SCSL-2003-10-PT
(335-443)

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

**IN THE TRIAL CHAMBER**

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

Registrar: Mr Robin Vincent

Date filed: 29 September 2003



**THE PROSECUTOR**

**Against**

**BRIMA BAZZY KAMARA also known as**
**IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA**

CASE NO. SCSL – 2003 – 10 – PT

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# PROSECUTION RESPONSE TO THE DEFENCE APPLICATION IN RESPECT OF JURISDICTION AND DEFECTS IN INDICTMENT

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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 Ken Fleming, QC

**SPECIAL COURT FOR SIERRA LEONE**
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## I. INTRODUCTION

1. The Prosecution files this response to the Defence document entitled "Application by Brima Bazzy Kamara in respect of Jurisdiction and Defects in Indictment" (the "**Motion**"), filed on behalf of Brima Bazzy Kamara (the "**Accused**") on 22 September 2003.[1]

2. The Motion purports to be an "application", although no provision for such an "application" is made in the Statute of the Special Court (the "**Statute**") or in the Special Court's Rules of Procedure and Evidence (the "**Rules**"). It is evident that the Motion challenges the right of the Prosecutor and Judges of the Special Court to exercise their functions,[2] including their right to submit and approve indictments,[3] as well as challenging the legal validity of the Special Court's procedure for the approval of indictments,[4] and the legal validity of Articles 2, 3 and 4 of the Special

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1 Registry Page ("RP") 325-331.
2 Motion, para. 1.12 and 1.16 to 1.19.
3 Motion, paras. 1.13 and 1.20.
4 Motion, paras. 1.14 and 1.15.

Court's Statute, in so far as they confer jurisdiction on the Special Court to try crimes prior to the passing of the Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**").[5] Furthermore, the Motion challenges the jurisdiction of the Special Court to try crimes to which Article IX of the Lomé Agreement of 7 July 1999 refers.[6] The Prosecution submits that the Motion cannot be characterised as anything other than a preliminary motion raising objections based on lack of jurisdiction, within the meaning of Rule 72(B)(i) of the Rules.[7] The title of the document also suggests that it is a preliminary motion raising objections based on defects in the form of the indictment, within the meaning of Rule 72(B)(ii).[8]

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

## II. ARGUMENT

### A. THE ALLEGED VIOLATION OF THE CONSTITUTION OF SIERRA LEONE

4. Paragraphs 1.1 to 1.21 of the Motion argue that the indictment in this case is invalid, because (1) the Constitution of Sierra Leone provides that the Sierra Leonean Director of Public Prosecutions has the exclusive right to prosecute crimes in Sierra Leone; (2) the procedure in the Special Court's Rules for the approval of indictments is contrary to the Constitution of Sierra Leone; and (3) because the Judge of the Special Court who approved the indictment was not appointed pursuant to the Constitution of Sierra Leone.

5. Each of these arguments in premised on an underlying argument that the Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**") "creates a Sierra Leonean jurisdiction",[9] that upon the passing of the Implementing

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[5] Motion, paras. 2.1 to 2.4.

[6] Motion, para. 3.12.

[7] *Cf. Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 6 ("All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction?").

[8] Given that the initial appearance of the Accused has already been held, the right of the Accused to bring a preliminary motion at this stage is not contested.

[9] Motion, para. 3.3.

Legislation, the crimes under Articles 2, 3 and 4 of the Statute were created crimes of Sierra Leone,[10] that the Prosecutor of the Special Court is therefore prosecuting crimes under Sierra Leonean law,[11] and that the Judges of the Special Court are therefore exercising the judicial power of Sierra Leone.[12] The Prosecution submits that this underlying argument is wholly erroneous.

6. 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.

7. The Special Court was established by the Special Court Agreement, an international treaty concluded by the United Nations and the Government of Sierra Leone,[13] which 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.

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

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10 Motion, para. 1.10.

11 Motion, para. 1.12.

12 Motion, para. 1.18. See also Motion, para. 3.3, arguing that cases tried by the Special Court "are determined pursuant to domestic law".

13 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".

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.

9. The validity of the Special Court Agreement as an international treaty is not affected by the Defence's arguments concerning the Constitution of Sierra Leone.[14] 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.[15]

10. In the present case, even if it is 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 be a 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.

11. 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

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[14] 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.

[15] 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), pp. 10-11, Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 618.

ICC Statute,[16] 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 Leone citizens.[17] Moreover, the ICC is entitled to exercise its functions and powers on the territory of Sierra Leone.[18] A similar constitutional issue to the one 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,[19] 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 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."[20]

Similarly, South Africa enacted legislation implementing the ICC Statute,[21] 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,[22] of which the ICC is not one.

12. 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

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[16] 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.

[17] ICC Statute, Article 12.

[18] 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 ...").

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

[20] Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002) para. 3.46. The issue is considered in paras. 2.35, 2.41 to 2.55, and 3.40 to 3.49. See also 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 U.S.A.

[21] 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.

[22] South African Constitution, sections 165(1) and 166.

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. This is so, in view of the analogies with these other countries,[23] 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 Government and the Parliament of Sierra Leone apparently did not consider that they were acting unconstitutionally.

13. 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.[24] It is therefore unnecessary for the Special Court to decide this question. Indeed, the Special Court has no *jurisdiction* to decide this question.

## B. THE ALLEGED RETROSPECTIVITY OF THE IMPLEMENTING LEGISLATION

14. Paragraphs 2.1 to 2.4 of the Motion argue that because the crimes in Articles 2 to 4 of the Statute were not crimes under Sierra Leonean law until the enactment of the

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[23] 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.

[24] See, e.g., *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997), p. 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".

