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SCSL-2003-13-PT
(967-1197)

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: 30 October 2003

THE PROSECUTOR

Against

SANTIGIE BORBOR KANU also known as 55 also known as FIFTY-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL – 2003 – 13 – PT

PROSECUTION RESPONSE TO THE DEFENCE MOTION CHALLENGING JURISDICTION OF THE COURT

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 Geert Jan Alexander Knoops

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I. INTRODUCTION

1. The Prosecution files this response to the Defence document entitled "Motion Challenging the Jurisdiction of the Special Court, Raising Serious Issues Relating to Jurisdiction on Various Grounds and Objections Based on Abuse of Process" (the "**Motion**"), filed on behalf of Santigie Borbor Kanu (the "**Accused**") on 20 October 2003.[1]

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

II. ARGUMENT

A. ARGUMENT CONCERNING THE INTERNATIONAL LEGAL FOUNDATION OF THE SPECIAL COURT

3. Paragraphs 4-5 of the Motion argue that the Statute of the Special Court, which is based upon a "bilateral agreement", must be distinguished from the Statutes of the

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[1] Registry Page ("RP") 782-818.

International Criminal Tribunal for the Former Yugoslavia ("**ICTY**") and International Criminal Tribunal for Rwanda ("**ICTR**") which are based upon United Nations Security Council resolutions, and the Statute of the International Criminal Court ("**ICC**") which is based upon a multilateral treaty. The Motion argues that because the Special Court Agreement[2] is a bilateral agreement between the United Nations and a State, it "cannot judicially amount to an international legal instrument which can set aside certain constitutional rights and provisions". The Defence then argues that the Special Court Agreement is inconsistent with certain provisions of the Constitution of Sierra Leone.[3]

4. The Motion appears to accept that the Special Court Agreement is a treaty under international law (see Motion, para. 6). The Defence argument appears to be that a *bilateral* treaty, as opposed to a *multilateral* treaty such as the ICC Statute, cannot "set aside certain constitutional rights and provisions". However, the Motion advances no arguments or authorities in support of the proposition that under general principles of international law there is any relevant distinction in this respect between a multilateral and a bilateral treaty.

5. The Prosecution submits that even if there were an inconsistency between the Special Court Agreement and certain provisions of the Constitution of Sierra Leone, which is not admitted, this would not affect the validity or operation of the Special Court Agreement, or the existence of the Special Court, or the exercise of its jurisdiction. The Special Court Agreement is an international treaty concluded by the United Nations and the Government of Sierra Leone,[4] 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. Thus, the arguments in paragraphs 8-9 of the Defence

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[2] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (the "**Special Court Agreement**").

[3] The Motion states that the Special Court Agreement must be distinguished from the Statutes of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), the International Criminal Tribunal for Rwanda (the "ICTR") and the International Criminal Court (the "ICC"), suggesting that the Statutes of the latter three courts *can* "set aside certain constitutional rights and provisions".

[4] 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".

Motion that international law is not a source of law under the Constitution of Sierra Leone is immaterial to the existence and operation of the Special Court, which exists and operates in the sphere of international law and not municipal law.

6. The creation of the Special Court can be likened to the creation of the ICC, which is also a treaty-based international criminal court. Insofar as violations of international criminal law are concerned, the subject-matter jurisdiction of both of these treaty-based international courts is similar. In the selfsame way that the ICC is not perceived to violate the constitutional or other municipal law of Sierra Leone, nor does the Special Court. As an institution created by international law, and operating within the sphere of international law, the Special Court is not subject to the municipal law or constitution of any State, any more than the ICC would be.

7. The validity of the Special Court Agreement as an international treaty cannot be affected by the Constitution of Sierra Leone.[5] 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.[6]

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[5] 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.

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

8. In the present case, even if it assumed for the sake of argument that the conclusion of the Special Court Agreement by the Government of Sierra Leone was in breach of the Constitution of Sierra Leone (which is not conceded), any such breach would not be "manifest" within the meaning of Article 46 of the two Vienna Conventions. The Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**") states that the Special Court Agreement was, for the part of the Government of Sierra Leone, signed under the authority of the President pursuant to section 40(4) of the Constitution. The Implementing Legislation purports to ratification of the Special Court Agreement by the Parliament for the purposes of section 40(4) of the Constitution. Thus, *prima facie*, the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied.

9. If the argument of the Defence were correct, it would mean that the Government of Sierra Leone also violated the Constitution when Sierra Leone became a party to the ICC Statute,[7] 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.[8] Moreover, the ICC is entitled to exercise its functions and powers on the territory of Sierra Leone.[9] 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,[10] 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

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

8 ICC Statute, Article 12.

9 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 ...").

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

> 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."[11]

Similarly, South Africa enacted legislation implementing the ICC Statute,[12] even though section 165(1) of the Constitution of South Africa provides that the judicial authority of South Africa is vested in certain courts specifically identified in section 166 thereof, of which the ICC is not one.

10. For the purposes of disposing of this motion, it is unnecessary for the Trial Chamber to determine whether or not Australia or South Africa acted in accordance with their own constitutions when they ratified the ICC Statute and enacted national implementing legislation. In view of the fact that they did so, and in view of the opinion expressed by the Australian Parliamentary Committee, it cannot be said that there was any "*manifest*" violation of their constitutions. For the same reason, even if the Government and Parliament of Sierra Leone had acted unconstitutionally in entering into the Special Court Agreement and enacting the Implementing Legislation (as argued by the Defence and not conceded by the Prosecution), it cannot be said that any violation of constitutional norms was "*manifest*" within the meaning of Article 46 of the two Vienna Conventions, in view of the analogies with these other countries,[13] 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

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

[12] 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.

[13] 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.

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

11. 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.[14] Paragraphs 10-20 of the Motion, dealing with certain provisions of the Constitution of Sierra Leone that are allegedly violated by the Special Court Agreement, are thus simply irrelevant. It is therefore unnecessary for the Special Court to decide this question. Indeed, the Special Court has no *jurisdiction* to decide this question.

