universally recognised principles of justice, many of which are derived from common law traditions;
- the ICC Prosecutor will be subject to controls and will have to justify and seek approval for investigations and prosecutions, although the systems of accountability are necessarily different from those applying to officials in our domestic judicial system; and

- the ICC will not inhibit ADF peacekeeping or other operations.

3.4 The Committee is also persuaded that there is more to be gained from establishing a permanent international criminal court than continuing to rely on the sporadic willingness of the international community to establish *ad hoc* tribunals to bring the perpetrators of atrocities to justice.

3.5 On this basis, the Committee recommends that the Government take early action to ratify the Statute of the ICC.

3.6 The Committee believes that the Government's proposed legislation does address most of the contentious issues that have been raised during the inquiry subject to the recommendations set out below. In particular, the Committee believes the legislation will provide further reassurance on the issue of the primacy of Australia's judicial system and, by defining the crimes of genocide, crimes against humanity and war crimes in a manner consistent with our legal traditions, will ensure that Australia will be in a position to try perpetrators of these crimes without recourse to the ICC.

3.7 As an additional safeguard, the Committee has recommended (see recommendation 6) that the Australian Government and Parliament closely monitor the operation of the ICC. This would include the Government tabling in Parliament annual reports on the operations of the ICC and its decisions. These reports should then be the subject of a public inquiry conducted by the Treaties Committee. Such a process would allow an evaluation of whether Australia's adherence to the Statute was consistent with expectations and the maintenance of the primacy of Australian law. The Committee has noted the existence under the Statute of a right of withdrawal (see the section "Withdrawal from the Statute" later in this Chapter).

Recommendation 1

3.8 **The Committee recommends that, subject to other recommendations incorporated elsewhere in this report, Australia ratify the Statute of the International Criminal Court.**

Aims of the Court

3.9 More than 50 years have passed since the international community of nations first contemplated creating an international criminal court to bring to justice those who commit heinous crimes of the type prosecuted at the post-World War II Nuremberg and Tokyo trials.

3.10 In that time, there has been a constant stream of atrocities committed, often against civilian populations, by people who were rarely held accountable for their acts. Genocide, ethnic cleansing and other crimes against humanity have been committed in countries such as the former Yugoslavia, Rwanda, Cambodia, Guatamala, El Salavador, Iraq, Liberia, Somalia, Sierra Leone, Burundi and East Timor.

3.11 Few argue that the world should ignore these crimes and allow those who commit them to go unpunished. But this is what has happened. National jurisdictions have, all too often, proved to be unable or unwilling to investigate prosecute, or punish the perpetrators of these crimes. Apart from the former Yugoslavia and Rwanda (where ad hoc criminal tribunals have been established), the perpetrators of these crimes have in most cases acted with impunity.

3.12 The aim of establishing a means by which the perpetrators of gross violations of human rights can be prosecuted is entirely laudable.

Impact on national sovereignty

3.13 The Committee does not believe that ratification of the ICC Statute would diminish in any significant way the rights of Australian citizens or undermine Australia's position as an independent nation.

3.14 While the Committee accepts that many of the concerns expressed about the impact of ratification on Australia's sovereignty are genuinely felt and derive from a strong sense of national pride, they are based on three fundamental misunderstandings.

3.15 The first misunderstanding is that ratification would involve giving away to the ICC judicial responsibility that Australian courts have traditionally exercised. This is not so.

- The ICC will cover initially only three crimes at international law: genocide, crimes against humanity and war crimes (described as the most serious crimes of concern to the international community). It will not cover matters that have been traditionally within the scope of domestic criminal jurisdictions.
- The ICC Statute is proposing to establish a new judicial mechanism – one that has not previously existed. Although the crimes of genocide, crimes against humanity and war crimes have long been established in international law, there have been few opportunities to prosecute individuals for these crimes. Moreover, national governments have not always had the necessary laws in place to prosecute such crimes within their own jurisdictions. For example, Australian law does not currently criminalise genocide nor does it deal comprehensively with crimes against humanity or war crimes.
- The proposed legislation, upon entering into force, will establish in Australian law those crimes listed in the Statute. More importantly, the legislation will allow Australia as a sovereign nation to bring to justice in Australia, any person who has committed such crimes. The legislation will ensure that these individuals will be tried in Australia with all the legal rights and protections of other citizens under the Australian court system.

3.16 The second misunderstanding is that ratification would create a universal or 'supranational' court, capable of overturning decisions made by domestic courts, including the High Court of Australia. This is not so.

- The ICC will operate outside the realm of national court systems. The ICC Statute does not provide any role for the ICC in examining or reviewing the merits of a decision made by national courts.
- Under the principle of complementary national and international criminal jurisdictions (which is the cornerstone of the ICC Statute) will create an obligation upon States Parties to investigate and, where appropriate, prosecute allegations that their nationals have committed crimes within the jurisdiction of the ICC. The ICC will only prosecute as a court of last resort where the State is unwilling or genuinely unable to carry out the investigation or prosecution. Inability to prosecute presumably would mean that the judicial processes in a State Party have collapsed and are no longer functioning. The ICC could also prosecute where the domestic prosecution has been conducted in a manner clearly intended to shield an accused person from the ICC.

- In light of the comprehensive nature of the proposed legislation should an Australian court acquit a person accused of genocide, crimes against humanity or war crimes, or should an Australian court decide that there are insufficient grounds to proceed with a prosecution, it is reasonable to expect that will be the end of the matter.

3.17 The third misunderstanding is that ratification would *automatically* expose the nationals of State Parties to the jurisdiction of the ICC. This is not so.

- The ICC Statute confirms the primacy of national jurisdictions and provides that the ICC can act *only* if the State is unable or unwilling to prosecute.[1]
- The proposed legislation supports Australian jurisdictional primacy and if the Australian Government chooses to submit a Declaration relating to primacy of jurisdiction as part of its ratification process, as the Committee recommends, this will strengthen further the role of the Australian court system in covering these crimes.

3.18 Some submissions also assert that ratification should be resisted, as it is part of a sinister agenda to hand over national sovereignty to a global government run by the United Nations. The ICC will operate under its own unique Statute separate from the United Nations with a Draft Relationship Agreement between the Court and the United Nations, yet to be confirmed by the parties to the ICC Statute. The ICC has no other purpose than to ensure that those individuals who commit the most heinous of crimes cannot continue to escape justice.

3.19 There is no doubt that, in many cases, treaty making, otherwise deemed to be in the national interest, does involve making concessions or agreeing to act within a set of rules which may limit domestic policy options and potentially involve sanctions. For example:

- agreeing to membership of the World Trade Organisation involves an acceptance that domestic barriers to international trade should be reduced; and
- being party to international fishing agreements involves the acceptance of catch limits and conservation measures.

3.20 The ICC Statute is not seeking to limit or constrain the behaviour of national governments. Instead it is an example of independent nations choosing to act collectively to achieve a consensual objective that, history has shown, cannot otherwise be achieved.

---

1 Article 17(b) of the Statute.

3.21 Ratification of the ICC Statute would have considerably less impact on governance and policy in Australia than many other treaties. If the Government were to ratify the ICC Statute, Australia would be exercising its sovereign will in a way that:

- does not diminish its standing as an independent nation;
- does not alter the fundamental structures of government or our legal system within Australia in any way; and
- does not impose onerous burdens on Australian citizens.

3.22 The most that can be said about the burden of the Court is that it exposes the nationals of State Parties to a jurisdiction that is secondary and contingent. It is 'secondary' in that it never comes ahead of national jurisdictions and it is 'contingent' in that it is only activated if:

(a) the judicial system within a State has collapsed;

(b) the judicial system within a State operates in a way that is manifestly intended to shield a person from justice because the proceedings were not being conducted independently or impartially, and in a manner which, in the circumstances, that was inconsistent with an intent to bring the person concerned to justice.; or

(c) a State invites the ICC to exercise its jurisdiction.

3.23 The Committee agrees with those who submit that it is inconceivable that Australia's long established and highly regarded judicial system would be judged by the international community to be anything other than well functioning and of the highest integrity.[2] The circumstances in which the ICC would impose its jurisdiction are so unlikely to occur in Australia that it is reasonable to conclude that ratification of the ICC Statute will not expose Australian citizens to any other standard of justice than that administered by Australian courts.[3]

3.24 In the absence of a collapsed State, the only likely circumstances where the ICC might exercise jurisdiction over an Australian national are when the

---

2 The Committee noted that the ICC's *Rules of Procedure and Evidence* allow for States to bring to the Court's attention 'information showing that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct' (see Rule 51).

3 In this context, the Committee noted the argument that some have put forward that if Australia's system of government were to collapse to the point where governments and courts were unwilling or unable genuinely to prosecute individuals for genocide, crimes against humanity or war crimes, there would be valid grounds for the international community to intervene and ensure that justice is done.

government of the day invites the ICC to do so. For example, a future government may choose to relinquish its jurisdictional competence to the ICC if an Australian citizen serving overseas as a mercenary, in a conflict in which Australia was not involved, was alleged to have committed an ICC crime. Similarly, if a person immigrates to Australia and is subsequently indicted by the ICC for crimes committed in their country of origin, a future government may decide to relinquish its jurisdiction if it is considered to be in the national interest.

3.25 Both of these scenarios confirm the primacy of Australia's national jurisdiction and the sovereign power of governments to make decisions for, and in respect of, their citizens.

3.26 To provide further reassurance on this point, the Committee believes there is merit in considering closely the suggestion made by the Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) that the Government should assert explicitly the primacy of Australia's judicial system by:

- ensuring that the legislation it proposes to introduce to implement the ICC Statute provides that an Australian citizen or person ordinarily resident in Australia and engaged in an operation authorised by the Government shall be subject to Australian national criminal jurisdiction (thereby reflecting the complementarity principle); and
- at the time it ratifies the ICC Statute, depositing a Declaration of its understanding of the primacy of national criminal law and the secondary and contingent nature of the ICC's jurisdiction.

3.27 The Committee has been concerned throughout this inquiry to ensure that the complementarity principle will be workable and to ensure that Australia will have primacy of jurisdiction in all cases arising under the umbrella of the ICC Statute.

3.28 Both the ICC bill and the consequential amendments bill reflect this intent. Section 3 of the ICC bill states:

> (1) It is the Parliament's intention that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia.
>
> (2) Accordingly, this Act does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

3.29 The consequential amendments bill also reflects this under cl. 268.1 (2):

> It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

3.30 While the Committee acknowledges this emphasis on Australia's primary jurisdiction with respect to ICC crimes it considers that the term primary should be replaced by 'primacy' to emphasise that Australia will be well able to deal with specified offences within the Australian legal system without recourse to the ICC.

3.31 To this end the Committee recommends the following modifications to the ICC bill.

Recommendation 2

3.32 **The Committee recommends that Clause 3 (2) of the International Criminal Court Bill be amended to read:**

Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

3.33 In the same context the Committee believes that the text of the consequential amendments bill should also reflect this stronger approach.

Recommendation 3

3.34 **The Committee recommends that Section 268.1 (2) of the International Criminal Court (Consequential Amendments) Bill be amended to read:**

(2)(i) It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

(ii) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences in this Division that are also offences within the jurisdiction of the ICC.

3.35 In proposing these amendments to the implementing legislation the Committee considers that this will clearly enunciate Australia's intent as a sovereign nation to apply its own laws, laws which mirror those of the ICC Statute, and apply them to any person residing in Australia who has been accused of committing genocide, crimes against humanity, or war crimes.

3.36 The suggestion by the Australian Red Cross, that Australia should lodge a declaration clarifying its understanding of the complementarity principle as part of its ratification process, is one which the Committee considers has merit also. Such a declaration may reflect the text in the following recommendation.

Recommendation 4

3.37 **The Committee recommends that the Government of Australia concur with the preamble of the Statute which notes that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes and that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.**

The Committee further recommends that, in noting the provisions of the Statute of the International Criminal Court, the Australian Government should declare that

- **it is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and**
- **Australia further declares that it interprets the crimes listed in Articles 6 to 8 of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill.***

3.38 It is also worth noting that Australia and Australian citizens have been exposed to the potential of trial before international courts for many years. The International Court of Justice has been in operation for over 50 years and more recently tribunals such as the International Tribunal for the Law of the Sea and the World Trade Organisation's Dispute Settlement Body have been established. At an individual level, Australia's extensive network of extradition arrangements means that a person accused of an

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

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

Concerns about constitutionality

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

Recommendation 5

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

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

be introduced into Parliament as soon as practicable subject to consideration of recommendations elsewhere in this report.

The proposed implementing legislation and the ICC crimes

3.51 It is important to ensure there is no conflict between the intent and operation of the Australian legislation and the operation of the ICC. To guard against this possibility the Committee believes that the issues concerning the legislation, raised below, need to be considered carefully by the Attorney-General when final drafting of the legislation is undertaken, and during its passage through the Parliament. There should be little difference between key definitions of crimes in the Statute, the *Elements of Crimes* document and the Australian legislation.

Definitions of ICC crimes

3.52 The Committee acknowledges the view put in some submissions that the crimes of genocide, crimes against humanity and war crimes, as defined in the ICC Statute, seem to be capable of wide interpretation. The Committee does not, however, share the conclusion drawn by some that the crimes are so ill-defined as to allow the ICC to 're-engineer social policies throughout the world.'