Implementing Legislation, the creation of liability for acts committed prior to that offends a constitutional prohibition against retrospective legislation. However, because the Special Court functions in the sphere of international law and not municipal law, the Constitution of Sierra Leone is inapplicable. The principle of *nullum crimen sine lege* requires only that the relevant acts were unlawful at the time of their commission as a matter of international law.[25]

## C. THE ALLEGED APPLICABILITY OF THE LOMÉ AGREEMENT

15. Paragraphs 3.1 to 3.13 of the Motion argue that the Special Court has no jurisdiction to hear and determine crimes allegedly committed prior to 7 July 1999, as such crimes are covered by an effective amnesty provision in Article IX of the Lomé Agreement.

16. However, apart from any other consideration, the Special Court must comply with the provisions of its own Statute, which forms part of the treaty creating it, and which determines the parameters of its jurisdiction. Even if Article IX of the Lomé Agreement purported to be a legal bar to the prosecution of a person by the Special Court for crimes under Articles 2-4 of the Statute (which for the reasons given below, it does not and could not), the Special Court would be bound to apply the express provision in Article 10 of its Statute, which states that "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."

17. In any event, the Lomé Agreement[26] is not a treaty under international law,[27] but an agreement signed between two national bodies—the Government of Sierra Leone and

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[25] See, e.g., *Prosecutor v. Delalic et al. (Celebici case), Judgment*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, para. 178 (indicating that the ICTY merely identifies and applies existing customary international law).

[26] "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)" (the "**Lomé Agreement**").

[27] Article 2 of the Vienna Convention of the Law of Treaties 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 and whatever its particular designation" (emphasis added). The Lomé Agreement is patently not an international treaty, and the reference in the Lomé Ratification Act to section 40(4) of the Sierra Leone Constitution cannot transform it into an international treaty.

the RUF. Others who signed the Agreement were not parties to it, but merely signed as "moral guarantors" or as international organizations and governments who were "facilitating and supporting" the conclusion of the Agreement.[28] The Lomé Agreement thus has no force under international law. It had no legal basis at all until the Lomé Peace Agreement (Ratification) Act 1999 (the "**Lomé Ratification Act**") was enacted by the Sierra Leone Parliament, and even then its basis was limited to domestic law. The Prosecution submits that even if there is a conflict between Sierra Leone's domestic law and the Special Court's Statute (and this is in no way conceded by the Prosecution), domestic law cannot be invoked to invalidate a properly concluded treaty such as the Special Court Agreement concluded between the United Nations and Sierra Leone.[29]

18. Further more, even assuming that an amnesty was extended by the Lomé Ratification Act, a national statute, this was repealed as a matter of national law on 7 March 2002 by the enactment of the Implementing Legislation. The Implementing Legislation is an act subsequent to the Lomé Ratification Act which therefore supersedes and replaces the terms of the Lomé Ratification Act to the extent that the two acts are inconsistent. Based on the doctrine of subsequent legislation,[30] if a later enactment is inconsistent with the provisions of an earlier enactment, those provisions of the earlier enactment are impliedly, even if not expressly, repealed.

19. Finally, even if Article IX of the Lomé Agreement somehow had some legal effect in the legal system of the Special Court (and for the reasons given above, it does not), that provision of the Lomé Agreement, properly construed, was not intended to cover crimes under Articles 2-4 of the Special Court Statute. At the time of signature of the Lomé Agreement, the Special Representative of the Secretary-General for Sierra Leone appended to his signature on behalf of the United Nations a disclaimer to the

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[28] See Lomé Agreement, Articles XXXIV and XXXV. The text of the Lomé Agreement is contained in a schedule to the Lomé Ratification Act.

[29] See the provisions of the two Vienna Conventions on the Law of Treaties, referred to in footnote 14 above.

[30] Also known as the doctrine of implied repeal, it states that an earlier Act cannot be used to amend or repeal a later Act. Instead, where any conflict arises between Acts of Parliament that cannot be smoothed by judicial interpretation, the later one always takes precedence: *lex posteriores priores contrarias abrogant.*

effect that the United Nations holds the understanding that the amnesty provision in Article IX of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[31] Neither of the parties to the Lomé Agreement, nor any of the international organizations or States represented at the signing, voiced any objection or disagreement with this interpretation at the time, or at any subsequent time. Indeed, in the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations.[32] The inclusion of Article 10 in the Special Court's Statute can itself be seen as additional confirmation of this interpretation.[33] The Prosecution submits that this interpretation is further supported by a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law.[34] The matters referred to in the previous paragraph are themselves a practical example of this norm. Further evidence of this norm can be found in the fact that certain international bodies and national courts have considered amnesty laws incompatible with treaty provisions on human rights.[35] The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone also expressed the view that to the extent that the Lomé Agreement purported to confer an amnesty for serious violations of international humanitarian law, it would be illegal under international law.[36]

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[31] See Security Council Resolution 1315 (2000), 14 August 2000, preambular para. 5; Report of the Secretary-General, ibid., para. 23.

[32] See Report of the Secretary-General, para. 24.

[33] Cassese, *International Criminal Law* (2003), ("**Cassese**"), p. 316.

[34] See, e.g., Brownlie, ibid., note 15 pp. 514-515, indicating that *jus cogens* norms are "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy" (footnotes omitted); Cassese, p. 316, stating that "whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe." See also the Declaration on the Protection of all Persons from Enforced Disappearances, General Assembly Resolution 47/133, 18 December 1992, UN Doc. A/RES/47/133 (1992), Articles 14 and 18.