B. ARGUMENT ALLEGING LACK OF JURISDICTION BY VIRTUE OF THE LOMÉ AGREEMENT

12. Paragraphs 6 and 22-24 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.

13. 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

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

referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution." There is no merit to the Defence argument in para. 6 of the Motion that in the case of an inconsistency between two treaties, the latter treaty is invalid. Where State X enters into a treaty with State Y that is inconsistent with an earlier treaty between State X and State Z, this may engage the international responsibility of State X towards State Z, but will not invalidate the latter treaty between State X and State Z, except in specific circumstances which cannot apply in the present case.[15]

14. In any event, the Lomé Agreement[16] is not a treaty under international law,[17] but an agreement signed between two national bodies—the Government of Sierra Leone and 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.[18] 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.[19]

15. Furthermore, 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

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15 *Oppenheim's International Law* (6th edn. Jennings and Watts (eds.), 1992, vol. 1, pp. 1214-1215.

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

17 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.

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

19 See the provisions of the two Vienna Conventions on the Law of Treaties, referred to in footnote 5 above.

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,[20] 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.

16. 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 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.[21] 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.[22] The inclusion of Article 10 in the Special Court's Statute can itself be seen as additional confirmation of this interpretation. 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.[23] The matters

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[20] 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.*

[21] See Security Council Resolution 1315 (2000), 14 August 2000, preambular para. 5; Report of the Secretary-General Supra footnote 4 para. 23.

[22] ibid, para. 24.

[23] See, e.g., Brownlie, *Principles of Public International Law* (5th edn, 1998), 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, *International Criminal Law* (2003), p. 316 that "whenever general rules prohibiting

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 instruments that are closely related to the issue of crimes against humanity either expressly or impliedly prohibit amnesty. 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.[24]

17. There is no merit to the Defence argument (at paras. 25-28 of the Motion) that it would be an abuse of process for the Special Court to permit the prosecution of any accused for crimes pre-dating the Lomé Agreement, in alleged breach thereof. This argument cannot be sustained, for the same reasons given above. It cannot be an abuse of process for the Special Court not to apply Article IX of the Lomé Agreement in circumstances where the Special Court is bound by the express provisions of Article 10 of its own Statute, and in circumstances where Article IX of the Lomé Agreement (a) is of no effect in international law, (b) has even been repealed as a matter of *national* law to the extent that it could apply to crimes under Articles 2-4 of the Special Court's Statute, and (c) on its correct interpretation does not even apply to crimes under Articles 2-4 of the Special Court's Statute. The fact that these international crimes may be "equally" punishable under Sierra Leone municipal law (as argued in paragraph 27 of the Defence Motion) cannot affect this conclusion. Furthermore, the Defence advances no authorities on the existence or scope of the doctrine of abuse of process in international criminal law. The Prosecution should not be required to respond to a vague Defence allegation that is not supported by detailed argument.

C. ARGUMENT CONCERNING COMMAND RESPONSIBILITY

18. The Defence argues that the Special Court cannot assume jurisdiction for crimes which were allegedly committed by the Accused prior to his assuming command or

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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."

[24] 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 ...".

allegedly taking the position of a superior. They argue that based on the Indictment, it was alleged that the Accused was "a senior commander of AFRC/RUF force in Kono district" between Mid-February 1998 – April 30, 1998 and "one of the three commanders (...) on 6 January 1999." The Defence argues that the Indictment contains several charges relating to crimes committed before mid-February 1998 when it was alleged the Accused was "a Senior Commander of AFRC/RUF." The Defence concludes that the Special Court is not empowered to try the Accused for crimes related to the concept of superior responsibility for crimes committed before February 1998.

19. The Prosecution states that the Accused is not only charged in the indictment for crimes for which he bears command or superior responsibility but he is also charged with offences for which he is individually liable or was part of a joint criminal enterprise or common criminal purpose. In all cases in the indictment, the Accused is charged under Article 6.1 of the Statute and alternatively under Article 6.3. Counts 3 - 5 cited by the Defence are preceded by paragraph 31 which clearly states that the Accused by his acts or omissions in relation, but not limited to these events, pursuant to Article 6.1, and or alternatively, Article 6.3 of the Statute, is individually criminally liable for the crimes alleged. It is misconceived to suggest that the Accused is only charged with command responsibility for the crimes under Counts 3-5 when the indictment clearly says otherwise.

20. Further, the Prosecution states that the period for which the Accused actually had command, though material, does not signify that the Accused was not liable in any other way outside this period. The fact that he may not have been in command for this period does not preclude the fact that he bears superior responsibility or individual responsibility outside these periods.

21. The Prosecution submits that these are purely matters of evidence which have to be determined by a court of law having heard the evidence.

IV. CONCLUSION

The Court should therefore dismiss the Motion in its entirety.

Freetown, 30 October 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

PROSECUTION INDEX OF AUTHORITIES

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

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].

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12. *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997) [Extract].

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

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

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

17. Declaration on the Protection of all Persons from Enforced Disappearances (1992) [Extract].

18. *Prosecutor v. Furundzija, Judgement*, IT-95-17/1, Trial Chamber, 10 December 1998 [Extract].

ANNEX 1

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE

WHEREAS the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

WHEREAS by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

WHEREAS the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

NOW THEREFORE the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Court, the Secretary-General, or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a three-year term and shall be eligible for re-appointment.

5. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a three-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and shall be eligible for re-appointment.

Article 5
Premises

The Government shall assist in the provision of premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court

The expenses of the Special Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Special Court.

Article 7
Management Committee

It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.

Article 8
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or

legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 9
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process,

except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 10
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

Article 11
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 12
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to

diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 13
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 14
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back.

Article 15
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions. The provisions of article 14, paragraph 2(a) and (d), shall apply to them.

Article 16
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 17
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 18
Working language

The official working language of the Special Court shall be English.

Article 19
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions of those already in custody shall be initiated.

3. In the initial phase, judges of the Trial Chamber and the Appeals Chamber shall be convened on an ad hoc basis for dealing with organizational matters, and serving when required to perform their duties.

4. Judges of the Trial Chamber shall take permanent office shortly before the investigation process has been completed. Judges of the Appeals Chamber shall take permanent office when the first trial process has been completed.

Article 20
Settlement of Disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 21
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Article 22
Amendment

This Agreement may be amended by written agreement between the Parties.

Article 23
Termination

This Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.