3.53 It is important to recognise that the crimes within the jurisdiction of the ICC are not new, in that the definitions of these crimes draw upon long established principles of law. The definitions codify both customary international law and the provisions of treaties including the 1948 Genocide Convention, the 1949 Geneva Conventions and the 1984 Torture Convention, elements of which have been incorporated into Australian domestic law over the years.

3.54 In addition:

- it is not uncommon for international treaties to use language which expresses broad intent and for individual nations to incorporate these intentions with more precise language in their domestic law;
- the definitions in the ICC Statute need to be read in conjunction with the amplification contained in the draft *Elements of Crimes*;
- considerable further refinement is provided in the implementing legislation the Government intends to introduce to ensure that

Australia's domestic criminal law mirrors the full range of crimes described in the ICC Statute; and

- the interpretation and practical application of laws is a matter of daily business for Australian courts.

3.55 The Committee is confident that the ICC bill and the consequential amendments bill provide a thorough and effective coverage of Statute crimes which are defined in a manner, and with a level of detail, consistent with Australia's legal traditions. While there are some issues in relation to how crimes under the Statute are reflected in the legislation, the Committee is confident that the legislation will meet Australia's responsibilities under the Statute and ensure that there should be very little possibility that any Australian citizen will face ICC crimes outside the Australian legal system. The Committee notes that New Zealand, the United Kingdom and Canada, countries with a similar legal heritage, have also incorporated the ICC crimes into their national criminal jurisdictions.

3.56 Some submissions have expressed concern that when the ICC comes into operation it may begin to develop its own particular brand of jurisprudence which may not in all cases be appropriate to application under the Australian legal system. The Committee is confident that the Statute and the implementing legislation will provide adequate protection for Australian citizens. However, the Government should acknowledge these concerns and monitor the general operation of the ICC and the application of the complementarity principle, with particular reference to jurisprudence that may be developed by the ICC and its potential impact on the Australian legal system and citizens of Australia.

Recommendation 6

3.57 **The Committee recommends that:**

- **the Australian Government, pursuant to its ratification of the Statute, table in Parliament annual reports on the operation of the International Criminal Court and, in particular, the impact on Australia's legal system; and that**
- **these annual reports stand referred to the Joint Standing Committee on Treaties, supplemented by additional Members of the House of Representatives and Senators if required, for public inquiry.**

The Committee envisages that, in conducting its inquiries into these

annual reports, it would select a panel of eminent persons to provide expert advice.

3.58 Implementation of the above recommendation would allow the Government and the Parliament to evaluate whether Australia's adherence to the ICC Statute was consistent with their expectations and the maintenance of the primacy of Australian law. The Committee notes that, ultimately, any State Party has the right to withdraw.

The definition of rape

3.59 The Committee concurs with the opinion presented by the Australian Red Cross that the definition of rape in the consequential amendments legislation should reflect more closely the crime of rape as laid out in the *Elements of Crimes*, in relation to the victim's lack of consent. While the current coverage of rape may fall within the provisions of the draft legislation on 'sexual violence'[10] the Committee agrees with the contention that if a person was being charged with a war crime or crimes against humanity, the court should be given the option of looking at the question of the coercive environment, which might make the particular individual victim's consent or lack of it, irrelevant to the prosecution of the crime. The text of the legislation should reflect this point in law.

Recommendation 7

3.60 **The Committee recommends that the Attorney-General review clauses 268.13 and 268.58 pertaining to the crime of rape in the International Criminal Court (Consequential Amendments) Bill 2001 and harmonise the definitions with the approach taken in the *Elements of Crimes* paper in a manner consistent with Commonwealth criminal law.**

10 See clauses 268.1, 268.63 1 and 268.86 of the consequential amendments bill. (Attorney-General's Department, *Submission No. 232.2*, p. 2). See also as an example *Elements of Crimes*, Article 7(1)(2)(g)(1) 2 which states: 'The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent'.

Exemption on the basis of official capacity

3.61 The Committee received evidence which claimed that the legislation, as currently drafted, does not reflect the intent of Article 27 of the Statute, which provides that the official capacity of a government official shall not exempt that person from criminal responsibility under the Statute. The Attorney-General's Department informed the Committee that the draft Bills do not repeat the provisions of Article 27, because under customary international law an international tribunal may deal with a person alleged to have committed an international crime, regardless of the person's official capacity. However, if as the Attorney-General's Department submission suggested, there are limitations on Australia's arrest and surrender of a person with official capacity to an international tribunal in certain circumstances,[11] the Committee believes that there should be a review of the relevant provisions to determine whether they can express more effectively the position.

3.62 An additional aspect relating to Article 27 of the Statute, raised by the Castan Centre, was that the legislation should articulate a position on the statute of limitations and immunities attaching to official capacities in order to avoid the possibility arising that application of these barriers might lead the ICC to determine that, under Article 17, Australia was unwilling to investigate a case itself.

Recommendation 8

3.63 **The Committee recommends that the Attorney-General review the legislation to ensure that the responsibilities required under Article 27 of the Statute are fully met either in the proposed bills or in current applicable legislation.**

---

11 '.... there are limitations on Australia's arrest and surrender of a person with official capacity to an international tribunal in certain circumstances. This is recognised in Article 98.1 of the Statute, which provides that the Court may not proceed with a request for arrest and surrender which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of the person or property of a third State, unless the Court can first obtain a waiver of that immunity from the third State. Article 98.1 is reflected in clause 13 of the draft International Criminal Court Bill 2001' (Attorney_General's Department, *Submission No. 232.2*, p. 1).

Breaches of the Geneva Conventions

3.64 One of the intentions of the consequential amendments bill is to bring together under the *Criminal Code Act 1995* all crimes of international concern within the jurisdictional competence of the ICC. The Committee concurs with this approach. However, as the Australian Red Cross pointed out there may be a potential problem with the proposed repeal of Part II of the *Geneva Conventions Act 1957* which criminalises grave breaches of the Geneva Conventions 1949 and of Additional Protocol I. It is important that the jurisdictional competence of Australian Courts not be affected for the period from 1957 to the date of commencement of the new legislation, by the repeal of Part II. It is possible that Section 8(b) of the *Acts Interpretations Act 1901* may cover this problem.

Recommendation 9

3.65 **The Committee recommends that the Attorney-General ensure that the *International Criminal Court (Consequential Amendments) Bill* does not limit the jurisdiction of Australian courts with respect to crimes under Part II of the *Geneva Conventions Act* 1957, for the period between 1957 and the commencement of the proposed legislation. The Committee further recommends that the *Explanatory Memorandum* for the proposed legislation state clearly how coverage of these crimes for the intervening period is to be provided.**

Subdivision H of the consequential amendments bill

3.66 Evidence presented to the Committee from the Australian Red Cross suggested a problem arises in subdivision H because some of the war crimes offences are repeats of offences already covered in subdivisions D or E of the legislation.[12]

12 'Proposed Section 268.96, the war crime of 'medical or scientific experiments' repeats the same offence as proposed Section 268.47 (in Subdivision E). Both Sections 268.96 and 268.47 enumerate 5 similar elements of the specific offence but those elements are not identical. For example, Section 268.96(l)(c) incorporates an objective test for evaluating the perpetrator's conduct such that the conduct is not 'consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the perpetrator...'. Since Section 268.47 contains no such explicit reference to an objective standard of conduct, it is arguable that the prosecution may be required to prove a subjective standard — that is, that the accused themselves knew that their conduct was unjustified by the medical condition of the victim. Such a subjective standard may be more difficult to prove

3.67 The Committee understands why this approach was adopted, but it would be possible for future defendants to raise objections if they were charged with a specific war crime appearing twice in the legislation if the prosecution were to choose the specific offence with the less onerous burden of proof.

Recommendation 10

3.68 **The Committee recommends the Attorney-General review Subdivisions H, D and E of the *International Criminal Court (Consequential Amendments) Bill* to ensure consistency in the definition of offences.**

Additional legislative issues

3.69 A number of other issues were raised in evidence, which are presented here with the purpose of alerting the Attorney-General's Department to these issues, when it reviews the proposed legislation before its presentation to the Parliament. These were:

- there should be time constraints on issuing arrest warrants – cl 21 and 22 of the ICC Bill are deficient because they do not impose time limitations like those under Article 59 of the Statute;[13]
- that cl 102 be amended to extend privileges and immunities to ICC officials not named in Article 48(2) of the Statute;
- that in defining torture as a war crime the consequential amendments bill has the effect of broadening the crimes ambit rather than following the approach in the Statute;
- the need for consideration of Australia's commitment to the minimum age for conscription, which is set at 15 under the Statute and the consequential amendments bill, although Australia's commitment under the Convention on the Rights of the Child sets the age at 18 years.

---

beyond reasonable doubt in some circumstances than an objective test of 'generally accepted medical standards'. Disparity in the specific elements of the same crime referred to in two different Subdivisions of the draft legislation cannot be helpful' (Australian Red Cross National Advisory Committee on Humanitarian Law, *Submission No. 18.4, p. 4).*

13 Article 59 of the Statute covers the arrest proceedings in the custodial State and s (1) states that a State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question.

- that there is adequate protection in the legislation to ensure persons are not held on remand for unduly long periods when they are charged for ICC crimes;
- that there is adequate provision under the legislation for legal aid within Australia and some similar provision under the Statute where a case is heard by the ICC; and
- that the passage of legislation relating to the proceeds of crime (the *Proceeds of Crime Bill 2002* and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002)* currently before the Parliament, will not have a major impact on complementary clauses in the final ICC legislation.

Recommendation 11

3.70 **The Committee recommends that Attorney-General review the *International Criminal Court Bill* and *the International Criminal Court (Consequential Amendments) Bill* in relation to the matters listed in paragraph 3.67 of this report.**

Accountability of the Prosecutor and Judges

3.71 There is no doubt that the ICC will be a blend of different legal cultures. There will be some elements of the proposed regime which, from an Australian common law perspective, seem unfamiliar.

3.72 The Committee is sympathetic to the observation made by many witnesses that not all of the nations subscribing to the ICC share Australia's long-standing regard for the rule of law and proud history of judicial independence and competence. Not all judicial systems, are of equal standing. Nevertheless, 'different' does not equate to 'worse'.

3.73 The important issue is not the differences between the Australian legal tradition and the regime proposed for the ICC, but whether the checks and balances in the ICC's regime are sufficient to ensure the integrity of the process overall.

3.74 In procedural terms, many of the checks and balances are familiar and sound:

- an accused person has rights comparable to those available in common law countries (including the presumption of innocence and the right to a speedy trial);
- victims have rights (including the rights to participate in proceedings and to receive compensation);
- the rules of evidence are consistent with those applying in Australian courts; and
- there are rights of appeal to a separate chamber of the ICC, constituted by judges who only hear cases on appeal.

3.75 It is the role and accountability of the Prosecutor which is most problematic. In the common law tradition the roles of investigator and prosecutor are carefully separated and performed by officials answerable to different ministers in the Executive Government. In the ICC model the role of investigator and prosecutor are combined and operate without Executive oversight. This is not to say the ICC Prosecutor will be able to operate in an unfettered manner.

3.76 The ICC Statute and the *Rules of Procedure and Evidence* establish a decision making and accountability structure to be followed by the Prosecutor when seeking to initiate an investigation. First, the Prosecutor must conclude that there is a reasonable basis to proceed, then he or she must seek the authority to investigate from three judges sitting as a Pre-Trial Chamber (Article 15(3)).[14] Article 53 further provides that in considering whether there is a reasonable basis to proceed the Prosecutor must consider whether:

---

14 Article 57 of the Statute provides that orders or rulings of the Pre-Trial Chamber must be by a majority of the judges, where those orders or rulings relate to

- Article 15 – requests by the Prosecutor to initiate an investigation
- Article 18 – application by the Prosecutor to initiate an investigation, despite a request by a State that the Prosecutor defer to the State's own investigation
- Article 19 – challenges to the jurisdiction of the Court or the admissibility of a case
- Article 54, para 2 – authorising the Prosecutor to conduct investigations on the territory of a State, where the Pre-Trial Chamber has determined (under Article 57(3)(d)) the State "is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request..."
- Article 61, para 7 – pre-trial hearings to confirm (or decline to confirm) the charges on which the Prosecutor intends to seek trial
- Article 72 – determinations re protection of information of possible national security importance.

Unless otherwise provided for in the Rules of Procedure and Evidence, or by a majority of the Pre-Trial Chamber, "in all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in [the] Statute.." (Article 57(2)(b)).

(a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;

(b) the case would be admissible under Article 17 (that is, the complementarity principle does not stand in the way); and

(c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

3.77 Before authorising the commencement of an investigation the Pre-Trial Chamber must likewise assess whether there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court (Article 15(4)).

3.78 At any time during an investigation the Prosecutor may apply to the Pre-Trial Chamber for an arrest warrant to be issued. In considering whether to issue a warrant, the Pre-Trial Chamber must be satisfied that there are reasonable grounds for believing that the person has committed a crime within the jurisdiction of the Court and that the arrest of the person appears necessary (Article 58(1)).