[35] See, Cassese, pp. 313-314 (referring to the United Nations Human Rights Committee, the Inter-American Commission, the Inter-American Court of Human Rights and an order of a Spanish Judge) and p.316 (referring to an order of an Argentinian judge and the Spanish *Audiencia nacional*).

[36] See Report of the Secretary-General, para. 24: "With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law ...".

## IV. CONCLUSION

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

21. In paragraphs 4.1 and 4.2 of the Motion, the Defence requests the Trial Chamber's leave to file an additional "application" at a later time. The Prosecution submits that this request is premature. The Prosecution submits that as a general principle, in the interests of the orderly and efficient conduct of litigation, a party should be required to put forward all arguments in support of a particular challenge at the same time, in a single motion. Where a party subsequently has reason to put forward additional arguments at a later stage, it should apply at that time for leave to do so, justifying why those arguments could not reasonably have been raised earlier.[37] Should the Defence file a motion at any future time seeking leave to raise new arguments, the Prosecution would respond to that motion at the appropriate time.

Freetown, 30 September 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Walter Marcus-Jones
Senior Appellate Counsel

Christopher Staker
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

[37] In other words, a party should not be able to request a "blank cheque" in advance to file further motions or arguments in the future. The fact that the Defence has not yet received disclosure is in any event in the Prosecution's submission not of itself a reason why the Defence cannot put all of its arguments now. Although the deadline for the filing of preliminary motions is fixed by reference to a period after disclosure, this should not be taken to suggest that the Defence needs disclosure in order to be able to determine whether it intends to bring preliminary motions.

# PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 [extract].

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

3. 1969 Vienna Convention on the Law of Treaties [extract].

4. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [extract].

5. Aust, *Modern Treaty Law and Practice* (2000) [extract].

6. Brownlie, *Principles of Public International Law* (5th edn, 1998) [extract].

7. ICC Statute [extract].

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

8. Details of Australia's ratification.
9. Details of Sierra Leone's ratification.
10. Details of South Africa's ratification.

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

12. Constitution of South Africa [extract].

13. Akehurst, *Akehurst's Modern Introduction to International Law* (7th edn, 1997) [extract].

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

15. "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)", "Lome Agreement" [extract].

16. Security Council Resolution 1315 (2000), 14 August 2000.

17. Cassese, *International Criminal Law* (2003) [extract].

18. Declaration on the Protection of all Persons from Enforced Disappearances, General Assembly Resolution 47/133, 18 December 1992, UN Doc. A/RES/47/133 (1992) [extract].

19. *Prosecutor v. Furundzija, Judgment*, IT-95-17/1, Trial Chamber, 10 December 1998 [extract].

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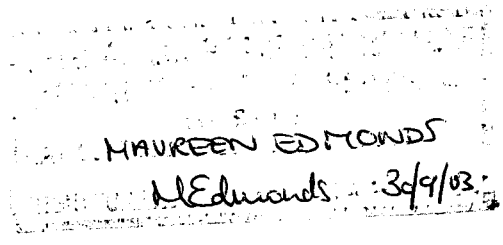
*Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 [extract].



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**Before:**
**Judge Cassese, Presiding**
**Judge Li**
**Judge Deschênes**
**Judge Abi-Saab Judge Sidhwa**

**Registrar:**
**Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Decision of:**
**2 October 1995**

**PROSECUTOR**

**v.**

**DUSKO TADIC a/k/a "DULE"**

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# DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

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The Office of the Prosecutor:

**Mr. Richard Goldstone, Prosecutor**
**Mr. Grant Niemann**
**Mr. Alan Tieger**
**Mr. Michael Keegan**
**Ms. Brenda Hollis**

Counsel for the Accused:

**Mr. Michail Wladimiroff**
**Mr. Alphons Orie**
**Mr. Milan Vujin**
**Mr. Krstan Simic**

## I. INTRODUCTION

### A. The Judgement Under Appeal

1. 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 Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

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2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae.*

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . . ]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

## B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))

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(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

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6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

# INDEX OF AUTHORITIES 2

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

United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

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# 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 specificity 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

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## 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.

### 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 jurisdiction 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

## INDEX OF AUTHORITIES 3

1969 Vienna Convention on the Law of Treaties [extract].

# Vienna Convention on the Law of Treaties

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

### Article 27
### Internal law and observance of treaties

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

### Article 46
### Provisions of internal law regarding competence to conclude treaties

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

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

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

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

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

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1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [extract].

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

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

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

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

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

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

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

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

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

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

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Aust, *Modern Treaty Law and Practice* (2000) [extract].

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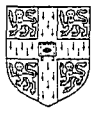
# MODERN TREATY LAW AND PRACTICE

ANTHONY AUST



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

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

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

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

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

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

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

[19] See Thirlway, 'Law and Procedure', at p. 86.

[20] See Sinclair, pp. 10–24.

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

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

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

### *Effect of emerging customary law on prior treaty rights and obligations*

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

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

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

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

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Brownlie, *Principles of Public International Law* (5th edn, 1998) [extract].

# PRINCIPLES OF PUBLIC INTERNATIONAL LAW

BY

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# 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), 290; *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.

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.

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ICC Statute [extract].

# Rome Statute of the International Criminal Court

(U.N. Doc. A/CONF.183/9*)

Entire Statute (html)

# Rome Statute of the International Criminal Court

[as corrected by the procés-verbaux of 10 November 1998 and 12 July 1999]

## 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.

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preamble / Part 2

(entire Statute (261K))

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.