IN WITNESS WHEREOF, the following duly authorized representatives of the United Nations and of the Government of Sierra Leone have signed this Agreement.

Done at Freetown, on 16 January 2002 in two originals in the English language.

For the United Nations
Hans Corell, Under-Secretary-General for Legal Affairs

For the Government of Sierra Leone
Solomon Berewa, Attorney General and Minister of Justice

ANNEX 2

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

United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and 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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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal 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

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

> "In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations | For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3
Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chambers, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a four-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons most responsible for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a four-year term and shall be eligible for reappointment. He or she shall be of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a four-year term and be eligible for reappointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by a Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 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.

ANNEX 4

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.

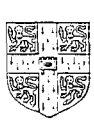
3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

ANNEX 5

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

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.

ANNEX 6

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), 190; *Yrbk.* (1965), ii. 159; 60 *AJ* (1966), 164; Draft Articles, II, Invalidity and Termination of Treaties, *Yrbk.* (1963), ii. 189; 58 *AJ* (1964), 241; Draft Articles, III, Application, Effects, Modification and Interpretation of Treaties, *Yrbk.* (1964), ii; 59 *AJ* (1965), 203, 434; Final Report and Draft, *Yrbk.* (1966), ii. 172; 61 *AJ* (1967), 263.

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

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

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

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

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

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

[4] Art. 84.

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

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

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

[8] *Infra*, p. 678.

[9] *Infra*, p. 661.

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

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

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

declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

The reference to 'other subjects' of the law was designed to provide for treaties concluded by international organizations, the Holy See, and other international entities such as insurgents.[13]

In the Vienna Convention, as in the Final Draft of the Commission, the provisions are confined to treaties between states (Art. 1).[14] Article 3 provides that the fact that the Convention is thus limited shall not affect the legal force of agreements between states and other subjects of international law or between such other subjects of international law or between such other subjects. Article 2(1)(a) defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments[15] and whatever its particular designation'. The distinction between a transaction which is a definitive legal commitment between two states, and one which involves something less than that is difficult to draw but the form of the instrument, for example, a joint communiqué, is not decisive.[16] Article 2 stipulates that the agreements to which the Convention extends be 'governed by international law' and thus excludes the various commercial arrangements, such as purchase and lease, made between governments and operating only under one or more national laws.[17] The capacity of particular international organizations to make treaties depends on the constitution of the organization concerned.[18]

[13] See ch. III on legal personality.

[14] On the concept of a treaty see Widdows, 50 *BY* (1979), 117–49; Virally, in *Festschrift für Rudolf Bindschedler* (1980), 159–72; Thirlway, 62 *BY* (1991), 4–15.

[15] The conclusion of treaties in simplified form is increasingly common. Many treaties are made by an exchange of notes, the adoption of an agreed minute and so on. See: *Yrbk. ILC* (1966), ii. 188 (Commentary); Hamzeh, 43 *BY* (1968–9), 1779–89; Smets, *La Conclusion des accords en forme simplifée* (1969); Gotlieb, *Canadian Treaty-Making* (1968).

[16] See the *Aegean Sea Continental Shelf Case*, ICJ Reports (1978), 3 at 38–44; and the *Nicaragua* case (Merits), ibid. (1986), 14 at 130–2.

[17] See Mann, 33 *BY* (1957), 20–51; id., 35 *BY* (1959), 34–57; and cf. the *Diverted Cargoes* case, *RIAA* xii. 53 at 70. See also *British Practice* (1967), 147.

[18] On the capacity of members of federal states: *supra*, pp. 59–60, 77.

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.

ANNEX 7

The Special Court Agreement, 2002 (Ratification) Act 2002.

BILL

Supplement to the Sierra Leone Gazette Vol. CXXX. No II dated 7th March 2002

THE SPECIAL COURT AGREEMENT, 2002, RATIFICATION ACT, 2002

ARRANGEMENT OF SECTIONS

SPECIAL COURT AGREEMENT, 2002 (RATIFICATION) ACT, 2002

WHEREAS the Agreement for the Special Court which was, for the part of the Government of Sierra Leone, signed under the authority of the President and is by the proviso to subsection (4) of section 40 of the Constitution of Sierra Leone, 1991 required to be ratified by an Act of Parliament:

AND WHEREAS it is desirable that provision be also made for the implementation of all elements of the Agreement that are not self-executing as well as those which need to be supplemented:

NOW, THEREFORE, it is enacted by the President and Members of Parliament in this present Parliament assembled as follows:-

PART I – PRELIMINARY

Interpretation

1. In this Act, unless the context otherwise requires –

"Agreement" means the Agreement between the Government of Sierra Leone and the United Nations for the establishment for the establishment of a Special Court, signed on the 16th January, 2002, and set out in the Schedule;

"arresting officer" means a person authorised under this Act to arrest another person;

"Attorney-General" means the Attorney–General and Minister of Justice of Sierra Leone;

"Constitution" means the Constitution of Sierra Leone 1991;

"Director of Prisons" has the same meaning as the Prisons Act, 1960;

"indictee" means a person indicted before the Special Court; "indictment" means an indictment brought before the Special Court;

"Management Committee" means the Management Committee referred to in Article 7 of the Agreement;

"Minister of Internal Affairs" means the Minister for internal affairs of Sierra Leone;

"officer in charge" has the same meaning as in the Prison Act, 1960;

"official" in relation to the Special Court means the Prosecutor, Deputy Prosecutor, Registrar and any other personnel of the Special Court;

"order of the Special Court" means any order, summons, subpoena, warrant, transfer order or any other order issued by a judge of the Special Court;

"prisoner of Sierra Leone" means a person who is in the lawful custody of the Director of Prisons or officer in charge of any prison, whether or not that person has been convicted of an offence;

"prison officer" has the same meaning as in the Prisons Act, 1960;

"Prosecutor" means the Prosecutor of the Special Court;

"Sierra Leone Court" has the same meaning as in the Constitution;

"Sierra Leone prison" or "prison" means a prison as defined in section 2 of the Prisons Act, 1960;

"Sierra Leone sentence" means any sentence of imprisonment imposed by a Sierra Leone court;

"Special Court" means the Special Court established by the Agreement and includes any organ of the Special Court;

"Special Court prisoner" means a person who is for the time being detained under an order of, or sentence imposed by the Special Court.