3.79 Before proceeding to trial the Prosecutor must provide the Pre-Trial Chamber with sufficient evidence to establish that there are substantial grounds to believe the accused has committed a crime within the jurisdiction of the ICC. If the Pre-Trial Chamber determines that there are such grounds it shall confirm the charges and commit the person to trial (Article 61(7)).

3.80 At the trial, the onus is on the Prosecutor to prove guilt and, in order to convict, the Court must be convinced of the person's guilt beyond reasonable doubt (Article 66).

3.81 While these steps seem to provide a rigorous and transparent means of checking the propriety of investigations and the merits of a prosecution, they do rely to a significant degree on the competence and integrity of the Prosecutor and, importantly, of the judges of the Court.

3.82 In this regard, there is no reason to conclude that the judges and officials appointed to the ICC will be less able than those appointed to the International Court of Justice or the Tribunals for the former Yugoslavia and Rwanda, some of whom have been Australian jurists and officials of the highest calibre. In coming to this view, the Committee notes that the criteria and procedures described in the Statute for the selection of judges and officials are more transparent than those used to select judges for Australian courts.

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

- the ICC will operate in accordance with widely recognised legal principles;
- there are sufficient checks and balances in the ICC regime to ensure that it highly unlikely that a Prosecutor could pursue unjustified or politically motivated prosecutions under the influence of third parties; and
- there is no reason to conclude that the judges of the Court will be less eminent or qualified than those that have been appointed to other international tribunals.

3.84 If at any time the Prosecutor or the judges of the Court were to act in a manner inconsistent with the standards expected of the Court and prescribed in the Statute, they would be censured not only by the Assembly of State Parties, but also by the wider international community.

3.85 For Australia, along with other State Parties, the ultimate response to a dysfunctional Court would be to withdraw from the Statute.

Withdrawal from the Statute

3.86 As mentioned previously, some of those who made submissions to the inquiry were concerned about what would happen if the ICC developed over time into an institution operating in a manner which failed to meet the ideals expected of it by its current proponents. The concern was that Australia might well come to regret ratifying the Statute. It should be borne in mind that States becoming Parties to the Statute have the power to reverse their decision.

3.87 Article 127 of the Statute sets out the right of States to withdraw from adherence to the Statute, by way of written notification to the Secretary-General of the United Nations. The withdrawal would take affect one year after receipt of the notification, unless the notification specified a later date.

3.88 Withdrawal would not absolve a State Party from obligations that arose while it was still a Party. For example, withdrawal would not effect the obligation to cooperate with the ICC in relation to criminal investigations and proceedings that were commenced before the date on which the withdrawal became effective.

Impact on the Australian Defence Force (ADF)

3.89 Claims that ratification of the ICC Statute would inhibit the deployment of ADF forces warrant careful examination. It clearly would not be in the national interest to jeopardise Australia's capacity to contribute to international defence or peacekeeping operations, or to expose ADF members to increased risks while engaged in such operations.

3.90 The Committee was reassured, however, by advice that at the highest ranks of the ADF there is support for the establishment of the ICC. The Committee is also confident that the complementarity principle will ensure the continued primacy of Australia's civilian and military systems of criminal justice. This confidence is reinforced by Article 98(2) of the ICC Statute, which obliges the ICC to defer to national justice systems where peacekeeping forces are supported by bilateral 'status of forces' agreements. Such agreements are commonplace.

3.91 The Committee notes claims that establishment of the ICC would relieve ADF peacekeepers of the burden of acting as law enforcement and judicial authorities while on peacekeeping operations.

3.92 The Committee understands that while no specific provisions concerning the role of the ADF are included in the Government's proposed implementing legislation the ADF's existing military justice laws and the new laws under the proposed ICC bills will not be in conflict. Nevertheless, it is important that the scope and impact of the new laws are communicated promptly and effectively to all ADF personnel. Such measures will help preserve the ADF's enviable record in promoting and protecting international human rights.

3.93 It was suggested to the Committee that ratification of the ICC Statute would expose ADF members to the risk that false charges of war crimes could be made against them[15]. In the Committee's view, the risk of false charges would be no greater following the establishment of the ICC than it is at present.

---

15 Digger James, *Submission No. 9*, p. 1: ' the new International Criminal Court would expose Australian servicemen to great dangers of unfounded prosecutions and would hamstring our armed services'.

Permanent court *vs. ad hoc* tribunals

3.94 The Committee acknowledges the important work being done by the ICTY and the ICTR and accepts that, in some ways, the narrowness of their mandate is a key element of their success.

3.95 On the other hand, the Committee is of the view that generally *ad hoc* tribunals are a poor substitute for a permanent international criminal court. The fact that only two *ad hoc* tribunals have been established since the post-World War II tribunals is ample demonstration that the establishment of such tribunals is subject to international political influence and that the vagaries of such influence cannot be relied upon to bring to account the perpetrators of those atrocities to which the ICC is directed.

3.96 The strongest arguments in support of a permanent court are that it:

- would help ensure that consistent judicial standards and procedures are developed and applied; and
- may help reduce the influence of international politics in decisions about what crimes to investigate and prosecute, thereby minimising the risk of 'victor's justice'.

Application to non-State parties

3.97 It has been argued that the ICC Statute breaches a fundamental principle of international relations by seeking to impose obligations on non-State parties. A distinction must be drawn between:

- application to non-State parties (which can occur *only* with the consent of the non-State party); and
- application to the *nationals* of non-State parties (which can, in certain circumstances, occur even when consent is denied).

3.98 The ICC Statute clearly provides that the Court's jurisdiction can extend to the nationals of non-State parties if either:

- a national of a non-State party has committed a Statute crime in the territory of a State party; or

- the UN Security Council refers a matter to the Court (such a matter could involve the commission of a Statute crime by the national of a non-State party in the territory of a non-State party).

3.99 The Committee acknowledges that there is a distinction between application to non-State parties and application to the nationals of non-State parties, but the principle of universal application of international human rights law, regardless of nationality, is not without precedent.

3.100 In this instance, the Committee acknowledges that a significant proportion of the international community has agreed that extending the Court's jurisdiction to cover the nationals of non-State parties, in the circumstances described above, is an appropriate element of the new international criminal justice system the ICC Statute proposes to establish.

'Opt out' clause

3.101 The Committee recognises the concern that has been expressed about the provision in the ICC Statute that allows State Parties to 'opt out' of the ICC's jurisdiction in relation to war crimes for a period of seven years. This clause does permit delayed application of the ICC's jurisdiction and can be seen as a weakness in the Statute.

3.102 On the other hand, the existence of this clause may encourage some nations emerging from periods of conflict to consider ratifying without the risk of immediately exposing their nationals to prosecution. While some perpetrators of atrocities may, as a result, escape justice, future crimes may be deterred or punished.

3.103 The Committee notes that the 'opt out' clause is described as a 'transitional provision', to be reviewed 7 years after the ICC Statute enters into force (Articles 124 and 123).

Timing of Ratification

3.104 On balance, the Committee agrees that there would have been merit in Australia seeking to be one of the first 60 nations to ratify the ICC Statute. This, however, has not been possible owing to the fact that the exposure draft of the legislation was not received until 31 August 2001, the prorogation of the Parliament for the 2001 election and the reconstitution of the Treaties Committee for the 40th Parliament not occurring until

March 2002. Nevertheless, it is important that Australia be a State party at the inaugural meeting of the Court if this is at all possible.

3.105 Australian Government and non-government representatives have played a leading role in advocating the creation of the ICC and in preparing the ICC Statute, the draft *Elements of Crimes* and the draft *Rules of Procedure and Evidence*. It would be in Australia's interests if the Government were to play a similar role leading up to, and at, the first meeting of the Assembly of State Parties.

3.106 It is in this period that the administrative arrangements for the ICC will be established and the principal officers of the Court (that is the judges, prosecutors and registrars) will be selected. Decisions on these matters will greatly influence the initial culture, method of operation and professional standing of the Court.

Julie Bishop MP
Committee Chair

May 2002

A

Appendix A – Additional comments

While we endorse the principles and intent of the International Criminal Court, we do have reservations about the way in which its jurisprudence and practice may evolve.

These involve three inter-related areas of concern.

1. The lack of precision in the definition of some crimes, particularly 'crimes against humanity', creates the possibility that the ICC's jurisdiction might become broader than was intended. Rather than focusing on the most serious international crimes, it could start to pursue cases that are properly within the jurisdiction of the domestic courts of member states.
2. The pattern of jurisprudence that develops will partly depend on the composition of the Court and the elected panel of judges. Thus the potential exists for it to be used to promote a particular international political or ideological agenda.
3. A combination of these two creates the possibility that the operation of the ICC might evolve in a way that is inconsistent with Australia's national interest. The possibility exists that the principle of complementarity, rather than providing protection for member states, could lead to intervention by the ICC in some cases where the executive or judicial process of member states has resulted in a failure to prosecute, the dismissing of an action or an acquittal.

As a consequence, our support for the majority view of the Committee recommending ratification is highly qualified. Specifically, it is conditional upon the adoption of all other recommendations, particularly :

a) Recommendations 2, 3 and 4 declaring the primacy of Australia's jurisdiction;

b) Recommendation 4 interpreting the crimes strictly according to the definitions defined in the International Criminal Court (Consequential Amendments) Bill; and

c) Recommendation 6 establishing a process to regularly monitor and report to Parliament on the operations of the ICC.

With regard to Recommendation 6, it is further recommended that Australia's continued participation in the ICC be conditional on the sound development of the ICC's jurisprudence and practice. The review process must be satisfied that the ICC is not evolving in a way which is contrary to Australia's national interest, specifically that the interpretations of the listed crimes remain consistent with those defined by Australian legislation and that the application of the principle of complementarity does not compromise Australia's sovereignty over its domestic criminal jurisdictions and social policy. **It is further recommended that if such developments do occur, Australia exercise its right of withdrawal under Article 127.**

Kerry Bartlett MP

Senator Julian McGauran

Steven Ciobo MP

Senator Tsebin Tchen

Senator Brett Mason

B

Appendix B – Inquiry process, submissions, exhibits and witnesses

Inquiry process

On 10 October 2001 the National Interest Analysis (NIA) and the text of the Statute of an International Criminal Court were tabled in the Parliament as part of a batch of 8 treaties. On 14-15 October 2001 details of the Committee's inquiry into these treaties was advertised in *The Weekend Australian* and on the Committee's web site.

The Committee conducted an initial hearing in Canberra on 30 October 2000 at which the Department of Foreign Affairs and Trade, Attorney-General's Department and the Department of Defence presented evidence regarding the Statute. After considering the evidence given at this hearing, the Committee concluded that there was a need to extend its investigation of this treaty.

On 4 November 2001 the Committee placed a further advertisement in *The Weekend Australian* calling for submissions to an Inquiry into the Statute of an International Criminal Court and the web site was updated to reflect the extended inquiry. In addition, the Chair wrote to the Attorney-General asking that the legislation proposing to harmonise domestic law with the requirements of the ICC Statute be referred to the Committee. On 17 January 2001 the Committee received a letter from the Attorney-General and the Foreign Minister agreeing that the legislation to implement the Statute should be considered by the Committee in conjunction with its consideration of the National Interest Analysis. It was not until 30 August 2001 that exposure drafts of the International Criminal Court Bill 2001 and the International Criminal Court (Consequential Amendments) Bill 2001 were provided.

The Committee received 252 written submissions. All copies of submissions received electronically have been placed on the web site www.aph.gov.au/house/committee/jsct/. Hard copies of submissions are

available from the Committee Secretariat. The submissions and exhibits are listed below.

The Committee took evidence at public hearings on 13 February 2001 in Sydney, 14 March 2001 in Melbourne, 19 April 2001 in Perth, 24 September 2001 in Canberra, 9 April 2002 in Sydney and 10 April 2002 in Canberra. The names of the witnesses appearing at these hearings are listed below. Transcripts of the evidence taken at the hearings are available from the Committee's internet site or by contacting the Committee Secretariat.