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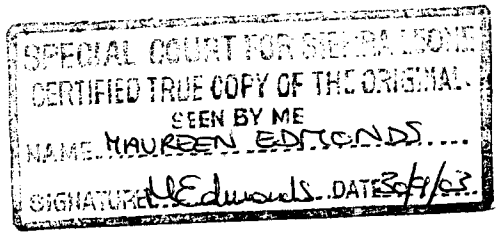
International Criminal Court: Extracts from website www.icc-cpi.int.
Details of Australia's ratification.



# International Criminal Court



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**Australia** (Asia / Pacific Islands)

**Signature status:**
Australia signed on 9 December 1998.

**Membership:**
Like-Minded Country, Commonwealth

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

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

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

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

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

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

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

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

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

**Ratification and Implementation Process:**
Under the Australian Constitution, treaty-making is the formal responsibility of the Executive branch rather than the Parliament. Decisions about the negotiation of multilateral conventions, including determination of objectives, negotiating positions, the parameters within which the Australian delegation can operate, and the final decision as to whether to sign and ratify are taken at Ministerial level, and in many cases, by Cabinet. In the case of the ICC

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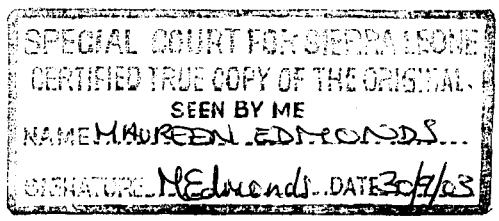
International Criminal Court: Extracts from website www.icc-cpi.int.
Details of Sierra Leone's ratification.



# International Criminal Court



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**Sierra Leone** (Africa)

**Signature status:**
Sierra Leone signed on 17 October 1998.

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

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

**Ratification and Implementation Process:**
No information is available.

**Last updated:**
30 September 2002

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International Criminal Court: Extracts from website www.icc-cpi.int.
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**South Africa** (Africa)

**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

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treaty, the responsible interministerial committee submits the treaty for the approval of the Cabinet. The Cabinet then submits it to the JSCOT, which by a 1996 reform of the treaty-making process, scrutinizes all proposed treaty action by the Australian government, except for urgent treaties and non-binding treaty action (e.g. signature).

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

**Last updated:**
11 March 2003

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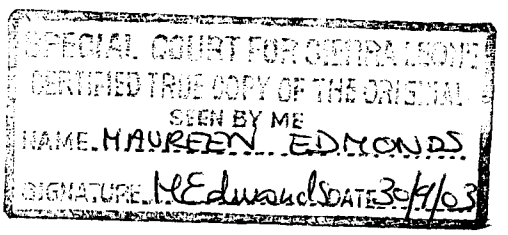
Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002) [extract].



The Parliament of the Commonwealth of Australia

# Report 45

## The Statute of the International Criminal Court

Joint Standing Committee on Treaties

May 2002

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

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

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

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

## Concerns about constitutionality

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

2.36 A number of specific claims were made:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## The proposed implementing legislation and the ICC crimes

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

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

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

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

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

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

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

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

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

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

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

## Concerns about constitutionality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Recommendation 5**

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

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

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Constitution of South Africa [extract].

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*Chapter 8*

# Courts and Administration of Justice

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### Judicial authority

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

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

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

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

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

### Judicial system

166. The courts are

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

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

**Constitutional Court**

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

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

(3) The Constitutional Court

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

(4) Only the Constitutional Court may

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

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

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

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

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

**Supreme Court of Appeal**

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

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

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Akehurst, *Akehurst's Modern Introduction to International Law* (7th edn, 1997) [extract].

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# AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Seventh revised edition

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## 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 a 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. Capotorti, 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.'

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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.

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

**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")**

**("*CELEBICI* Case")**

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**JUDGEMENT**

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**Counsel for the Accused:**

**Mr John Ackerman and Ms Edina Rešidovic 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**

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

174. 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 *Tadic 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]

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:

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> 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.

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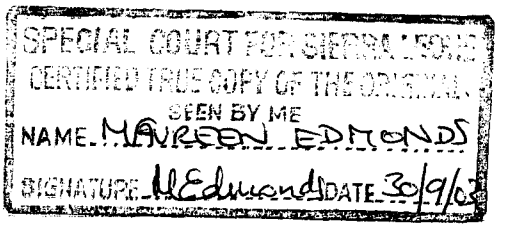
"Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)", "Lome Agreement" [extract].



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# PEACE AGREEMENT BETWEEN THE GOVERNMENT OF SIERRA LEONE AND THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE

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**THE GOVERNMENT OF THE REPUBLIC OF SIERRA LEONE and THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE (RUF/SL)**

Having met in Lome, Togo, from the 25 May 1999, to 7 July 1999 under the auspices of the Current Chairman of ECOWAS, President Gnassingbe Eyadema;

Recalling earlier initiatives undertaken by the countries of the sub-region and the International Community, aimed at bringing about a negotiated settlement of the conflict in Sierra Leone, and culminating in the Abidjan Peace Agreement of 30 November, 1996 and the ECOWAS Peace Plan of 23 October, 1997;

Moved by the imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation;

Committed to promoting full respect for human rights and humanitarian law;

Committed to promoting popular participation in the governance of the country and the advancement of democracy in a socio-political framework free of inequality, nepotism and corruption;

Concerned with the socio-economic well being of all the people of Sierra Leone;

Determined to foster mutual trust and confidence between themselves;

Determined to establish sustainable peace and security; to pledge forthwith, to settle all past, present and future differences and grievances by peaceful means; and to refrain from the threat and use of armed force to bring about any change in Sierra Leone;

Reaffirming the conviction that sovereignty belongs to the people, and that Government derives all its powers, authority and legitimacy from the people;