PART II – ADMINISTRATION OF SPECIAL COURT

Legal capacity of Special Court.

2. (1) The Special Court shall have the capacity to do the following acts in Sierra Leone—

(a) contract;

(b) acquire and dispose of moveable and immovable property;

(c) institute legal proceedings;

(d) enter into agreements with States or such other bodies possessing international legal personality as may be necessary for the exercise of its functions and for the furtherance of its operations; and

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(e) any other act a company may undertake pursuant to the Companies Act.

(2) The Special Court shall have a common seal, the affixing of which shall be authenticated by the signatures of—

(a) the President of the Court, and

the Registrar, or another member of the staff of the Special Court designated in that behalf by the President of the Court after consultation with the Management Committee.

Administration of Special Court

3. The Registrar shall be responsible immediately to the President of the Special Court for—

(a) the servicing of the Chambers of the Special Court and the Office of the Prosecutor;

(b) the recruitment, administration and discipline of the support staff; and

(c) the day-to-day administration of the financial and staff resources of the Special Court.

Application of funds of Special Court

4. The funds of the Special Court shall be applied to meet the expenses of—

(a) servicing the Chambers of the Special Court;

(b) the salaries, allowances and other costs of the support staff;

(c) the administrative costs of the Special Court other than those specified in paragraphs (a) and (b).

Accounts and audit of funds

5. (1) The Special Court shall keep proper books of account and other records in relation to the activities, property and finances of the Special Court and shall prepare in respect of each financial year of the Special Court a statement of accounts in a form designed to ensure the correct use of the finances of the Special Court.

(2) The accounts of the Special Court kept under subsection (1) shall be audited every six months by an auditor appointed by the Management Committee.

Annual report of the Special Court

6. (1) The Registrar shall, within three months after the end of the financial year of the Special Court, submit for the approval of the Management Committee an annual report of the activities, operation, property and finances of the Special Court for that year.

(2) Subject to subsection (1), an annual report shall include—

(a) a copy of the audited accounts of the Special Court together with the audit report thereon;

(b) the semi-annual summary financial reports of the Special Court for the preceding year approved by the Management Committee.

Property of Special Court

7. (1) The property of the Special Court shall be inviolable, whether by executive, administrative, judicial or legislative action.

(2) Without prejudice to the generality of subsection (1), the property of the Special Court shall not be subject to any laws regarding any of the following—

(a) search and seizure;

(b) requisition;

(c) confiscation; or

(d) expropriation.

(3) The Special Court shall exercise exclusive and free enjoyment of its property, in whole or in part and shall not be dispossessed of any real property unless the President of the Special Court gives express consent otherwise.

(4) Without prejudice to the generality of subsection (3), any real property owned or occupied by the Special Court or any of its organs shall not be subject to any laws or executive or administrative action regarding compulsory acquisition of property.

Financial arrangements of Special Court

8. (1) The Special Court, its funds, assets or property, wherever located and by whomsoever held, shall be immune from every form of legal process in Sierra Leone, unless the President of the Special Court expressly waives this immunity.

(2) Notwithstanding an express waiver of immunity, no funds, assets or property of the Special Court may be subject to any measure of execution.

(3) The Special Court shall be exempt from any financial controls, regulations or moratoriums.

(4) Without prejudice to the generality of subsection (3), the Special Court may—

(a) hold and use funds or negotiable instruments of any kind;

(b) maintain and operate accounts in any currency;

(c) convert any currency held by it into any other currency; and

(d) transfer its funds or currency from Sierra Leone, or within Sierra Leone, or to the United Nations or any other agency, free of any charges or restrictions.

Premises of Special Court

9. The Government shall endeavour to provide to the premises of the Special Court such utilities, facilities and other services as may be necessary for the operation of the Special Court and shall ensure that the Special Court is not dispossessed of all or any part of the premises of the Special Court without the express consent of the President of the Special Court.

PART III—EXERCISE OF JURISDICTION OF SPECIAL COURT

Jurisdiction, procedure and evidence

10. The Special Court shall exercise the jurisdiction and powers conferred upon it by the Agreement in the manner provided in the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda in force at the time of the establishment of the Special Court as adapted for the purposes of the Special Court by the judges of the Special Court as a whole.

Special Court may sit in Sierra Leone

11. (1) The Special Court may sit in Sierra Leone in such place as may be determined by the President of the Special Court after consultation with the Attorney-General for the purpose of performing its functions under the Agreement.

(2) The Special Court shall not form part of the Judiciary of Sierra Leone.

Special Court may administer oaths

12. The Special Court may, at any of its sittings, administer an oath or affirmation giving an undertaking as to truthfulness.

Offences before Special Court

13. Offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone.

Request for deferral or discontinuance of proceedings

14. Where, pursuant to Article 8 of the Statute of the Special Court, the Attorney-General receives any request for deferral or discontinuance in respect of any proceedings, he shall grant the request, if in his opinion there are sufficient grounds for him to do so.

PART IV—MUTUAL ASSISTANCE BETWEEN SIERRA LEONE AND SPECIAL COURT

Request to Sierra Leone for assistance

Request by Special Court for assistance

15. (1) The Attorney-General shall, upon receiving from the Special Court a request for assistance, including an urgent request for assistance, consider such request without any undue delay.

(2) A request for assistance made by the Special Court may include, but shall not be limited to—

(a) identification and location of persons;

(b) service of documents;

(c) arrest or detention of persons; and

(d) transfer of an indictee to the Special Court.

(3) Nothing in this Act shall—

(a) limit the type of assistance the Special Court may request under the Agreement; or

(b) prevent co-operation with the Special Court otherwise than pursuant to this Act, including co-operation of an informal nature.

Execution of request for assistance

16. (1) Subject to subsection (2), if the Special Court makes a request for assistance, it shall be dealt with in accordance with the relevant procedure

(2) If the request for assistance specifies that it should be executed in a particular manner or by using a particular procedure that is not prohibited by Sierra Leone law, the Attorney-General shall use his best endeavours to ensure that the request is executed in that manner or using that procedure.