Submissions

1	National Civic Council (WA)
1.1	National Civic Council (WA)
2	Scales and Partners
2.1	Scales and Partners
3	Mr Davvyd Williams
4	Mrs Babette Francis
5	Mr Arthur Hartwig
6	Mr & Mrs E L & EE Knight
7	Ms Helen Brady
8.2	Hon Justice John Perry
8.3	Hon Justice John Perry
8.1	Hon Justice John Perry
8	Hon Justice John Perry
9	Maj Gen Digger James
10	Ms Nicole McDonald
11.1	Ms June Beckett
11.2	Ms June Beckett
11	Ms June Beckett
12	Mr Frank Devitt
13	Supreme Court Adelaide
14	Adelaide Christian Centre International
15	Mr Bob Redfern
16	Amnesty International Australia
16.1	Amnesty International Australia
16.2	Amnesty International Australia
16.3	Amnesty International Australia
16.4	Amnesty International Australia
17	Coalition for an International Criminal Court
18	Dr Ian Spry Q.C.
18.1	Dr Ian Spry Q.C.
18.2	Dr Ian Spry Q.C.
18.3	Dr Ian Spry Q.C.
19	Council for the National Interest
19.1	Council for the National Interest
19.2	Council for the National Interest
20	New South Wales Bar Association
21	Mrs Dawn Brown
22	Australian Lawyers for Human Rights
23.1	Australian Lawyers for Human Rights
23	Human Rights Watch
23.1	Human Rights Watch
24	International Commission of Jurists
25	Australian Red Cross (National)
26	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
27	Mr Robert Williams
28	Ms Eliana Freydel Miller
29	Law Council of Australia
30	Festival of Light (SA)

198.1	Festival of Light (SA)
31	United Nations Association of Australia Inc.
32	Legacy Coordinating Council Inc
33	Professor Hilary Charlesworth
34	UNICEF Australia
35.1	Mr Ben Clarke
35	Mr Ben Clarke
36	Mr Gareth Kimberly
37	Refugee Council of Australia
38	Mr R H Gustard
39	Mr John Stone
40	Confidential
41	Attorney-General & Foreign Minister
42	Mr & Mrs Michael & Jo Renehan
43	Dr Glenister Sheil
44	Mr George Bradney
45	Mr A Drury
46	Mr R Barnett
198.1	Mr R Barnett
47	National Party of Australia (Pioneer)
48	Mr Alf Lelia
49	Ms Caroline Ransom
50	Dr Peter Ferwerda
51	Mr Lawrence Haggerty
52	Mr Frederick Howie
53	Mr Ian Schultz
54	Mrs Francis Chester
55	Mr Athol Chester
56	Mr Bill Trevillian
57	Mr William Blain
58	Mrs L Bell
59	Mr Francis Cole
59	Ms Jennifer Cole
60	Mr Shane Flynn
61	Mr Jim Shanks
62	Mr Kevin Thompson
63	Ms Bindi Mira-Batemen
64	Mr Bob McGregor-Skinner
64	Mrs Sophie McGregor-Skinner
65	Mr Robert Conners
66	Mr Robert Halliday
67	W R Emerton
68	Mrs Helen Harrison
68	Mr Doug Harrison
69	Ms Jean Eykamp
70	Ms Jennie Goldsack
71	Mr Kevin Connors
72	M C Turner
73	Mr Tom Fraser
73	Mrs Jeanette Fraser
74	Mr Michael Sweeney
75	Mr Ken Lawson
76	Mr Arthur Hine
77	Mr J Edwin Pink
78	Mr Rod Evans
79	Ms Valeria Staddon
80	Mr Richard Bryant
81	Mr Malcolm Cliff
82	Mr Nic Faulkner
83	Ms Margaret Gardner
84	Mr Peter Friis
85	Mr Henry Eiler
86	Mr Stewart Coad
87	Mrs Annette Burke
88	Ms Marlene Norris
89	Mr David Mira-Bateman
90	Mr Michael Kearney
90.1	Vigilance Committee
91	Mr Doug Howard
92	Mrs S Howard
93	H Morrow
94	Marsh Family
95	Mr Anthony Grigor-Scott
96	Deir Yassin Remembered
97	Ms Barbara Cliff
98	Mrs Val Wicks
98	Mr Graeme Wicks
99	Ms Anne Russell
100	Mr M Salmon
100	Mrs J Salmon
101	Mrs M Skinner
102	B Nelson
103	Ms Joan Michie

104 World Vision Australia
105 Mr Brian Branch
106 Mrs Joan Watson
107 Mrs D Reynolds
108 Mr Stan Stanfield
109 Mr John Stewart
110.1 Mr Rupert Sherlock
110 Mr Rupert Sherlock
111 Mr J E Spraggon
112 Mr' Theo Hettershide
113 Mrs M C Mercer
114 Mrs Eve Drinkald
114 Mr Ken Drinkald
115 Mr M W James
115 Mrs D M James
116 Mr Ray Allen OAM
117 Mr Maurice Shaya
118 Mr Denis McCormack
119 Dr I B Cameron
120 Wallace Binnie
121 Mrs Everdina Slee
122 Mrs Evonne Moore
123 Ms Jeanette Moods
124 Ms Carole Christianson
125 Ms Karen Mackinnon
126 Mr James Boc
126 Mrs Tracey Boc
127 Ms Wendy Norden
128 Mr Bruce Ford
128 Mrs Betty Ford
129 Confidential
130 Mrs Janice O'Brien
131 Mr Bernard O'Brien
132 Mr Barry Lidner
133 Mr Graham McGowan
134 Mr Douglas Beaumont
135 Mrs Mary Beaumont
136 Ms Julie Beare
137 R E Schmidt
137 A T Schmidt
138 Mrs Catherine O'Connor
139 Ms Isabel Bell MACE
140 Mrs Agnes Mitchell
140 Mr W Mitchell
141 Mrs Julie Bates
141 Mr Howard Bates
142 Clr Nadim Joukhadar
143 Mrts E Brown
144 Mr Allen Kingston
145 Mr Andrew Anderton
146 Mr Reg Macey
147 Australian Legion of Ex-Servicemen and Women
148 Br James Ward
149 Mr Alan Barron
149 Mrs Lyn Barron
150 Mr Peter Davis
151 Youth Concerned
151 Youth Concerned
152 Mr Michael Fawcett
153 Mr Rod Sullivan
154 Mr Ces Clark M.I.I.A.
155 Mr Gary Ryan
156 Mrs Mary Sexton
157 D O'brien
158 Mrs Gordana Duvnjak
159 Saltshakers
159 Saltshakers
160 Mr Jim Kennedy
161 Mrs R Boyce
161 Mr N Boyce
162 Mrs Betty McPhee
163 Mr Richard Gellie
164 B W Diggles
165 Mr Greg Willson
166 Mrs Margaret Dixon
167 Australian Defence Association
168 Mrs J J Morrissey
168 Mr John Morrissey
169 Ms Julie Arthur
170 Dr Jerome Mellor
171 Mr Edmund Cahill
172 Mrs Forwan
173 Mr Michael Sobb
174 Mr James Crockett
198.1 Mr James Crockett

175	Mr Charles Scichuna
176	Mr K O'Gorman
177	Mr Phillip Brabin
178	Mr John Casanova
179	Mr Tom king
179	Mrs Margaret King
180	J F McCormack
181	Mrs Maureen Jongebloed
198.1	Mrs Maureen Jongebloed
182	Mr Peter Keogh
183	Ms Isobel Gawler
184	Ms Wendy Lehmann
185	Mr Peter McDonald
186	Ms Trudy Lancaster
187	G F Tonge
188	Bartle Kempster
189	Australian Council of Trade Unions (ACTU)
190	Australian Bahai Community
191	Mr Bernard Rusterholtz
191	Mrs Winsome Rusterholtz
192	Mr John Gibbons
193	Parliament of Victoria
194	Mr C J McCormack
195	Mr Leo McManus
196	V W Hickey
197	Laurie Marantelli
198	Mr Robert Downey
198.1	Mr Robert Downey
199	Mrs Mary Cudmore
200	Our Lady of the Rosary Parish
201	Mr Des O'Callaghan
202	Ms Tina Lesses
203	National Civic Council (Vic - Isaacs)
204	Ms Elizabeth Bennett
205	Ms Jane Munro
206	Mrs E Arundell
207	Mrs A B Buchan
208	Mr Gerald Ackermann
209	Mr David Plevin
210	Australian Family Association (Mildura)
211	Ms Faye Alford
212	Mr Alexander Reid
213	Ms Mary Hertzog
214	Mr Peter Murray
215	Mr Klaus Clapinski
216	Ms Brenda Lee
217	Mr James Cockayne
218	Mr Patrick Healy
219	International Commission of Jurists (QLD Branch)
220	Mr Kevin McLaughlin
221	Mr John McCormack
222	Mr Robert Doran
223	Mrs Marie Barwick
224	Sydney University Law School Amnesty Group
225	Mr & Mrs Peters
227	Mr Klaus Clapinsky
228	Professor Geoffrey Walker
229	The Presbytery of Benalla
230	Mr David Kane
231	Professor George Winterton
232	Attorney-General's Department
232.1	Attorney-General's Department
233	Br John Moylan
234	Mr Gerald Ackerman
235	Ms Catherine Sullivan
236	Mr Robert Atkins
237	Ms Ursula Bennett
238	Mr Peter Davis
239	Caston Centre for Human Rights Law
240	Br John Moylan
241	Australian Patriot Movement
241.1	Australian Patriot Movement
242	Mr Laurie Marantelli
243	Mr Leo Wirquans
244	Australian Red Cross
245	Mr Tim Webb
246	The Australian Institute for Holocaust and Genocide
247	Department of Foreign Affairs and Trade
248	Law Institute of Victoria

249	Professor G Wilkins	252	United Nations Association of Australia (WA Division)
250	Mr Bruce Ruxton		
251	Mr Barry Gatwick		

Note: In addition, the Committee also received identical letters from eight individuals as part of an organised letter writing campaign. They all expressed opposition to the ICC Statute.

Exhibits

1	Mrs Babette Francis (National and Overseas Coordinator, Endeavour Forum), Professor Richard C Wilkins, Professor of Law Brigham Young University, *'Doing the Right Thing: The International Criminal Court and Social Engineering.*
2	Foreign Affairs, Defence and Trade Committee (House of Representatives), New Zealand), *Report on International Treaty Examination of the Rome Statute of the International Criminal Court'*, 4 May 2000.
3	Professor Timothy McCormack (Chair, National Advisory Committee on International Humanitarian Law, Australian Red Cross), Doherty K & McCormack T, Journal of International Law and Policy, UC Davis International Law and Policy, Vol 5, Spring 1999, No. 2.
4	Professor Timothy McCormack (Chair, National Advisory Committee on International Humanitarian Law, TLH McCormack & S Robertson, *Jurisdictional Aspects of the Statute of the New International Criminal Court*, Melbourne University Law Review, Volume 23, Number 3, 1999, pp. 636– 667.
5	Maj Gen Digger James, I C F Spry, Legal Notes, *A Proposed International Criminal Court*, National Observer, Spring 2000, Number 46.
6	Mr John Stone, Paper delivered by John Stone to the 12th Conference of the Samuel Griffith Society, *Setting the Sovereignty Scene: Use and Abuse of Treaty Power*, Sydney, 11 November 2000.
7	Ms Joanne Lee (Research Associate, International Centre for Criminal Law Reform and Criminal Justice Policy), *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, Joint Project of the ICHRDD and ICCLR&CJP May 2000.
8	Mr Asem Judeh (Director, Deir Yassin Remembered), Photographs and newspaper cuttings.
9	Dr Ian Spry QC (Editor, National Observer), *The Erosion of National Sovereignty*, An address given by Sir Harry Gibbs to the Samuel Griffith Society on 10 November 2000.

10 Dr Ian Spry QC (Editor, National Observer), 'International Criminal Court will limit our Freedom' *The Australian Financial Review*, 13 March 2001, Letters to the Editor, Ex-Military Officers.

11 Dr Ian Spry QC (Editor, National Observer), Paper, *The United States rejects the Proposed International Criminal Court.*

12 Dr Ian Spry QC (Editor, National Observer), Casey L A & Schaefer B D, *The International Criminal Court: The Issues.*

13 Dr Ian Spry QC (Editor, National Observer), Michael P Scharf, *Results of the Rome Conference for an International Criminal Court*, American Society of International Law, August 1998.

14 Dr Ian Spry QC (Editor, National Observer), Gary T Dempsey, Foreign Policy Expert at the Cato Institute, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, CATO Policy Analysis No. 311, July 16 1998.

15 Dr Ian Spry QC (Editor, National Observer), David J Scheffer, US Ambassador at Large for War Crimes, *America's Stake in Peace, Security and Justice*, August 11 1998, US Department of State.

16 Dr Ian Spry QC (Editor, National Observer), David J Scheffer, US Ambassador at Large for War Crimes, *International Criminal Court: The Challenge of Jurisdiction*, U S Department of State, March 16, 1999.

17 Dr Ian Spry QC (Editor, National Observer), *The International Criminal Court - - A Threat to American Military Personnel*, Serial No. 106-176, 25 July 2000, House of Representatives, Committee on International Relations, URL: www.house.gov/international<INF>relations

18 Hon Justice John Perry (Supreme Court Adelaide) - Slides from a presentation given by Justice Perry

18.1 Hon Justice John Perry (Supreme Court Adelaide), Report from the Preparatory Commission for the International Criminal Court 2 November 2000.

19 Embassy of the Peoples Republic of China, Letter to De-Anne Kelly MP, July 13, 2001.

20 Professor R Wilkins, Letter to Editor dated 25/04/2002.

21 Professor R Wilkins, memorandum to The Hon. Nick Minchin, *Possible Constitutional and Domestic Law Implications of Ratifying the Rome Statute for the Creation of an International Criminal Court*, 15 February 2001.