Recognising the imperative that the children of Sierra Leone, especially those affected by armed conflict, in view of their vulnerability, are entitled to special care and the protection of their inherent right to life, survival and development, in accordance with the provisions of the International Convention on the Rights of the Child;

Guided by the Declaration in the Final Communiqué of the Meeting in Lome of the Ministers of Foreign Affairs of ECOWAS of 25 May 1999, in which they stressed the importance of democracy as a factor of regional peace and security, and as essential to the socio-economic development of ECOWAS Member States; and in which they pledged their commitment to the consolidation of democracy and respect of human rights while reaffirming the need for all Member States to consolidate their democratic base, observe the principles of good governance and good economic management in order to ensure the emergence and development of a democratic culture which takes into account the interests of the peoples of West Africa;

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Recommitting themselves to the total observance and compliance with the Cease-fire Agreement signed in Lome on 18 May 1999, and appended as Annex 1 until the signing of the present Peace Agreement;

**HEREBY AGREE AS FOLLOWS:**

# PART ONE

## CESSATION OF HOSTILITIES

### ARTICLE 1

### CEASE-FIRE

The armed conflict between the Government of Sierra Leone and the RUF/SL is hereby ended with immediate effect. Accordingly, the two sides shall ensure that a total and permanent cessation of hostilities is observed forthwith.

### ARTICLE II

### CEASE-FIRE MONITORING

1. A Cease-fire Monitoring Committee (hereinafter termed the CMC) to be chaired by the United Nations Observer Mission in Sierra Leone (hereinafter termed UNOMSIL) with representatives of the Government of Sierra Leone, RUF/SL, the Civil Defence Forces (hereinafter termed the CDF) and ECOMOG shall be established at provincial and district levels with immediate effect to monitor, verify and report all violations of the cease-fire.

2. A Joint Monitoring Commission (hereinafter termed the JMC) shall be established at the national level to be chaired by UNOMSIL with representatives of the Government of Sierra Leone, RUF/SL, CDF, and ECOMOG. The JMC shall receive, investigate and take appropriate action on reports of violations of the cease-fire from the CMC. The parties agree to the definition of cease-fire violations as contained in Annex 2 which constitutes an integral part of the present Agreement.

3. The parties shall seek the assistance of the International Community in providing funds and other logistics to enable the JMC to carry out its mandate.

# PART TWO

## GOVERNANCE

The Government of Sierra Leone and the RUF/SL, recognizing the right of the people of Sierra Leone to live in peace, and desirous of finding a transitional mechanism to incorporate the RUF/SL into governance within the spirit and letter of the Constitution, agree to the following formulas for structuring the government for the duration of the period before the next elections, as prescribed by the Constitution, managing scarce public resources for the benefit of the development of the people of Sierra Leone and sharing the responsibility of implementing the peace. Each of these formulas (not in priority order) is contained in a separate Article of this Part of the present Agreement; and may be further detailed in protocols annexed to it.

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## REQUEST FOR INTERNATIONAL INVOLVEMENT

The parties request that the provisions of the present Agreement affecting the United Nations shall enter into force upon the adoption by the UN Security Council of a resolution responding affirmatively to the request made in this Agreement. Likewise, the decision-making bodies of the other international organisations concerned are requested to take similar action, where appropriate.

# PART SEVEN

## MORAL GUARANTORS AND INTERNATIONAL SUPPORT

### ARTICLE XXXIV

### MORAL GUARANTORS

The Government of the Togolese Republic, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations shall stand as Moral Guarantors that this Peace Agreement is implemented with integrity and in good faith by both parties.

### ARTICLE XXXV

### INTERNATIONAL SUPPORT

Both parties call on the International Community to assist them in implementing the present Agreement with integrity and good faith. The international organisations mentioned in Article XXXIV and the Governments of Benin, Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Liberia, Libyan Arab Jamahiriya, Mali, Nigeria, Togo, the United Kingdom and the United States of America are facilitating and supporting the conclusion of this Agreement. These States and organisations believe that this Agreement must protect the paramount interests of the people of Sierra Leone in peace and security.

# PART EIGHT

## FINAL PROVISIONS

### ARTICLE XXXVI

### REGISTRATION AND PUBLICATION

The Sierra Leone Government shall register the signed Agreement not later than 15 days from the date

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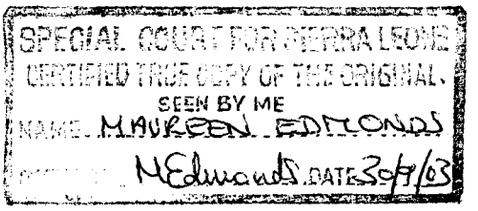
Security Council Resolution 1315 (2000), 14 August 2000.



United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

# Resolution 1315 (2000)

## Adopted by the Security Council at its 4186th meeting, on 14 August 2000

*The Security Council*:

*Deeply concerned* 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,

*Commending* the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

*Noting* that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

*Noting also* the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

*Recalling* that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

*Reaffirming* the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

*Recognizing* that, in the particular 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,

*Taking note* in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

*Recognizing further* the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

*Noting* the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

*Noting further* the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

*Acknowledging* the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

*Reiterating* that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably 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;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special 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 Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, 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;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) 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;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

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Cassese, *International Criminal Law* (2003) [extract].

# INTERNATIONAL CRIMINAL LAW

ANTONIO CASSESE

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# 17

# LEGAL IMPEDIMENTS TO THE EXERCISE OF NATIONAL JURISDICTION

Many obstacles in national legislation may hamper or put in jeopardy the institution of criminal proceedings for international crimes. The principal ones are: (i) laws granting amnesty for broad categories of crimes; (ii) national statutes of limitation; (iii) the prohibition of double jeopardy (the principle of *ne bis idem*), whereby a person may not be brought to trial twice for the same offence; (iv) national laws on immunity from prosecution of Heads of State, members of government or parliamentarians.