Confidentiality of request

17. A request for assistance and any supporting documents shall be set confidential by the Sierra Leone authorities who deal with any aspect of the request whenever the request includes a stipulation that it shall be kept confidential, except to the extent that disclosure is necessary for execution of the request.

Response to request

18. (1) The Attorney-General shall notify the Special Court, without undue delay, of his response to a request for assistance and the outcome of any action that has been taken in relation to it.

(2) If the Attorney-General decides to refuse or postpone the assistance requested, in whole or in part, he shall notify the Special Court accordingly and shall set out the reasons for that decision.

(3) If the request for assistance cannot be complied with for any other reason, the notification to the Special Court shall set out the reasons for the inability or failure to comply with the request.

(4) If the request for assistance relates to material that may be prejudicial to the national security of the Republic of Sierra Leone, the Attorney-General shall, without undue delay, notify the Special Court of that fact together with the reasons therefor.

(5) If—

(a) the Special Court has been notified pursuant to subsection (4); and

(b) a Judge of the Special Court nevertheless orders disclosure of the material;

that material shall be transferred to the Special Court.

Act No. 10 of 1963

(6) The disclosure of material to the Special Court under subsection (5) shall be deemed to be an authorised disclosure for the purposes of the Treason and State Offences Act, 1963.

Request to Special Court for assistance

Request by Attorney-General for assistance

19. (1) The Attorney-General may make a request for assistance to the Special Court for the purposes of any investigation into or trial in respect of any act or omission that may constitute a crime within the jurisdiction of the Special Court.

(2) A request for assistance by the Attorney-General and Minister of Justice may include, but shall not be limited to—

(a) the transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial conducted by the Special Court; and

(b) the questioning of any person detained by order of the Special Court.

PART V—ORDERS OF SPECIAL COURT

Orders of Special Court

20. For the purposes of execution, an order of the Special Court shall have the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court.

Execution of orders

21. (1) Any person executing an order of the Special Court shall comply with any direction specified in that order.

(2) Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court.

(3) Without prejudice to the generality of subsection (1), any person executing an order of the Special Court shall deliver forthwith any books, documents, photographs, tangible objects or other physical objects seized during the execution of that order into the custody of the Special Court.

(4) If a person to whom an order of the Special Court is directed is unable to execute that order, he shall report forthwith the inability to the Special Court and give the reasons therefor.

Forfeiture orders of Special Court

22. (1) When a forfeiture order issued by the Special Court is executed and property, proceeds or assets are delivered to the State, the Minister of Internal Affairs shall—

(a) if a use is specified in the forfeiture order, use the property, proceeds or assets according to that use; or

(b) if no use is specified in the order, either—

(i) use the property, proceeds or assets for a purpose aimed at addressing the consequences of the armed conflict in Sierra Leone between 1991 and 2002; or

(ii) sell such property, proceeds or assets as may be sold and deposit the amount realised together with any money forfeited under the forfeiture order into the War Victims Fund established pursuant to the Lome Agreement.

(2) The Minister of Internal Affairs shall make such regulations as are necessary to give effect to subsection (1).

PART VI—ARREST AND DELIVERY OF PERSONS

Warrant of arrest

23. For the purposes of execution, a warrant of arrest issued by the Special Court shall have the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court.

Execution of warrant of arrest

24. Where a warrant of arrest issued under section 23 is executed, the arresting officer shall serve on the person against whom the warrant is issued certified copies of—

(a) the warrant of arrest issued by the Special Court;

(b) where appropriate, the indictment;

(c) a statement of the rights of the accused; and

(d) if necessary, a translation thereof into a language understood by the accused.

Delivery of persons arrested

25. Where a warrant of arrest is executed, the person arrested shall be delivered forthwith into the custody of the Special Court.

Detention after delivery

26. Notwithstanding formal delivery of a person into the custody of the Special Court, a Sierra Leone prison may continue to detain that person on behalf of the Special Court if so requested or ordered by the Special Court.

Execution of warrant of arrest

27. (1) Where a warrant of arrest is issued against a prisoner of Sierra Leone, the arresting officer shall present the warrant of arrest to the Director of Prisons or the officer in charge, who shall deliver the prisoner into the custody of the arresting officer.

(2) After delivery of the prisoner of Sierra Leone into the custody of an arresting officer under subsection (1), the arresting officer shall deal with the prisoner in accordance with sections 24 and 25.

Arrest without warrant

28. Where a person against whom a warrant of arrest is issued under section 23 escapes or is unlawfully at large, he may be arrested without warrant by an arresting officer and, if so arrested, shall be delivered into the custody of the Special Court.

Official position of the accused no bar to arrest etc.

29. The existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court.

PART VII—JUDGEMENTS AND SENTENCES

Judgements

Proof of orders or judgements

30. (1) Any order or judgement of the Special Court purporting to bear the seal of the Special Court, or to be signed by a person in his capacity as a judge or official of the Special Court, shall be deemed to have been duly sealed or signed by that person, as the case may be.

(2) A document, duly authenticated, which purports to be a copy of any order made or judgement given by the Special Court shall be deemed to be a true copy.

Evidence regarding Special Court procedures and orders

31. (1) For the purposes of this Act, a statement contained in a document, duly authenticated, which purports to have been received in evidence or to be a copy of a document so received, or to set out or summarise evidence given, in proceedings before the Special Court is admissible as evidence of any fact stated in it.

(2) Nothing in this section shall be taken to affect the admission of any evidence, whether contained in a document or otherwise, which is admissible apart from this section.

Sentences

Enforcement of sentences of imprisonment

32. (1) Where a sentence of imprisonment imposed by the Special Court is to be served in Sierra Leone, it shall be served in accordance with the terms of the imprisonment.

(2) Subject to subsection (1), the conditions of imprisonment shall be governed by the relevant laws of Sierra Leone.

Modification of sentences

33. (1) The length of a sentence shall only be modified or altered by the Special Court.

(2) If the length of the sentence is modified or altered by the Special Court, upon notification of the modification or alteration to the Director of Prisons, the length of the sentence of a Special Court prisoner serving his sentence in a Sierra Leone prison shall be modified or altered accordingly.

Supervision of sentences

34. (1) The imprisonment being served by a Special Court prisoner in a Sierra Leone prison shall be subject to supervision by the Special Court.