22 Professor R Wilkins, Paper, *Ramifications of the International Criminal Court for War, Peace and Social Change.*

Witnesses

Monday, 30 October 2000 – Canberra

Attorney-General's Department

Mr Christopher Hodges, Principal Legal Officer, International Branch, Criminal Law Division

Ms Rebecca Irwin, Principal Legal Officer, Office of International Law

Mr Mark Jennings, Senior Adviser

Mr Geoffrey Skillen, Senior Legal Officer

Department of Defence

Commodore Robyn Warner, Acting Director, Operations and International Law

Department of Foreign Affairs and Trade

Mr Winfred Peppinck, Executive Director, Treaties Secretariat

Mr Richard Rowe, Legal Adviser

Mr Peter Scott, Executive Officer, International Law Section, Legal Branch

Tuesday, 13 February 2001 - Sydney

Individuals

Mr Gareth Kimberley

Ms Nicole McDonald

Mr John Stone

Amnesty International

Mr John Greenwell, Member, Government Liaison

Mr Des Hogan, Campaign Coordinator

Mr Christopher Ward

Australian Lawyers for Human Rights

Ms Kate Eastman, President

Director of Public Prosecutions (NSW)

Ms Helen Brady, Solicitor

Human Rights Watch

Ms Indira Rosenthal, Counsel

International Commission of Jurists

The Hon Justice John Dowd, President, Australian Section

New South Wales Bar Association

Mr Tim Game SC, Bar Council Representative

Mr David Re, Lawyer Assisting

The Issue

Ms June Beckett, Director/Journalist

UNICEF Australia

Ms Gaye Phillips, Chief Executive

Wednesday, 14 March 2001 - Melbourne

Individuals

Hon Justice John Perry

Mr Denis McCormack

Australian Red Cross

Hon James Carlton, Past President

Rev Professor Michael Tate, Member, National Advisory Committee on International Humanitarian Law

Australian Red Cross (National Advisory Committee on International Humanitarian Law)

Professor Timothy McCormack, Chair

Legacy Coordinating Council

Mr Graham Riches, Vice Chairman

National Observer and RSL

Dr Ian Spry QC

World Vision Australia

Mr Gregory Thompson, Manager, Advocacy Network

Ms Alison Wells, Policy and Campaigns Officer, Advocacy Network (Aust)

Thursday, 19 April 2001 - Perth

Individuals

Mr Ben Clarke LLB, LLM

Mr Rupert Sherlock

Council for the National Interest

Rear Admiral Philip Kennedy, Chairman

Major General Ken Taylor, Committee

Mr Denis Whitely, Executive Director

National Civic Council (Western Australian Branch)

Mr Richard Egan, State President

Monday, 24 September 2001 - Canberra

Attorney-General's Department

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice

Mr Christopher Hodges, Principal Legal Officer, International Crime Branch

Mr Geoffrey Skillen, Acting Senior Legal Officer, International Crime Branch

Ms Annette Willing, Acting Assistant Secretary, International Branch

Department of Foreign Affairs and Trade

Ms Amanda GORELY, Director, International Law Section

Mr Richard Rowe, Legal Adviser

Department of Defence

Commodore Warwick GATELY, Director General, Joint Operations and Plans

Major Bruce OSWALD, Deputy Director, International Law

Tuesday, 9 April 2002 - Sydney

National Advisory Committee on International Humanitarian Law, Australian Red Cross

Professor Tim McCormack, Chairman

Australian Institute for Holocaust and Genocide Studies

Mr Ara Margossian, Director,

Wednesday, 10 April 2002 - Canberra

Amnesty International Australia

Mr John Henry Greenwell, Member, Government Liaison Group

Attorney-General's Department

Mr Ben Bartos, Legal Officer, International Crime Branch

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice

Mr Geoffrey Skillen, Acting Principal Legal Officer, International Crime Branch

Ms Robin WARNER, Assistant Secretary, International Crime Branch

Department of Foreign Affairs and Trade

Ms Amanda GORELY, Director, International Law Section

Mr Peter Scott, Executive Officer, International Law Section

Department of Defence

Major James Gaynor, Defence Legal Service

Group Captain Simon Harvey, Director of Operations and International Law

Commodore Michael Smith, Director-General, Defence Legal Services

C

Appendix C – The Like-Minded Group

Background[1]

In the lead-preparatory negotiations for the development of the Rome Statute a group of countries came together based on the following principles:

1. To safeguard the integrity of the Statute adopted in Rome;
2. To work jointly for the Rome Statute's early entry into force;
3. To ratify or accede to the Rome Statute as early as possible;
4. To complete the remaining tasks assigned to the Preparatory Commission in resolution F as early as possible;
5. To encourage other States, through appropriate contacts and to the extent possible, to ratify or accede to the Rome Statute as early as possible; and
6. To fully support appropriate planning and the practical preparations for the effective establishment of the Court.

Canada was the initial chair in 1998. Australia has chaired the Group from 1998 till the present day.

---

1 From information provided by Department of Foreign Affairs and Trade.

The membership includes the following countries:

Andorra
Argentina
Austria
Australia (Chair)
Belgium
Benin
Bosnia-Herzegovenia
Brazil
Brunei
Bulgaria
Burkina Faso
Burundi
Canada
Costa Rica
Chile
Congo (Brazzaville)
Cote d'Ivoire
Croatia
Czech Republic
Denmark
Egypt
Estonia
Fiji
Finland
Gabon
Georgia
Germany
Ghana
Greece
Hungary
Iceland
Ireland
Italy
Jordan
Latvia
Lesotho
Liechtenstein
Lithuania
Luxembourg
Malawi
Malta
Namibia
Netherlands
New Zealand
Norway
Philippines
Portugal
Poland
Republic of Korea
Romania
Samoa
San Marino
Senegal
Sierra Leone
Singapore
Slovakia
Slovenia
Solomon Islands
South Africa
Spain
Swaziland
Sweden
Switzerland
Trinidad and Tobago
United Kingdom
Venezuela
Zambia
Zimbabwe

D

Appendix D – Signatories and States parties to the ICC Statute[1]

Signatories: 139 Parties: 66.

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Albania	18 Jul 1998	
Algeria	28 Dec 2000	
Andorra	18 Jul 1998	30 Apr 2001
Angola	7 Oct 1998	
Antigua and Barbuda	23 Oct 1998	18 Jun 2001
Argentina	8 Jan 1999	8 Feb 2001
Armenia	1 Oct 1999	
Australia	9 Dec 1998	
Austria	7 Oct 1998	28 Dec 2000
Bahamas	29 Dec 2000	
Bahrain	11 Dec 2000	
Bangladesh	16 Sep 1999	
Barbedos	8 Sep 2000	
Belgium	10 Sep 1998	28 Jun 2000
Belize	5 Apr 2000	5 Apr 2000
Benin	24 Sep 1999	22 Jan 2002
Bolivia	17 Jul 1998	
Bosnia and Herzegovina	17 Jul 2000	11 Apr 2002
Botswana	8 Sep 2000	8 Sep 2000
Brazil	7 Feb 2000	

1 This information was copied on 11 April 2002 from a listing provided on the Home Page of the International Criminal Court, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp .

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Bulgaria	11 Feb 1999	11 Apr 2002
Burkina Faso	30 Nov 1998	
Burundi	13 Jan 1999	
Cambodia	23 Oct 2000	11 Apr 2002
Cameroon	17 Jul 1998	
Canada	18 Dec 1998	7 Jul 2000
Cape Verde	28 Dec 2000	
Central African Republic	7 Dec 1999	3 Oct 2001
Chad	20 Oct 1999	
Chile	11 Sep 1998	
Colombia	10 Dec 1998	
Comoros	22 Sep 2000	
Congo	17 Jul 1998	
Costa Rica	7 Oct 1998	7 Jun 2001
Côte d'Ivoire	30 Nov 1998	
Croatia	12 Oct 1998	21 May 2001
Cyprus	15 Oct 1998	7 Mar 2002
Czech Republic	13 Apr 1999	
Democratic Republic of the Congo	8 Sep 2000	11 Apr 2002
Denmark	25 Sep 1998	21 Jun 2001
Djibouti	7 Oct 1998	
Dominica		12 Feb 2001*a*
Dominican Republic	8 Sep 2000	
Ecuador	7 Oct 1998	5 Feb 2002
Egypt	26 Dec 2000	
Eritrea	7 Oct 1998	
Estonia	27 Dec 1999	30 Jan 2002
Fiji	29 Nov 1999	29 Nov 1999
Finland	7 Oct 1998	29 Dec 2000
France	18 Jul 1998	9 Jun 2000
Gabon	22 Dec 1998	20 Sep 2000
Gambia	4 Dec 1998	
Georgia	18 Jul 1998	
Germany	10 Dec 1998	11 Dec 2000
Ghana	18 Jul 1998	20 Dec 1999
Greece	18 Jul 1998	
Guinea	7 Sep 2000	
Guinea-Bissau	12 Sep 2000	
Guyana	28 Dec 2000	
Haiti	26 Feb 1999	

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Honduras	7 Oct 1998	
Hungary	15 Jan 1999	30 Nov 2001
Iceland	26 Aug 1998	25 May 2000
Iran (Islamic Republic of)	31 Dec 2000	
Ireland	7 Oct 1998	11 Apr 2002
Israel	31 Dec 2000	
Italy	18 Jul 1998	26 Jul 1999
Jamaica	8 Sep 2000	
Jordan	7 Oct 1998	11 Apr 2002
Kenya	11 Aug 1999	
Kuwait	8 Sep 2000	
Kyrgyzstan	8 Dec 1998	
Latvia	22 Apr 1999	
Lesotho	30 Nov 1998	6 Sep 2000
Liberia	17 Jul 1998	
Liechtenstein	18 Jul 1998	2 Oct 2001
Lithuania	10 Dec 1998	
Luxembourg	13 Oct 1998	8 Sep 2000
Madagascar	18 Jul 1998	
Malawi	2 Mar 1999	
Mali	17 Jul 1998	16 Aug 2000
Malta	17 Jul 1998	
Marshall Islands	6 Sep 2000	7 Dec 2000
Mauritius	11 Nov 1998	5 Mar 2002
Mexico	7 Sep 2000	
Monaco	18 Jul 1998	
Mongolia	29 Dec 2000	11 Apr 2002
Morocco	8 Sep 2000	
Mozambique	28 Dec 2000	
Namibia	27 Oct 1998	
Nauru	13 Dec 2000	12 Nov 2001
Netherlands	18 Jul 1998	17 Jul 2001 A
New Zealand	7 Oct 1998	7 Sep 2000
Niger	17 Jul 1998	11 Apr 2002
Nigeria	1 Jun 2000	27 Sep 2001
Norway	28 Aug 1998	16 Feb 2000
Oman	20 Dec 2000	
Panama	18 Jul 1998	21 Mar 2002
Paraguay	7 Oct 1998	14 May 2001
Peru	7 Dec 2000	10 Nov 2001
Philippines	28 Dec 2000	

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Poland	9 Apr 1999	12 Nov 2001
Portugal	7 Oct 1998	5 Feb 2002
Republic of Korea	8 Mar 2000	
Republic of Moldova	8 Sep 2000	
Romania	7 Jul 1999	11 Apr 2002
Russian Federation	13 Sep 2000	
Saint Lucia	27 Aug 1999	
Samoa	17 Jul 1998	
San Marino	18 Jul 1998	13 May 1999
Sao Tome and Principe	28 Dec 2000	
Senegal	18 Jul 1998	2 Feb 1999
Seychelles	28 Dec 2000	
Sierra Leone	17 Oct 1998	15 Sep 2000
Slovakia	23 Dec 1998	11 Apr 2002
Slovenia	7 Oct 1998	31 Dec 2001
Solomon Islands	3 Dec 1998	
South Africa	17 Jul 1998	27 Nov 2000
Spain	18 Jul 1998	24 Oct 2000
Sudan	8 Sep 2000	
Sweden	7 Oct 1998	28 Jun 2001
Switzerland	18 Jul 1998	12 Oct 2001
Syrian Arab Republic	29 Nov 2000	
Tajikistan	30 Nov 1998	5 May 2000
Thailand	2 Oct 2000	
the former Yugoslav Republic of Macedonia	7 Oct 1998	6 Mar 2002
Trinidad and Tobago	23 Mar 1999	6 Apr 1999
Uganda	17 Mar 1999	
Ukraine	20 Jan 2000	
United Arab Emirates	27 Nov 2000	
United Kingdom & Northern Ireland	30 Nov 1998	4 Oct 2001
United Republic of Tanzania	29 Dec 2000	
United States of America*	31 Dec 2000	
Uruguay	19 Dec 2000	
Uzbekistan	29 Dec 2000	
Venezuela	14 Oct 1998	7 Jun 2000
Yemen	28 Dec 2000	
Yugoslavia	19 Dec 2000	6 Sep 2001
Zambia	17 Jul 1998	

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Zimbabwe	17 Jul 1998	

* In a letter to the Secretary-General of the United Nations, Kofi Annan the Under Secretary for Arms Control and International Security, John R Bolton, on 6 May 2002, indicated that the United States of America 'does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depository's status lists relating to this treaty'.

ANNEX 15

Details of South Africa's ratification of the ICC Statute.

8241625

International Criminal Court

The ICC at a glance
News Point
Upcoming Events
States Parties
Victims issues
Job opportunities
Basic documents
Organs of the Court
Cases
Witness protection

South Africa (Africa)

Historica
Assembl
Parties
The State

Signature status:
South Africa signed on 17 July 1998.

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

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

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

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

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

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

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

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

Last Updated:
16 October 2002

ANNEX 16

Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, 1997).