## 17.1 AMNESTY

Many States have passed legislation granting amnesty, with regard to specific episodes in the States' histories, for war crimes or crimes against humanity, or for broad categories of crimes that include the two classes just referred to. They have thus cancelled the crimes. After the enactment of such laws, conduct that was previously criminal is no longer such, with the consequence that: (i) prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and (ii) any sentence passed for the crime is obliterated.

After the Second World War, States such as France and Italy granted amnesty to those nationals who had fought against the Germans. (Later on the Italian authorities passed an amnesty law for fascists and collaborators as well.) On 18 June 1966, when the Algerian war was over, the French Parliament passed a law granting amnesty for all crimes committed in that conflict as well as in Indochina. Chile and Argentina passed laws providing for amnesty for all crimes committed during the post-Allende period, in the former case, and the military dictatorship, in the latter. Other countries such as Peru and Uruguay also enacted similar laws covering gross violations of human rights comprising torture or crimes against humanity.

The rationale behind amnesty is that in the aftermath of periods of turmoil and deep rift, such as those following armed conflict, civil strife, or revolution, it is best to heal social wounds by forgetting past misdeeds, hence by obliterating all the criminal

offences that may have been perpetrated by any side. It is believed that in this way one may more expeditiously bring about cessation of hatred and animosity, thereby attaining national reconciliation. However, in some recent instances the incumbent military and political leaders themselves passed amnesty laws, in view of an expected change in government and for the clear purpose of exempting themselves from future prosecution.

On the practical side, it is doubtful that amnesty laws may heal open wounds. Particularly when very serious crimes have been committed involving members of ethnic, religious, or political groups and eventually pitting one group against another, moral and psychological wounds may fester if attempts are made to sweep past horrors under the carpet. Resentment and hate are temporarily suppressed; sooner or later, however, they resurface and spawn even greater violence and crimes.

The choice between forgetting and justice must in any event be left to policy-makers and legislators. From a legal viewpoint, one may nevertheless note that international rules often oblige States to refrain from granting amnesty for international crimes. Here we should distinguish between treaty rules and customary rules.

In many instances international bodies or national courts have considered amnesty laws incompatible with treaty provisions on human rights, in particular with those provisions which require the granting of a right to judicial remedies for any violations of human rights. This is the opinion that the UN Human Rights Committee set out in 1994 in its General Comment no. 20 as well as its 'views' in *Laureano Atachahua* v. *Peru*, and in its comments on the reports of Peru and Haiti. The Committee took the same position in *Rodríguez* v. *Uruguay* with regard to torture.[1]

The Inter-American Commission shared this view in its reports on El Salvador,[2] Uruguay,[3] Argentina,[4] Chile,[5] and Colombia.[6]

One may also recall that the Inter-American Court of Human Rights recently held in the *Barrios Altos* case (*Chumbipuma Aguirre and others* v. *Peru*) that the granting of amnesty to the alleged authors of such gross violations of human rights as torture, summary executions, and forced disappearances was contrary to the non-derogable rights laid down in the body of international law on human rights and in particular to some provisions of the American Convention on Human Rights; it consequently held that two laws passed by Peru to grant such amnesty were 'devoid of legal effects' and

[1] In its 'views' in that case, the UN Human Rights Committee stated that amnesties for gross violations of human rights 'are incompatible with the obligations of the State Party under the Covenant'. The Committee noted 'with deep concern that the adoption of this Law [a Uruguayan law of 1986, called the Limitations Act or Law of Expiry] effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State Party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State Party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations' (§12).

[2] Report no. 26/92, IACHR Annual Report, 1992–3 (at www.oas.org).

[3] Report no. 29/92, IACHR Annual Report, 1992–3 (ibid.).

[4] Report no. 24/92, IACHR, Annual Report, 1992–3 (ibid.).

[5] Report no. 25/98, IACHR Annual Report, 1997 (ibid.).

[6] Third Report on Colombia, Chapter IV, §345, IACHR 1999 (ibid.).

the Peruvian authorities were obliged to initiate criminal proceedings against the alleged authors of those crimes (§§41–4, and 51(3–5)).

Finally, a Spanish judge refused to take into account an amnesty law as being contrary to international law in *Fortunato Galtieri* (order of 25 March 1997, at 7–9).[7]

It should be added that, as one commentator has noted,[8] some international treaties (for instance, the Convention on Genocide of 1948 and the four Geneva Conventions of 1949) impose upon State parties the obligation to prosecute and punish the alleged authors of crimes prohibited by such treaties. To pass and apply amnesty laws to alleged authors of any such crime would run counter to those treaty obligations.

Let us now ask ourselves whether there has evolved any rule of customary international law prohibiting amnesty for international crimes.

Against the existence of such a rule one could note that States have made agreements explicitly providing for amnesty for a set of offences including such offences as war crimes, torture, or crimes against humanity. It may suffice to cite here the Evian Agreements of 1962 between France and Algeria.[9] Mention may also be made of a legally binding Community act, the Framework decision of the Council of the European Union of 10 December 2001 (Article 5 of which envisages amnesty as one of the legal grounds on which a State may refuse the execution of arrest warrants, without making any exception for the international crimes referred to in the enumeration of Article 2). All these treaties and other acts have as their underpinning the principle of respect for State sovereignty, and its implication that the power to decide who may be exempted from criminal punishment belongs to the sovereign prerogatives of each State.