(2) In allowing the Special Court to supervise the conditions of imprisonment, the Director of Prisons shall ensure—

(a) the facilitation of communication between the Special Court prisoner and the Special Court, including the confidentiality of that communication; and

(b) the provision of any information, report or expert opinion as requested by the Special Court about the imprisonment of the Special Court prisoner; and

(c) the access of a judge or other official of the Special Court to a Special Court prisoner without the presence of any other person, except with the consent of the Special Court prisoner.

(3) Nothing in this section shall prevent the Director of Prisons from complying with any other request of the Special Court in relation to the supervision of sentences.

Pardon or commutation of sentences

35. (1) A Special Court prisoner may only be pardoned or have his sentence commuted by order of the Special Court.

(2) If it appears to the President of the Republic of Sierra Leone that a Special Court prisoner is eligible for pardon or commutation of sentence under the relevant laws of Sierra Leone, he shall notify the Special Court of that fact together with the reasons therefor.

Concurrent Sierra Leone sentences

36. (1) Where a Special Court prisoner is also subject to a Sierra Leone sentence imposed before his sentence of imprisonment is imposed by the Special Court, any sentence of imprisonment imposed by the Special Court shall be deemed to run concurrently with the Sierra Leone sentence, unless the Special Court orders otherwise.

(2) Where a Special Court prisoner is also subject to a Sierra Leone sentence imposed after his sentence of imprisonment is imposed by the Special Court, any sentence of imprisonment imposed by the Special Court shall be deemed to run concurrently with the Sierra Leone sentence, unless the Sierra Leone court orders otherwise.

PART VIII—OFFENCES AGAINST ADMINISTRATION OF JUSTICE AND OTHER OFFENCES

Offences against administration of justice

Obstructing justice

37. (1) Any person who wilfully obstructs, perverts or defeats the course of justice in relation to the Special Court commits an offence and shall be liable, on conviction to a

fine not exceeding two million leones or a term of imprisonment not exceeding two years or to both such fine and imprisonment.

(2) Without prejudice to the generality of subsection (1), a person is deemed wilfully to obstruct, pervert or defeat the course of justice who, in any existing or proposed proceeding of the Special Court—

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence; or

(b) accepts, obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence.

Obstructing officials

38. Any person who resists or wilfully obstructs—

(a) an official of the Special Court in the execution of his duty, or any person lawfully acting in aid of such an official; or

(b) any person executing an order of the Special Court,

commits an offence and shall be liable on conviction, to a fine not exceeding two million leones or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

Bribery of judges and officials

39. Subject to articles 12 and 13 of the Agreement, any person who—

(a) being a judge or an official of the Special Court, corruptly accepts, obtains, agrees to accept or attempts to obtain for himself or any other person any money, valuable consideration, office, place or employment—

(i) in respect of anything done or omitted or to be done in his official capacity; or

(ii) with intent to interfere in any other way with the administration of justice of the Special Court; or

(b) gives or offers, corruptly, to a judge or an official of the Special Court any money, valuable consideration, office, place or employment—

(i) in respect of anything done or omitted or to be done in his or her official capacity; or

(ii) with intent to interfere in any other way with the administration by justice of the Special Court;

commits an offence and shall be liable on conviction to a fine not exceeding thirty millions leones or to a term of imprisonment not exceeding ten years or to both such fine and imprisonment.

Intimidation of officials and witnesses

40. Any person who, wrongfully or without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing, in relation to a proceeding of the Special Court, causes the other person reasonably, in all the circumstances, to fear for his safety or the safety of any other person commits an offence and shall be liable on conviction to a fine not exceeding two million leones or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

Fabricating evidence

41. Any person who, with intent to mislead the Special Court in an existing or proposed proceeding, by any means other than perjury or incitement to perjury—

(a) fabricates anything with intent that it be used as evidence before the Special Court; or

(b) knowingly makes use of fabricated evidence;

commits an offence and shall be liable on conviction to a fine not exceeding two million leones or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

Offences outside Sierra Leone

42. Any person who commits outside Sierra Leone any act or omission in relation to the Special Court that, if committed in Sierra Leone, would be an offence under this Act, may be tried as if he had committed the act or omission in Sierra Leone.

Other offences

Illegal possession of property

43. (1) Any person who possesses any property or any proceeds of property knowing that all or part of the property or proceeds were obtained or derived directly or indirectly as a result of—

(a) any act or omission that constitutes a crime within the jurisdiction of the Special Court; or

(b) the commission of any offence under this Act;

commits an offence and shall be liable on conviction to a fine not exceeding thirty million leones or to a term of imprisonment not exceeding ten years or to both such fine and imprisonment.

(2) A person is not guilty of an offence under this section by reason only that he is in possession of property or the proceeds of property mentioned in subsection (1) for the purpose of—

(a) executing an order of the Special Court;

(b) complying with a request by the Special Court; or

(c) otherwise acting for the purpose of a lawful investigation

Money laundering

44. (1) Any person who—

(a) knowingly uses, transfers the possession of, sends or delivers to another person or to any place, transports, transmits, alters, disposes of or otherwise deals with, in any manner or by any means, any property or any property or any proceeds of property with intent to conceal or convert the property or proceeds; or

(b) knowing or believing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of—

(i) any act or omission that constitutes a crime within the jurisdiction of the Special Court; or

(ii) the commission of any offence under this Act;

commits an offence and shall be liable on conviction to a fine not exceeding

thirty million leones or to a term of imprisonment not exceeding ten years or to both such fine and imprisonment.

(2) A person is not guilty of an offence under this section by reason only that he is in possession of property or the proceeds of property mentioned in subsection (1) for the purpose of—

(a) executing an order of the Special Court;

(b) complying with a request by the Special Court; or

(c) otherwise acting for the purpose of a lawful investigation.

PART IX—MISCELLANEOUS

Compensation of victims

45. Any person who has been a victim of a crime within the jurisdiction of the Special Court, or persons claiming through him, may claim compensation in accordance with the Criminal Procedure Act, 1965 if the Special Court has found a person guilty of that crime.

Obligations imposed by Agreement

46. Unless this Act provides otherwise, for the purposes of any provision of the Agreement that confers a power, or imposes a duty or function on the State, that power, duty or function may be exercised or carried out on behalf of the Government of Sierra Leone by the Attorney-General.