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Seventh revised edition

Peter Malanczuk

Assessor iur., Dr. iur.,
Professor of International Law, Law Faculty, Erasmus University Rotterdam,
Former Legal Assistant to the President of the Iran–United States Claims Tribunal,
Counsel, Lalive & Partners, Attorneys-at-Law, Geneva,
Member, Tianjin Board of Arbitration, China

London and New York

First published in 1970 by HarperCollins Academic
Second edition 1971
Third edition 1977
Fourth edition 1982
Fifth edition 1987
Sixth edition 1987

Reprinted four times
by Routledge
11 New Fetter Lane, London EC4P 4EE

Simultaneously published in the USA and Canada
by Routledge
29 West 35th Street, New York, NY 10001

Seventh edition 1997
Reprinted 1998 (twice) and 1999 (twice), 2000, 2001, 2002

Routledge is an imprint of the Taylor & Francis Group

Typeset in Ehrhardt by
RefineCatch Ltd, Bungay, Suffolk
Printed and bound in Great Britain by
T.J. International Ltd, Padstow, Cornwall

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book is available from the Library of Congress

ISBN 0–415–16553–9 (hbk)
ISBN 0–415–11120–X (pbk)

4 International law and municipal law

'Municipal law' is the technical name given by international lawyers to the national or internal law of a state. The question of the relationship between international law and municipal law can give rise to many practical problems, especially if there is a conflict between the two.[1] Which rule prevails in the case of conflict? How do rules of international law take effect in the internal law of states?

Dualist and monist theories

There are two basic theories, with a number of variations in the literature, on the relationship between international and domestic law. The first doctrine is called the dualist (or pluralist) view, and assumes that international law and municipal law are two separate legal systems which exist independently of each other. The central question then is whether one system is superior to the other. The second doctrine, called the monist view, has a unitary perception of the 'law' and understands both international and municipal law as forming part of one and the same legal order. The most radical version of the monist approach was formulated by Kelsen.[2] In his view, the ultimate source of the validity of all law derived from a basic rule ('Grundnorm') of international law. Kelsen's theory led to the conclusion that all rules of international law were supreme over municipal law, that a municipal law inconsistent with international law was automatically null and void and that rules of international law were directly applicable in the domestic sphere of states.

In reality, the opposing schools of dualism and monism did not adequately reflect actual state practice and were thus forced to modify their original positions in many respects, bringing them closer to each other, without, however, producing a conclusive answer on the true relationship between international law and municipal law. As a rule of thumb, it may be said that the ideological background to dualist doctrines is strongly coloured by an adherence to positivism and an emphasis on the theory of sovereignty, while monist schools are more inclined to follow natural law thinking and liberal ideas of a world society.[3]

It is also notable that the controversy was predominantly conducted among authors from civil law countries.[4] Authors with a common law background tended to pay lesser attention to these theoretical issues and preferred a more empirical approach seeking practical solutions in a given

1 See *Harris CMIL*, 69–101; L. Ferrari-Bravo, International Law and Municipal Law: The Complementarity of Legal Systems, in R.St.J. Macdonald/D.M. Johnston (eds), *The Structure and Process of International Law*, 1983, 715–44; G. Pau, *Le droit interne dans l'ordre international*, 1985; G.I. Tunkin/R. Wolfrum (eds), *International Law and Municipal Law*, 1988; M. Fitzmaurice/C. Flintermann (eds), *L. Erades, Interactions Between International and Municipal Law: A Comparative Case Law Study*, 1993; B. Conforti, *International Law and the Role of Domestic Legal Systems*, 1993; C. Economides, *The Relationship between International and Domestic Law*, 1993; E. Benevisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, *EJIL* 4 (1993), 159–83; Y. Iwasawa, The Relationship Between International Law and National Law: Japanese Experiences, *BYIL* 64 (1993), 333–9; E. Benvenisti, Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the international Relations of Their State', *EJIL* 5 (1994), 423–39; P. Chandrasekhara Rao, *The Indian Constitution and International Law*, 1994; K.J. Partsch, International Law and Municipal Law, *EPIL* II (1995), 1185–202; P. Rambaud, International Law and Municipal Law: Conflicts and Their Review by Third States, *ibid.*, 1202–6; C. Schreuer, International Law and Municipal Law: Law and Decisions of International Organizations and Courts, *ibid.*, 1228–33; W. Czaplinski, International Law and Polish Municipal Law. A Case Study, *Hague YIL* 8 (1995), 31–46; J.J. Paust, *International Law as Law of the United States*, 1996; P.M. Eisemann (ed.), *The Integration of International and European Community Law into the National Legal Order*, 1996.

case. Lecturing at the Hague Academy of International Law in 1957, Fitzmaurice considered that

> the entire monist-dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exist for there to be any controversy at all – and which in fact does not exist – namely a *common field* in which the two legal orders under discussion both simultaneously have their spheres of activity.[5]

It is more useful to leave this dogmatic dispute aside here and to turn to the general attitude of international law to municipal law and then briefly describe the various approaches taken by national legal systems towards international law in practice.

The attitude of international law to municipal law

International law does not entirely ignore municipal law. For instance, as we have seen, municipal law may be used as evidence of international custom or of general principles of law, which are both sources of international law.[6] Moreover, international law leaves certain questions to be decided by municipal law; thus, in order to determine whether an individual is a national of state X, international law normally looks first at the law of state X, provided that the law of state X is not wholly unreasonable.[7]

However, the general rule of international law is that a state cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international law. Thus, in the *Free Zones* case, the Permanent Court of International Justice said: 'It is certain that France cannot rely on her own legislation to limit the scope of her international obligations.'[8] This is particularly true when, as often happens, a treaty or other rule of international law imposes an obligation on states to enact a particular rule as part of their own municipal law. A similar rule can be found in Article 27 of the Vienna Convention on the Law of Treaties:[9] 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

In other words, all that international law says is that states cannot invoke their internal laws and procedures as a justification for not complying with their international obligations. States are required to perform their international obligations in good faith, but they are at liberty to decide on the modalities of such performance within their domestic legal systems. Similarly, there is a general duty for states to bring domestic law into conformity with obligations under international law. But international law leaves the method of achieving this result (described in the literature by varying concepts of 'incorporation', 'adoption', 'transformation' or 'reception') to the domestic jurisdiction of states. They are free to decide how best to translate their international obligations into internal law and to determine which legal status these have domestically. On this issue, in practice there is a lack of uniformity in the different national legal systems.

2 See H. Kelsen, Die Einheit von Völkerrecht und staatlichem Recht, *ZaöRV* 41 (1958), 234–48; Kelsen, *Principles of International Law*, 2nd edn 1966 (Tucker ed.), 553–88.
3 On positivism and natural law theory see Chapter 2 above, 15–17, 32.
4 On the variety of legal systems in the world see Chapter 1 above, 6.
5 G. Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, *RdC* 92 (1957-II), 1, at 71.
6 See Chapter 3 above, 39–50.
7 See Chapter 17 below, 263–6.
8 PCIJ, series A/B, no. 46, 167. See L. Weber, Free Zones of Upper Savoy and Gex Case, *EPIL* II (1995), 483–4.
9 Text in *ILM* 8 (1969), 679; *AJIL* 63 (1969), 875; *Brownlie BDIL*, 388, at 400. See Chapter 9 below, 131.

The attitude of national legal systems to international law

The attitude of municipal law to international law is much less easy to summarize than the attitude of international law to municipal law. For one thing, the laws of different countries vary greatly in this respect. If one examines constitutional texts, especially those of developing countries which are usually keen on emphasizing their sovereignty, the finding is that most states do not give primacy to international law over their own municipal law.[10] However, this does not necessarily mean that most states would disregard international law altogether. Constitutional texts can form a starting point for analysis. What also matters is internal legislation, the attitude of the national courts and administrative practice, which is often ambiguous and inconsistent. The prevailing approach in practice appears to be dualist, regarding international law and internal law as different systems requiring the incorporation of international rules on the national level. Thus, the effectiveness of international law generally depends on the criteria adopted by national legal systems.

The most important questions of the attitude of national legal systems to international law concern the status of international treaties and of international customary law, including general principles of international law. The analysis of municipal law in relation to the European Community is a special area beyond the scope of the following.[11]

Treaties

The status of treaties in national legal systems varies considerably.[12] In the United Kingdom, for example, the power to make or ratify treaties belongs to the Queen on the advice of the Prime Minister, a Minister of the Crown, an Ambassador or other officials, though by the so-called Ponsonby Rule, as a matter of constitutional convention, the Executive will not normally ratify a treaty until twenty-one parliamentary days after the treaty has been laid before both Houses of Parliament. Consequently, a treaty does not automatically become part of English law; otherwise the Queen could alter English law without the consent of Parliament, which would be contrary to the basic principle of English constitutional law that Parliament has a monopoly of legislative power. There is an exception concerning treaties regulating the conduct of warfare[13] which is probably connected with the rule of English constitutional law which gives the Queen, acting on the advice of her ministers, the power to declare war without the consent of Parliament. If a treaty requires changes in English law, it is necessary to pass an Act of Parliament in order to bring English law into conformity with the treaty. If the Act is not passed, the treaty is still binding on the United Kingdom from the international point of view, and the United Kingdom will be responsible for not complying with the treaty.

An Act of Parliament giving effect to a treaty in English law can be repealed by a subsequent Act of Parliament; in these circumstances there is conflict between international law and English law, since international law regards the United Kingdom as still bound by the treaty, but English courts cannot give effect to the treaty.[14] However, English courts usually

10 See A. Cassese, Modern Constitutions and International Law, *RdC* 192 (1985-III), 331 *et seq.*

11 See F. Caportorti, European Communities: Community Law and Municipal Law, *EPIL* II (1995), 165–70. See Chapter 6 below, 95–6.

12 See, for example, F.G. Jacobs/S. Roberts (eds), *The Effect of Treaties in Domestic Law* (UK National Committee of Comparative Law), 1987; M. Duffy, Practical Problems of Giving Effect to Treaty Obligations – The Cost of Consent, *AYIL* 12 (1988/9), 16–21; W.K. Hastings, New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi, *ICLQ* 38 (1989), 668 *et seq.*; R. Heuser, Der Abschluß völkerrechtlicher Verträge im chinesischen Recht, *ZaöRV* 51 (1991), 938–48; Zh. Li, Effect of Treaties in Domestic Law: Practice of the People's Republic of China, *Dalhouse LJ* 16 (1993), 62–97; Interim Report of the National Committee on International Law in Municipal Courts [Japan], *Jap. Ann. IL* 36 (1993), 100–62; T.H. Strom/P. Finkle, Treaty Implementation: The Canadian Game Needs Australian Rules, *Ottawa LR* 25 (1993), 39–60; G. Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen am Beispiel der Rechtsprechung der Gerichte Deutschlands, Österreichs, der Schweiz und der Vereinigten Staaten von Amerika*, 1993; K.S. Sik, *The Indonesian Law of Treaties 1945–1990*, 1994; C. Lysaght, The Status of International Agreements in Irish Domestic Law, *ILT* 12 (1994), 171–3; M. Leigh/M.R. Blakeslee (eds), *National Treaty Law and Practice*, 1995; P. Alston/M. Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty*, 1995.

13 See Lord McNair, *The Law of Treaties*, 1961, 89–91, and *Porter v. Freudenberg*, [1915] 1 KB 857, 874–80.

14 *Inland Revenue Commissioners v. Collco Dealings Ltd*, [1962] AC 1. Would English courts apply subsequent Acts of Parliament which conflicted with the European Communities Act 1972? See E.C.S. Wade/W. Bradley, *Constitutional and Administrative Law*, 10th edn 1985, 136–8.

try to interpret Acts of Parliament so that they do not conflict with earlier treaties made by the United Kingdom.[15]

As far as the United Kingdom is concerned, there is a very clear difference between the effects of a treaty in international law and the effects of a treaty in municipal law; a treaty becomes effective in international law when it is ratified by the Queen, but it usually has no effect in municipal law until an Act of Parliament is passed to give effect to it. In other countries this distinction tends to be blurred. Most other common law countries, except the United States, as will be discussed below, follow the English tradition and strictly deny any direct internal effect of international treaties without legislative enactment. This is the case, for example, in Canada and India.[16] The House of Lords recently reaffirmed this rule in 1989 in the *International Tin* case, in which Lord Oliver of Aylmerton noted:

> as a matter of constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[17]

In the vast majority of democratic countries outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously. For instance, the Constitution of the United States provides that the President 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur' (Article II (2)). Treaties ratified in accordance with the Constitution automatically become part of the municipal law of the United States. However, this statement needs some qualification.[18] Under the US Constitution, treaties of the Federal Government (as distinct from the states) are the 'supreme Law of the Land', like the Constitution itself and federal law (Article VI). Cases arising under international treaties are within the judicial power of the United States and thus, subject to certain limitations, within the jurisdiction of the federal courts (Article III (2)). International agreements remain subject to the Bill of Rights and other requirements of the US Constitution and cannot be implemented internally in violation of them. If the United States fails to carry out a treaty obligation because of its unconstitutionality, it remains responsible for the violation of the treaty under international law.