To support instead the gradual evolution of a customary prohibition of amnesty for the crimes under discussion, one may mention other elements of State practice. On 7 July 1999 the Special Representative of the UN Secretary-General attached a disclaimer to the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone,[10] which provided for amnesty in Article 9. Under this disclaimer:

[7] The Chilean Supreme Court first held that amnesty laws were admissible and applicable (see *Osvaldo Romo Mena*, decision of 26 October 1995, at 3–5), then, in a decision of 9 September in the same case, held the contrary view (at 2–6).

[8] P. Gaeta, 'Les règles internationales sur les critères de compétence des juges nationaux', in Cassese and Delmas-Marty (eds), *Crimes internationaux*, 197–209.

[9] See also the 1977 Second Protocol Additional to the Geneva Conventions of 1949. In Article 6(5) it provides that at the end of hostilities the authorities in power must endeavour to grant amnesty 'to persons who have participated in the armed conflict'. The idea is that those who have simply fought, *and not necessarily committed any crimes*, against the government—or for the government in a conflict where the government lost—should not be prosecuted for murder, treason, etc. or any of the offences under national law with which a person who fought against the government, and perhaps killed government soldiers in combat, could be charged. Article 6(5) exists to promote national reconciliation by having those 'offences' forgiven. It must also be noted that, when the Protocol was drafted (between 1974 and 1977), the idea that serious violations of international rules on internal armed conflict could be classified as war crimes, had not yet been adopted.

[10] See UN Doc. S/1999/777.

The United Nations interprets that the amnesty and pardon in Article 9 of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.

In its turn, Article 10 of the Statute of the Special Court for Sierra Leone provides that an amnesty granted for the crimes falling under the Court's jurisdiction 'shall not be a bar to prosecution'. Interestingly, the same language may be found in Article 40 of the Cambodian Bill of 2000 on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. Furthermore, in 2000, France revised its Constitution to implement the Statute of the ICC, after the Constitutional Council had held in 1999, in *Constitutionality of the ICC Statute* (§34), that the principle of complementarity laid down in the ICC Statute entailed that France might have to arrest and hand over to the Court for trial a person benefiting from amnesty in France, and this consequence was contrary to the French Constitution, in particular to the principle laid down in Article 34 whereby it is the prerogative of the French Parliament to decide on amnesty. Thus, in the event France bowed to the principle that laws on amnesty may not be relied upon for crimes falling under the Court's jurisdiction.

These innovative manifestations of international practice find their rationale in the notion that, as international crimes constitute attacks on *universal* values, no *single* State should arrogate to itself the right to decide to cancel such crimes, or to set aside their legal consequences. These manifestations therefore reflect the concept that the requirement to dispense justice should trump the need to respect State sovereignty. However, they are not yet so widespread as to warrant the contention that a customary rule has crystallized, the more so because, as stated above (16.1) no customary rule having a general purport has yet emerged imposing upon States the obligation to prosecute and punish the alleged authors of any international crime. Indeed, if such a rule could be held to have taken shape, one could infer from it that granting amnesty would conflict with such a rule.

Perhaps the current status of international practice, in particular its inconsistency combined with the more and more widespread *opinio juris* in the international community that international crimes should be punished, could be conceptualized as follows. There is not yet any general obligation for States to refrain from enacting amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless, if the courts of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such courts would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States. One might add that, in light of the current trends of the international community, one may find much merit in the distinction suggested, at least for minor defendants, by a distinguished judge and commentator,[11] between

[11] D. Vandermeersch, 'Droit belge', in Cassese and Delmas-Marty (eds), *Juridictions nationales*, at 108. See also J. Dugard, in Cassese, Gaeta, John, *ICC Commentary*, at 695–8.

amnesties granted as a result of a process of national reconciliation, and blanket amnesties. The legal entitlement of foreign States not to take into account an amnesty passed by the national State of the alleged perpetrator should apply to the second category. Instead, if the amnesty results from a specific individual decision of a court or a Truth and Reconciliation Commission, the exigencies of justice could be held to be fulfilled, and foreign courts should refrain from adjudicating those crimes. It should be added that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe. At any rate, this is the view an ICTY Trial Chamber spelled out in *Furundžija*, with regard to torture as a war crime (§155). An Argentinian judge took a similar view in *Simon Julio, Del Cerrro Juan Antonio* (at 43–64, 103–4). Also the Spanish *Audiencia nacional* held amnesty laws concerning international crimes to be contrary to *jus cogens* in *Scilingo* (at 7, Legal Ground 8) and *Pinochet* (at 7–8, Legal Ground 8).

## 17.2 STATUTES OF LIMITATION

Many States lay down rules providing that after the elapse of a certain number of years (normally, 10 or 20) *no prosecution may any longer be initiated* with regard to some major categories of crimes such as murder, robbery, etc. Some States also add provisions whereby, if *a final sentence* pronounced for a crime has not been served after a certain number of years, it is no longer applicable. (For instance, in France, under Article 7 of the Code of Criminal Procedure, the right to prosecute a crime is forfeited within 10 years of the perpetration of the crime, whereas, pursuant to Article 132–2 of the Criminal Code, a penalty is no longer applicable 20 years after the issuance of a final sentence; similar provisions may be found in the codes of such European countries as Austria, Germany, Switzerland, Portugal, and Denmark.)

The rationale behind this legislation is that the passage of time renders the collection of evidence very difficult (in that witnesses are no longer available, material evidence may have disappeared or got lost, etc.). In addition, it is felt that it is better for society to forget, the more so because, once many years have gone by, the victims or their relatives may have become reconciled to past crimes. Another ground warranting statutes of limitation is often found in the fact that as a result of the failure of prosecuting officers to search for evidence or find the alleged culprit, the deterrent effect of criminalization dwindles and eventually comes to naught; consequently, leaving open the possibility for prosecution no longer proves appropriate.