Regulations

47. The Attorney-General may, after consultation with the Special Court, make regulations to give effect to this Act.

SCHEDULE

AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE

(Text of Agreement and Statute: see www.specialcourt.org)

MEMORANDUM OF OBJECTS AND REASONS

The object of this Bill is to make provision for the ratification and implementation of the Agreement between the Government of Sierra Leone and the United Nations signed on 16th January 2002, for the establishment of the Special Court for Sierra Leone.

It is a requirement of the Constitution under the proviso to subsection (4) of section 40 thereof, that an international agreement which, among other things imposes any charge on the finances of the State, i.e. the Consolidated Fund, must be ratified by either an Act of Parliament or by resolution of Parliament supported by a simple majority vote in Parliament. In addition to compliance with the Constitution, ratification by an Act of Parliament also serves the purpose of transforming the Agreement into local statute and therefore directly applicable in Sierra Leone.

However, not all the provisions of the Agreement are capable if being implemented either in the form of the substance in which they appear in the Agreement. There are quite a number of those provisions for which supplementary provisions are needed for their implementation. Thus, for instance, Article 25 of the Statute attached to the Agreement provides that the President of the Special Court shall submit an annual report on the operations and activities of the Court to the Secretary-General and to the

Government of Sierra Leone. This provision calls for not only operational but also financial accountability on which the Agreement is silent, hence the need for clauses 3 to 5 of the Bill. Similarly, as a corporate body, the Court must have its own common seal for the authentication of its documents and other instruments of process, provision for which is now made clause 2 of the Bill.

Then again, although the Agreement spells out clearly the jurisdiction of the Special Court, the Agreement is almost silent about the manner in which the jurisdiction may be exercised. Much of the Bill, starting from Part III is devoted to providing for the details needed to effectuate the exercise of jurisdiction by the Special Court.

Solomon E. Berewa
Attorney-General and Minister of Justice

Freetown
Sierra Leone
March, 2002

ANNEX 8

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

International Criminal Court

The ICC at a glance
News Point
Basic Documents
Cases
Victims issues
Witness protection
Presidency
Chambers
Office of the Prosecutor
Registry
Defence
States Parties

Historical introduction
Assembly of the States Parties
The State Parties

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:
11 March 2003

ANNEX 9

Statute of the International Criminal Court [Extract].

1055

Rome Statute of the International Criminal Court

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

Entire Statute (html)

1056

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.

ANNEX 10

Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* [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

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.

ANNEX 11

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

International Criminal Court

The ICC at a glance
News Point
Basic Documents
Cases
Victims issues
Witness protection
Presidency
Chambers
Office of the Prosecutor
Registry
Defence
States Parties

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:
11 March 2003

Historical introduction
Assembly of the States Parties
The State Parties

ANNEX 12

Akehurst's Modern Introduction to International Law (7th edn, Malanczuk (ed.), 1997) [Extract].

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.'

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. Skubiszewski, 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.

ANNEX 13

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

UNITED
NATIONS

1085
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Security Council

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12 July 1999
ENGLISH
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LETTER DATED 12 JULY 1999 FROM THE CHARGÉ D'AFFAIRES AD INTERIM OF THE PERMANENT MISSION OF TOGO TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to transmit herewith the text of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front concluded at Lomé on 7 July 1999 (see annex).

I should be very grateful if you would arrange to have this letter and the annex thereto circulated as a Security Council document.

(Signed) Kodjo MENAN
Chargé d'affaires ad interim

99-20561 (E) 130799 140799

Annex

[Original: English and French]

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

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

Having met in Lomé, Togo, from the 25 May 1999 to 7 July 1999 under the auspices of the Current Chairman of ECOWAS, President Gnassingbé Eyadéma;

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 ;

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 I

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.

Article III Transformation of the RUF/SL Into a Political Party

Article IV Enabling Members of the RUF/SL to Hold Public Office

Article V Enabling the RUF/SL to Join a Broad-based Government of National Unity Through Cabinet Appointment

Article VI Commission for the Consolidation of Peace

Article VII Commission for the Management of Strategic Resources, National Reconstruction and Development

Article VIII Council of Elders and Religious Leaders.

ARTICLE III

TRANSFORMATION OF THE RUF/SL INTO A POLITICAL PARTY

1. The Government of Sierra Leone shall accord every facility to the RUF/SL to transform itself into a political party and enter the mainstream of the democratic process. To that end:

2. Immediately upon the signing of the present Agreement, the RUF/SL shall commence to organize itself to function as a political movement, with the rights, privileges and duties accorded to all political parties in Sierra Leone. These include the freedom to publish, unhindered access to the media, freedom of association, freedom of expression, freedom of assembly, and the right to mobilize and associate freely.

3. Within a period of thirty days, following the signing of the present Agreement, the necessary legal steps shall be taken by the Government of Sierra Leone to enable the RUF/SL to register as a political party.

4. The Parties shall approach the International Community with a view to mobilizing resources for the purposes of enabling the RUF/SL to function as a political party. These resources may include but shall not be limited to:

(i) Setting up a trust fund;

(ii) Training for RUF/SL membership in party organization and functions: and

(iii) Providing any other assistance necessary for achieving the goals of this section.

ARTICLE IV

ENABLING MEMBERS OF THE RUF/SL TO HOLD PUBLIC OFFICE

1. The Government of Sierra Leone shall take the necessary steps to enable those RUF/SL members nominated by the RUF/SL to hold public office, within the time-frames agreed and contained in the present Agreement for the integration of the various bodies named herein.

2. Accordingly necessary legal steps shall be taken by the Government of Sierra Leone, within a period of fourteen days following the signing of the present Agreement, to amend relevant laws and regulations that may constitute an impediment or bar to RUF/SL and AFRC personnel holding public office.

3. Within seven days of the removal of any such legal impediments, both parties shall meet to discuss and agree on the appointment of RUF/SL members to positions in parastatals, diplomacy and any other public sector.