A recent controversial decision of the US Supreme Court was given in the *Alvarez-Machain* case. A Mexican doctor accused of torturing an American narcotics agent was kidnapped in Mexico by US agents and brought to trial in the United States. The Court held that this action was not covered by the terms of the 1978 US–Mexico Extradition Treaty, because its language and history would 'not support the proposition that the Treaty prohibits abductions outside of its terms'.[19] This awkward

15 *Inland Revenue Commissioners v. Collco Dealings Ltd*, [1962] AC 1 (*obiter*). This rule is not limited to treaties which have been given effect in English law by previous Acts of Parliament. See *R. v. Secretary of State for Home Affairs, ex p. Bhajan Singh*, [1975] 2 All ER 1081; *R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi*, [1976] 3 All ER 843, 847; and *Pan-American World Airways Inc. v. Department of Trade* (1975), *ILR*, Vol. 60, 431, at 439. See also P.J. Duffy, English Law and the European Convention on Human Rights, *ICLQ* 29 (1980), 585–618; A.J. Cunningham, The European Convention on Human Rights, Customary International Law and the Constitution, *ICLQ* 43 (1994), 537–67.

16 See M.W. Janis, *An Introduction to International Law*, 2nd edn 1993, 96.

17 *Australia & New Zealand Banking Group Ltd et al. v. Australia et al.*, House of Lords, judgment of 26 October 1990, *ILM* 29 (1990), 671, at 694; see Chapter 6 below, 94. On the interpretation of treaties see R. Gardiner, Treaty Interpretation in the English Courts Since *Fothergill v. Monarch Airlines* (1980), *ICLQ* 44 (1995), 620–9.

18 For details, see *Restatement (Third)*, Vol. 1, part III, ch. 2, 40–69; Janis, *op. cit.*, 85–94; H.A. Blackmun, The Supreme Court and the Law of Nations, *Yale LJ* 104 (1994), 39–49; A.M. Weisburd, State Courts, Federal Courts and International Cases, *Yale JIL* 20 (1995), 1–64.

19 *U.S. v. Alvarez-Machain*, *ILM* 31 (1992), 902, 112 S. Ct. 2188, 119 L. edn 2d 441 (1992), at 453. See Janis, *op. cit.*, 91–2. In the end the case against the Mexican doctor was dismissed by the federal trial judge. See also B. Baker/V. Röbe, To Abduct or To Extradite: Does a Treaty Beg the Question? The Alvarez-Machain Decision in U.S. Domestic Law and International Law, *ZaöRV* 53 (1993), 657–88; D.C. Smith, Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in *U.S. v. Alvarez-Machain*, *EJIL* 6 (1995), 1–31; M.J. Glennon, State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain*, *AJIL* 86 (1992), 746–56; M. Halberstam, In Defense of the Supreme Court Decision in *Alvarez-Machain*, *ibid.*, 736–46; L. Henkin, Correspondence, *AJIL* 87 (1993), 100–2.

interpretation of the treaty by the majority of the Supreme Court shows a remarkable disrespect for international law and understandably provoked a strong protest by the government of Mexico, which demanded that the treaty be renegotiated.

Another complicating aspect, particularly under United States law, is the distinction between 'self-executing' and 'non-self-executing agreements'.[20] In essence, the distinction concerns the issue whether an agreement, or certain provisions thereof, should be given legal effect without further implementing national legislation and is relevant when a party seeks to rely on the agreement in a case before an American court. Moreover, it is important to note that most United States treaties are not concluded under Article II of the Constitution with the consent of the Senate, but are 'statutory' or 'congressional-executive agreements' signed by the President under ordinary legislation adopted by a majority of both the House of Representatives and the Senate. There are also treaties called 'executive agreements' which the President concludes alone without the participation of Congress.[21]

In the United States and in those countries following the legal traditions of continental Europe, treaties enjoy the same status as national statutes. This means that they generally derogate pre-existing legislation (the principle of *lex posterior derogat legi priori*), but are overruled by statutes enacted later. It is difficult, however, to generalize in this area in view of considerable national modifications to this rule.

Some constitutions even make treaties superior to ordinary national legislation and subordinate law, but rarely superior to constitutional law as such. The operation of this rule in practice depends on who has the authority to give effect to it. This may be reserved to the legislature, a political body, excluding any review by the courts. In other cases, where constitutional courts exist or where courts have the power of judicial review of legislative action, the situation is often different. There are also countries in which the authoritative interpretation of the meaning of international treaties is a privilege of the executive branch, to secure the control of the government over foreign affairs. To a certain extent this is also the case in France with the result that the power of the French courts is in effect curtailed to reject the validity of a national statute because of a conflict with an international treaty. Thus, the view that numerous countries following the model of the French legal system have recognized the priority of treaties is at least open to doubt.[22]

In the Netherlands the situation is somewhat peculiar. The Dutch Constitution of 1953, as revised in 1956, clearly provided that all internal law, even constitutional law, must be disregarded if it is incompatible with provisions of treaties or decisions of international organizations that are binding on all persons.[23] Although there is no system of judicial review of legislative acts in the Netherlands,[24] which in this respect follows the tradition of the United Kingdom, Dutch courts thus obtained the authority to overrule acts of Parliament, not on grounds of unconstitutionality, but on the ground that they may conflict with certain treaties or resolutions of international organizations. However, there is a safeguard built into constitutional procedures. The Dutch Parliament has to consent to treaties

20 The case law started in 1829 with Chief Justice John Marshall's decision in *Foster & Elam v. Neilson*, 27 US (2 Pet.) 253 (1829). See T. Buergenthal, Self-Executing and Non-Self-Executing Treaties in National and International Law, *RdC* 235 (1992-IV), 303–400; C.M. Vázquez, The Four Doctrines of Self-Executing Treaties, *AJIL* 89 (1995), 695–723 and the comment by M. Dominik, *AJIL* 90 (1996), 441.

21 See Janis, *op. cit.*, 92; L. Wildhaber, Executive Agreements, *EPIL* II (1995), 312–18.

22 See Partsch, *op. cit.*, 1195.

23 Netherlands Constitution, Article 66, as amended in 1956. See H.H.M. Sondaal, Some Features of Dutch Treaty Practice, *NYIL* 19 (1988), 179–257; H. Schermers, Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law, *Mich. JIL* 10 (1989), 266 *et seq.*

24 Article 120 of the Dutch Constitution provides: 'The constitutionality of acts of Parliament and treaties shall not be reviewed by the courts.'

which conflict with the Constitution by a majority necessary for constitutional amendments. The new text of the 1983 Constitution retained this power of the courts in Article 94, but has given rise to some dispute as to whether it departs from the previous text as far as the relationship between international treaties and the Constitution is concerned.[25] The unusual, 'monist' Dutch openness to the internal effect of international law, not only in the case of treaties, may find some explanation in the fact that, as a small country with considerable global trading and investment interests, the Netherlands places more emphasis on the rule of law in international relations.

The strictly 'dualist' tradition of the former socialist countries has been to require a specific national legislative act before treaty obligations could be implemented and had to be respected by national authorities.[26] Thus, their courts were not required to decide on conflicts between treaty norms and municipal law, and international law could generally not be invoked before them or administrative agencies, unless there was an express reference to it in domestic law.[27]

With the constitutional reforms in Eastern Europe there have been some important changes. The new Russian Constitution of 1993, for example, contains the following revolutionary clause (Article 15(4)):

> The generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply.[28]

Although this clause is comparatively broad, because it includes not only treaties but also 'generally recognized principles and norms of international law', it does not give priority to these sources over the Constitution itself. What this means in practice and what the role of the new Constitutional Court of the Russian Federation in this respect will be, remain to be seen.[29] On 16 June 1995, the State Duma of the Russian Federation adopted a Federal Law on International Treaties[30] which replaced the 1978 Law on the Procedure for the Conclusion, Execution, and Denunciation of International Treaties of the former Soviet Union.[31]

Moreover, in a recent study of fifteen constitutions or draft constitutions of Central-Eastern European States, Eric Stein concludes that

> most incorporate treaties as an integral part of the internal order, and although this is not clear in all instances, treaties have the status of ordinary legislation. In five (probably seven) instances treaties are made superior to both prior and subsequent national legislation, while in three documents this exalted rank is reserved for human rights treaties only.[32]

In the end, the actual implementation of such provisions by the courts and administration will matter more than lofty constitutional texts.

Custom and general principles

There are some significant differences in the rules for the application of customary international law and general principles in municipal law as

25 Cassese, *op. cit.*, at 411, views the new text as 'a step backwards'. Dutch authors do not agree, see M.C.B. Burkens, The Complete Revision of the Dutch Constitution, *NILR* (1982), 323 *et seq.*; E.A. Alkema, Foreign Relations in the 1983 Dutch Constitution, *NILR* (1984), 307, at 320 *et seq.*; see also the study by E.W. Vierdag, *Het nederlandse verdragenrecht*, 1995. On recent developments see J. Klabbers, The New Dutch Law on the Approval of Treaties, *ICLQ* 44 (1995), 629–42.

26 See, e.g., Article 24 of the 1978 USSR Law of the Procedure for the Conclusion, Execution and Denunciation of International Treaties, *ILM* 17 (1978), 1115.

27 On the general lack (with the exception of the former German Democratic Republic) of constitutional provisions or general legislation on the effect of international law in the internal laws of the Comecon states, see K. Skubizewski, Völkerrecht und Landesrecht: Regelungen und Erfahrungen in Mittel- und Osteuropa, in W. Fiedler/G. Ress (eds), *Verfassungsrecht und Völkerrecht: Gedächtnisschrift für Wilhelm Karl Geck*, 1988, 777 *et seq.*

28 G.M. Danilenko, The New Russian Constitution and International Law, *AJIL* 88 (1994), 451–70. See also A. Kolodkin, Russia and International Law: New Approaches, *RBDI* 26 (1993), 552–7.

29 M.F. Brzezinski, Toward 'Constitutionalism' in Russia: The Russian Constitutional Court, *ICLQ* 42 (1993), 673 *et seq.*

30 Text in *ILM* 34 (1995), 1370 with an Introductory Note by W.E. Butler. See T. Beknazar, Das neue Recht völkerrechtlicher Verträge in Russland, *ZaöRV* 56 (1995), 406–26.

31 1978 USSR Law, *op. cit.*

32 E. Stein, International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?, *AJIL* 88 (1994), 427–50, at 447. See also E. Stein, International Law and Internal Law in the New Constitutions of Central-Eastern Europe, in *FS Bernhardt*, 865–84; V.S. Vereshchetin, New Constitutions and the Old Problem of the Relationship between International Law and National Law, *EJIL* 7 (1996), 29–41.

compared with treaties. There is no problem of internal conflict between the executive branch and the legislative branch of government on the conclusion of a treaty. Rules for the recognition of customary international law in the internal sphere are either laid down in advance in the constitution or are gradually formulated by the national courts. A procedure by which a legislature would have to transform customary international law into municipal law would be impracticable, simply because it would require a regular review of all changes of norms and principles of international law, a task which no body can master for legislative purposes. Custom is also less clear than treaties and has decreased in its significance as a source of international law.

The differences between common law and civil law countries with regard to the incorporation of customary international law and general principles of international law into their domestic law are much less pronounced than in the case of treaties. Even the practice of the United States, which is markedly different from other common law jurisdictions as regards treaties, is rather similar to the prevailing principle in Great Britain and the Commonwealth, namely

> that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority.[33]

The traditional rule in Britain is that customary international law automatically forms part of English and Scots law; this is known as the doctrine of incorporation. Lord Chancellor Talbot said in *Barbuit*'s case in 1735 that 'the law of nations in its fullest extent is and forms part of the law of England'.[34] Strictly speaking, this statement is too wide, because it is not true of treaties; but, as far as customary international law is concerned, it was repeated and applied in a large number of cases between 1764 and 1861, and was reaffirmed by Lord Denning.[35]

However, it is possible to interpret some recent cases as discarding the doctrine of incorporation in favour of the doctrine of transformation, that is, the doctrine that rules of customary international law form part of English law only in so far as they have been accepted by English Acts of Parliament and judicial decisions.[36] In short, the theory of English law is in favour of the incorporation doctrine, but, since English courts look to English judgments as the main evidence of customary international law, practice approximates to the transformation theory. Quite apart from the problem of ascertaining the content of customary international law, there are a number of situations which constitute exceptions to the general rule, and in which English courts cannot apply customary international law. For example, if there is a conflict between customary international law and an Act of Parliament, the Act of Parliament prevails.[37] However, where possible, English courts will interpret Acts of Parliament so that they do not conflict with customary international law.[38] Moreover, if there is a conflict between customary international law and a binding judicial precedent laying down a rule of English law, the judicial precedent prevails.[39] But English courts are probably free to depart from earlier judicial precedents

33 I. Brownlie, *Principles of Public International Law*, 4th edn 1990, 43 with references.

34 25 ER 77. But see J.C. Collier, Is International Law Really Part of the Law of England?, *ICLQ* 38 (1989), 924–34.

35 *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] QB 529, 553–4.

36 See Akehurst, 6th edn of this book, Chapter 4.

37 *Mortensen v. Peters* (1906), 8 F. (J.C.) 93. For an account of the background and sequel to this case, see H.W. Briggs, *The Law of Nations*, 2nd edn 1953, 52–7. The case is not absolutely conclusive, because the Court doubted the scope of the relevant rule of customary international law.

38 *Maxwell's Interpretation of Statutes*, 12th edn 1969, 183–6; *Halsbury's Laws of England*, 4th edn 1983, Vol. 44, para. 908.