In many States the general provisions on the statute of limitation also apply to at least some classes of international crimes. For instance, in Spain, pursuant to Article 113 of the Criminal Code, after 20 years no prosecution is admissible for crimes involving *reclusion mayor* (imprisonment of 26 to 30 years), whereas the statutory period is of 15 years for crimes entailing *reclusion menor* (imprisonment of 12 to 20

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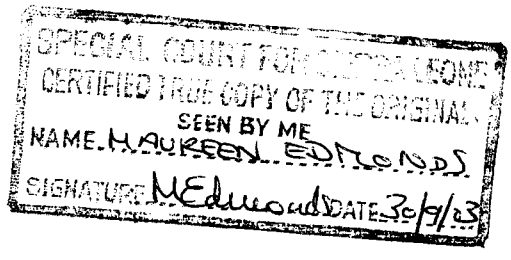
Declaration on the Protection of all Persons from Enforced Disappearances, General Assembly Resolution 47/133, 18 December 1992, UN Doc. A/RES/47/133 (1992) [extract].



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**Declaration on the Protection of All Persons from Enforced Disappearances.** Adopted by the UN General Assembly, Dec. 16, 1992, GA Res. 133, UN GAOR, 47 Sess., Supp. 49 at 207, UN Doc. A/RES/47/133. Reprinted in 32 I.L.M. 903 (1993).

The General Assembly,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations and other international instruments, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law,

Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity,

Recalling its resolution 33/173 of 20 December 1978, in which it expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrow caused by those disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons,

Recalling also the protection afforded to victims of armed conflicts by the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977.

Having regard in particular to the relevant articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which protect the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law,

Having regard also to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that States parties shall take effective measures to prevent and punish acts of torture,

Bearing in mind the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement officials, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Standard Minimum Rules for the Treatment of Prisoners,

Affirming that, in order to prevent enforced disappearances, it is necessary to ensure strict compliance with the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment contained in the annex to its resolution 43/173 of 9 December 1988, and with the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set forth in the annex to Economic and Social Council resolution 1989/65 of 24 May 1989 and endorsed by the General Assembly in its resolution 44/162 of 15 December 1989,

Bearing in mind that, while the acts which comprise enforced disappearance constitute a violation of the prohibition found in the aforementioned international instruments, it is none the less important to devise an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission,

1. Proclaims the present Declaration on the Protection of all Persons from Enforced Disappearance, as a body of principles for all States;

2. Urges that all efforts be made so that the Declaration becomes generally known and respected;

*Article 1*

1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.

2. Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

*Article 13*

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

*Article 14*

Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all

persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.

*Article 15*

The fact that there are grounds to believe that a person has participated in acts of an extremely serious nature such as those referred to in article 4, paragraph 1, above, regardless of the motives, shall be taken into account when the competent authorities of the State decide whether or not to grant asylum.

*Article 16*

1. Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation referred to in article 13 above.

2. They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.

3. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations.

4. The persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.

*Article 17*

1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.

2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.

*Article 18*

1. Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

2. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account.

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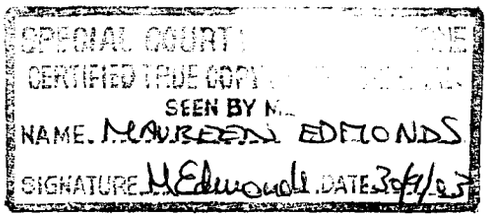
*Prosecutor v. Furundzija, Judgment*, IT-95-17/1, Trial Chamber, 10 December 1998 [extract].



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IN THE TRIAL CHAMBER

**Before: Judge Florence Ndepele Mwachande Mumba, Presiding**
**Judge Antonio Cassese**
**Judge Richard May**

**Registrar:**
**Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Judgement of: 10 December 1998**

**PROSECUTOR**

**v.**

**ANTO FURUNDZIJA**

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**JUDGEMENT**

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**The Office of the Prosecutor:**
**Ms. Brenda Hollis**
**Ms. Patricia Viseur-Sellers**
**Ms. Michael Blaxill**

**Counsel for the Accused:**
**Mr. Luka Misetic**
**Mr. Sheldon Davidson**

## I. INTRODUCTION

The trial of Anto Furundzija, hereafter "accused", a citizen of Bosnia and Herzegovina who was born on 8 July 1969, before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 8 June 1998 and came to a close on 12 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter "Prosecution", and the Defence for the accused, the Trial Chamber,

**HEREBY RENDERS ITS JUDGEMENT.**

### A. The International Tribunal

1. The International Tribunal is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993, hereafter "Statute",[1] and by the Rules of Procedure and Evidence of the

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## 2. International Human Rights Law

143. The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace.[163] In addition, treaties as well as resolutions of international organisations set up mechanisms designed to ensure that the prohibition is implemented and to prevent resort to torture as much as possible.[164]

144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or jus cogens. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[165]

145. These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders.[166] Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.

146. The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.

## 3. Main Features of the Prohibition Against Torture in International Law

147. There exists today universal revulsion against torture: as a USA Court put it in Filartiga v. Pe•a-Irala, "the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind".[167] This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

### (a) The Prohibition Even Covers Potential Breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of

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Human Rights in Soering,[168] international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied.[169] By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The Prohibition Imposes Obligations Erga Omnes

151. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The Prohibition Has Acquired the Status of Jus Cogens

153. While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.[170] The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the

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same normative force.

154. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter- state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio,[171] and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.[172] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".[173]

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty- making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, "it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission".[174]

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.