39 *Chung Chi Cheung v. R.*, [1939] AC 160, 168; *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] QB 529, 557.

laying down a rule of international law if international law has changed in the meantime.[40]

The legal system in the United States shares the English common-law tradition in this respect and considers international law other than treaties as a part of the common law itself. But US courts do not clearly distinguish between the various sources of international law, and their reasoning has been properly described as a 'potpourri approach'.[41] It seems that they are more inclined to apply international customary rules in cases of disputes between individuals and states than in such between states themselves. Sufficient state practice to establish the existence of an international customary rule has been found, for example, to exempt coastal fishing vessels from seizure[42] and to protect neutral ships in international waters from attack in the Falklands war.[43] No such rule was found to require the United States to provide temporary asylum to all persons fleeing from foreign civil wars, because such state practice would only reflect 'understandable humanitarian concern'.[44]

Conflicts between 'international common law' and US domestic law are very much dealt with on the same level as conflicts between international treaties and national legislation. The US Supreme Court has the ultimate authority in this respect, both with regard to federal courts and state courts.[45] Whether 'international common law' in the United States has the same quality to override earlier municipal law, as in the case of treaties, is a matter of dispute.[46] At any rate, US courts, like other national courts, generally attempt to avoid an interpretation of a legislative act which would bring it into conflict with the law of nations. However, this is often a matter of national perception of what international law says.

With regard to Western European countries in the civil law tradition, there is some controversy on the evaluation of recent constitutional developments. In a survey presented in 1985, Cassese saw a tendency, not only in developing and socialist countries, but also in states such as France, Spain and the Netherlands, to downgrade customary international law.[47] This view has been questioned by a more recent investigation of Western European constitutions and state practice conducted by Wildhaber and Breitenmoser. Their examination of Germany, Italy, Austria, Greece, France, Portugal, Switzerland, Liechtenstein, the Netherlands, Belgium, and Spain concludes that

> both the written and nonwritten constitutional law of Western European countries recognize conventional and customary international law as 'part of the law of the land', and that the practice in states without an explicit provision concerning the relationship between international law and municipal law is no different from the practice in states with such a clause in their constitutions.[48]

The authors also show that most Western European countries give priority to customary international law over conflicting rules of statutory domestic law and that national courts tend to find harmonization between obligations of international law and internal law by way of interpretation under the principle of 'friendliness to international law'.[49] The main problem with this analysis, however, is that its basis appears to be restricted to the two central principles of *pacta sunt servanda* (treaties must be adhered

40 *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] QB 529, 554, 557, 576–9, rejecting the contrary view in *The Harmattan*, *WLR* 1 (1975), 1485, at 1493–5. For the relevance of the act of state doctrine and of Foreign Office certificates, see further Akehurst, 6th edn of this book, Chapter 4.

41 See Janis, *op. cit.*, 100; F.L. Kirgis, Federal Statutes, Executive Orders and 'Self-Executing Custom', *AJIL* 81 (1987), 37–75; H.G. Maier, The Authoritative Sources of Customary International Law in the United States, *Mich. JIL* 10 (1989), 450; J.J. Paust, Customary International Law: Its Nature, Sources and Status as Law of the United States, *Mich. JIL* 12 (1990), 59–91.

42 *Paquete Habana* case, 175 US 677, 686–711 (1900).

43 *Amerada Hess v. Argentine Republic*, 830 F. 2d 421 (2d Cir. 1987).

44 *Echeverria-Hernandez v. United States Immigration & Naturalization Serv.*, 923 F. 2d 688, 692–3 (9th Cir. 1991), vacated, 946 F. 2d 1481 (9th Cir. 1991).

45 See *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 425–6 (1964).

46 See Janis, *op. cit.*, 102.

47 Cassese, *op. cit.*, 383.

48 L. Wildhaber/S. Breitenmoser, The Relationship between Customary International Law and Municipal Law in Western European Countries, *ZaöRV* 48 (1988), 163–207, 204.

49 *Ibid.*, 206.

to) and good faith (on the part of states in performing their international obligations). It is more likely that considerable diversity will emerge with regard to an analysis of what national courts consider customary international law or general principles in many other controversial areas.

The new states created in the process of decolonization generally mistrust customary international law developed by their former colonial masters and insist on the codification of new rules with their participation.[50] Therefore, it is not surprising that their constitutions rarely expressly recognize customary international law or general principles.

Similarly, the former socialist countries were not disposed to accept general rules of international law not developed by themselves in internal practice. The new Russian Constitution distinguishes between the effect of treaties and 'the generally recognized principles and norms of international law'. Treaty rules, without differentiating between 'self-executing' and 'non-self-executing' provisions, have a higher status than contrary domestic laws, disregarding whether the treaty is earlier or later; however, not above the federal Constitution itself.[51] The 'generally recognized principles and norms of international law' do not enjoy the same status, probably because they are not considered as specific enough. With regard to human rights, the Constitution recognizes that they are ensured 'according to the generally recognized principles and norms of international law'.[52] But the practical meaning of this and other similar provisions is, as yet, unclear.[53]

Conclusions

From what has been said above, it is clear that in many countries the law will sometimes fail to reflect the correct rule of international law. But this does not necessarily mean that these states will be breaking international law. Very often the divergence between national law and international law simply means that the respective state is unable to exercise rights which international law entitles (but does not require) that state to exercise. Even when a rule of municipal law is capable of resulting in a breach of international law, it is the application of the rule, and not its mere existence, which normally constitutes the breach of international law; consequently, if the enforcement of the rule is left to the executive, which enforces it in such a way that no breach of international law occurs, all is well. For instance, there is no need to pass an Act of Parliament in order to exempt foreign diplomats from customs duties;[54] the government can achieve the same result by simply instructing customs officers not to levy customs duties on the belongings of foreign diplomats.

Public international law and private international law

Laws are different in different countries. If a judge in state X is trying a case which has more connection with state Y than with state X, he is likely to feel that the case should have been tried in state Y, or (since some judges are reluctant to forgo the sense of self-importance which comes from trying cases) that he himself should try the case in accordance with the law of state Y. Feelings of this sort have produced a complicated set of rules in

50 See Chapter 2 above, 28–30.
51 Danilenko, *op. cit.*, 465.
52 Article 17, 1993 Russian Constitution.
53 See Danilenko, *op. cit.*, 467.
54 See Chapter 8 below, 126–7.

almost every country, directing the courts when to exercise jurisdiction in cases involving a foreign element, when to apply foreign law in cases involving a foreign element, and when to recognize or enforce the judgments of foreign courts. These rules are known as private international law, or the conflict of laws.[55]

The type of international law to which this book is mainly devoted is often called public international law, in order to distinguish it from private international law; the expression 'international law', used without any qualification, almost always means public international law, not private international law. International law, as noted above,[56] primarily governs the relationships between states, whereas in the nineteenth century private international law was thought of as regulating transborder relationships between individuals, in the sense of the old 'law merchant' (or *lex mercatoria*),[57] the usages among traders. Similar names can mislead and the only true connection between public international law and private international law is the transborder element of the facts being regulated.

Although some authors have advocated the idea of 'transnational law' comprising both systems, in reality, there is no such thing. No legal order exists above the various national legal systems to deal with transborder interactions between individuals (as distinct from states). The problem is, therefore, which of the various domestic laws should apply. States have taken the attitude that cases involving a foreign element should not necessarily be governed by their own law, the *lex fori*, and have adopted special conflict rules which indicate the national law to be applied in such cases. For example, if a Spanish court has to decide on the validity of a contract concluded between a French company and an Italian merchant to be performed in Madrid, it would have to apply the rules of Spanish private international law to find the applicable law of contracts (French, Italian, Spanish, or other national law, depending on the circumstances on the case). These rules do not have an international nature and there are as many systems of private international law as there are states.

There appears to be little connection between public international law and the various municipal systems of private international law.[58] Private international law originated from a belief that in certain circumstances it would be appropriate to apply foreign law or to let a foreign court decide the case. The trouble is that each state has its own idea of what is appropriate. For instance, English courts are very ready to enforce foreign judgments; the courts in the Netherlands and several other countries seldom do so, unless there is a treaty to that effect.[59] The rules determining the jurisdiction of a state's own courts in civil cases involving a foreign element differ so much that it is impossible to discern any common pattern. Even the rules about the application of foreign law differ. For instance, before 1800 a man's 'personal law' (that is, the law governing legitimacy, capacity to marry and other questions of family law) was the law of his religion in Muslim countries, and the law of his domicile (permanent home) in Western countries; one reason for this difference was that there was greater religious tolerance in Muslim countries than in Christian countries. After 1800, in Napoleon's time, France went through an intensely nationalistic phase, and decided that French law should be the personal law of all

55 See U. Drobnig, Private International Law, *EPIL* 10 (1987), 330–5; L. Collins (ed.), *Dicey and Morris on the Conflict of Laws*, 12th edn 1993; E.F. Scoles/P. Hay, *Conflict of Laws*, 1992.

56 See Chapter 1 above, 1–2.

57 I. Strenger, La Notion de *lex mercatoria* en droit du commerce international, *RdC* 227 (1991-II), 207–355; T. E. Carbonneau, *Lex Mercatoria and Arbitration*, 1993.

58 But see P.D. Trooboff, The Growing Interaction between Private and Public International Law, *Hague YIL* 6 (1993), 107–14. See further A.F.M. Maniruzzaman, Conflict of Law Issues in International Arbitration, *AI* 9 (1993), 371–403; W. Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, 1994.

59 See K. Lipstein, Recognition and Execution of Foreign Judgments and Arbitral Awards, *EPIL* 9 (1986), 322–6, with reference to bilateral and multilateral treaties on the matter; for the situation in the United States see *Restatement (Third)*, Vol. 1, Chapter 8, 591 *et seq.*

French nationals; after some hesitation, French courts inferred from this rule, by way of analogy, that *everyone's* personal law should be his national law, as distinct from the law of his domicile. The same thing happened in other continental countries at a slightly later date. England adhered to the old rule of domicile, but a series of nineteenth-century judicial decisions introduced a lot of artificiality and complexity into the rules about acquisition and loss of domicile. The consequence is extreme diversity between the rules of private international law in different countries, with resulting hardship; for instance, if a Spanish national domiciled in England gets an English divorce, it will be recognized in most English-speaking countries, but not in most continental countries. The significant thing, however, is that no country protested when France and other countries started abandoning the old rule of domicile; and it is submitted that the absence of protest constitutes a tacit admission that states are free to alter their rules of private international law at will.

Admittedly the differences between the rules of private international law in different countries must not be exaggerated; there *are* rules which are more or less the same in the vast majority of countries. An example is the rule concerning transfers of property; the validity of the transfer depends on the law in force at the place where the property was at the time of the alleged transfer (*lex situs* or *lex rei sitae*). But this similarity could be due to coincidence or to commercial convenience, rather than to any rules of public international law. Similarity between the laws in different countries does not necessarily reflect a rule of public international law; for instance, the law of contract is much the same in most English-speaking countries – simply because the original settlers in most English-speaking countries came from England.[60] In order to prove that public international law requires states to incorporate a particular rule in their municipal laws, it is not enough to show that rule does in fact exist in their municipal laws; it is also necessary to show an *opinio iuris*,[61] a conviction that public international law requires states to incorporate the rule in question in their municipal laws. This is what is lacking. When judges apply the *lex situs*, or any rule of private international law, they do not ask what the practice is in other countries, or attempt to bring their decisions into line with it; nor do they suggest that their actions are governed by any rule of public international law. When a state departs from a generally accepted rule of private international law, it is not denounced as a law-breaker by judges or diplomats in other countries. English judges sometimes say that their actions are dictated by 'comity'. This is an unusual word, and gives the impression of being a technical term; but it is unclear what, if anything, English judges mean when they use it. Its literal meaning is 'courtesy', and in this sense comity is regarded as something different from law of any sort; rules of comity are customs which are normally followed but which are not legally obligatory. At other times it is used as a synonym for private international law; as a synonym for public international law; or as a totally meaningless expression. It is a wonderful word to use when one wants to blur the distinction between public and private international law, or to avoid clarity of thought.[62]

It is therefore submitted that the rules of private international law do

60 J.N. Matson, The Common Law Abroad, *ICLQ* 42 (1993), 753 *et seq.*

61 See Chapter 3 above, 44–5.

62 On comity see Chapters 1, 2 and 3, 44 above.

not form part of public international law, or vice versa. However, it should be noted that states sometimes make treaties to unify their rules of private international law; and, when this happens, the content of private international law does come to be regulated by public international law.[63] The continuing work of the Hague Conference on Private International Law, founded in 1893, has been important in this connection.[64]

63 See H. Kötz, Unification and Harmonization of Laws, *EPIL* 10 (1987), 513–18.

64 See A. Dyer, Hague Conventions on Private International Law, *EPIL* II (1995), 663–70; Dyer, Hague Conventions on Civil Procedure, *ibid.*, 658–63; T.M.C. Asser Instituut (ed.), *The Influence of the Hague Conference on Private International Law*, 1993; K. Lipstein, One Hundred Years of Hague Conferences on Private International Law, *ICLQ* 42 (1993), 553 *et seq.* On the status (signatures and ratifications) of Conventions adopted by the Hague Conference, see *ILM* 35 (1996), 526. Furthermore, for the work of UNCITRAL see G. Herrmann, United Nations Commission on International Trade Law, *EPIL* 5 (1983), 297–301.