ARTICLE V

ENABLING THE RUF/SL TO JOIN A BROAD-BASED GOVERNMENT OF NATIONAL UNITY THROUGH CABINET APPOINTMENTS

1. The Government of Sierra Leone shall accord every opportunity to the RUF/SL to join a broad-based government of national unity through cabinet appointments. To that end:

2. The Chairmanship of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD) as provided for in Article VII of the present Agreement shall be offered to the leader of the RUF/SL, Corporal Foday Sankoh. For this purpose he shall enjoy the status of Vice President and shall therefore be answerable only to the President of Sierra Leone.

3. The Government of Sierra Leone shall give ministerial positions to the RUF/SL in a moderately expanded cabinet of 18, bearing in mind that the interests of other political parties and civil society organizations should also be taken into account, as follows:

(i) One of the senior cabinet appointments such as finance, foreign affairs and justice ;

(ii) Three other cabinet positions.

4. In addition, the Government of Sierra Leone shall, in the same spirit, make available to the RUF/SL the following senior government positions: Four posts of Deputy Minister.

5. Within a period of fourteen days following the signing of the present Agreement, the necessary steps shall be taken by the Government of Sierra Leone to remove any legal impediments that may prevent RUF/SL members from holding cabinet and other positions.

ARTICLE VI

COMMISSION FOR THE CONSOLIDATION OF PEACE

1. A Commission for the Consolidation of Peace (hereinafter after termed the CCP), shall be established within two weeks of the signing of the present Agreement to implement a post-conflict programme that ensures reconciliation and the welfare of all parties to the conflict, especially the victims of war. The CCP shall have the overall goal and responsibility for supervising and monitoring the implementation of and compliance with the provisions of the present Agreement relative to the promotion of national reconciliation and the consolidation of peace .

2. The CCP shall ensure that all structures for national reconciliation and the consolidation of peace already in existence and those provided for in the present Agreement are operational and given the necessary resources for realizing their respective mandates. These structures shall comprise :

(i) the Commission for the Management of Strategic Resources, National Reconstruction and Development;

(ii) the Joint Monitoring Commission;

(iii) the Provincial and District Cease-fire Monitoring Committees;

(iv) the Committee for the Release of Prisoners of War and Non-Combatants;

(v) the Committee for Humanitarian Assistance;

(vi) the National Commission on Disarmament, Demobilization and Reintegration;

(vii) the National Commission for Resettlement, Rehabilitation and Reconstruction;

(viii) the Human Rights Commission; and

(ix) the Truth and Reconciliation Commission.

3. The CCP shall have the right to inspect any activity or site connected with the implementation of the present Agreement.

4. The CCP shall have full powers to organize its work in any manner it deems appropriate and to appoint any group or sub-committee which it deems necessary in the discharge of its functions.

5. The Commission shall be composed of the following members:

i) Two representatives of the civil society ;

ii) One representative each named by the Government, the RUF/SL and the Parliament.

6. The CCP shall have its own offices, adequate communication facilities and secretariat support staff.

7. Recommendations for improvements or modifications shall be made to the President of Sierra Leone for appropriate action. Likewise, failures of the structures to perform their assigned duties shall also be brought to the attention of the President.

8. Disputes arising out of the preceding paragraph shall be brought to the Council of Elders and Religious Leaders for resolution, as specified in Article VIII of the present Agreement.

9. Should Protocols be needed in furtherance of any provision in the present Agreement, the CCP shall have the responsibility for their preparation.

10. The mandate of the CCP shall terminate at the end of the next general elections.

ARTICLE VII

COMMISSION FOR THE MANAGEMENT OF STRATEGIC RESOURCES, NATIONAL RECONSTRUCTION AND DEVELOPMENT

1. Given the emergency situation facing the country, the parties agree that the Government shall exercise full control of the exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone. Accordingly, a Commission for the Management of Strategic Resources, National Reconstruction and Development (hereinafter termed the CMRRD) shall be established and charged with the responsibility of securing and monitoring the legitimate exploitation of Sierra Leone's gold and diamonds, and other resources that are determined to be of strategic importance for national security and welfare as well as cater for post-war rehabilitation and reconstruction, as provided for under Article XXVIII of the present Agreement.

2. The Government shall take the necessary legal action within a period not exceeding two weeks from the signing of the present Agreement to the effect that all exploitation, sale, export, or any other transaction of gold and diamonds shall be forbidden except those sanctioned by the CMRRD. All previous concessions shall be null and void.

3. The CMRRD shall authorize licensing of artisanal production of diamonds and gold, in accordance with prevailing laws and regulations. All gold and diamonds extracted or otherwise sourced from any Sierra Leonean territory shall be sold to the Government.

4. The CMRRD shall ensure, through the appropriate authorities, the security of the areas covered under this Article, and shall take all necessary measures against unauthorized exploitation.

5. For the export or local resale of gold and diamonds by the Government, the CMRRD shall authorize a buying and selling agreement with one or more reputable international and specialized mineral companies. All exports of Sierra Leonean gold and diamonds shall be transacted by the Government, under these agreements.

6. The proceeds from the transactions of gold and diamonds shall be public monies which shall enter a special Treasury account to be spent exclusively on the development of the people of Sierra Leone, with appropriations for public education, public health, infrastructural development, and compensation for incapacitated war victims as well as post-war rehabilitation and reconstruction. Priority spending shall go to rural areas.

7. The Government shall, if necessary, seek the assistance and cooperation of other governments and their instruments of law enforcement to detect and facilitate the prosecution of violations of this Article.

8. The management of other natural resources shall be reviewed by the CMRRD to determine if their regulation is a matter of national security and welfare, and recommend appropriate policy to the Government.

9. The functions of the Ministry of Mines shall continue to be carried out by the current authorized ministry. However, in respect of strategic mineral resources, the CMRRD shall be an autonomous body in carrying out its duties concerning the regulation of Sierra Leone's strategic natural resources.

10. All agreements and transactions referred to in this Article shall be subject to full public disclosure and records of all correspondence, negotiations, business transactions and any other matters related to exploitation, management local or international marketing, and any other matter shall be public documents.

11. The Commission shall issue monthly reports, including the details of all the transactions related to gold and diamonds, and other licenses or concessions of natural resources, and its own administrative costs.

12. The Commission shall be governed by a Board whose Chairmanship shall be offered to the Leader of the RUF/SL, Corporal Foday Sankoh. The Board shall also comprise :

i) Two representatives of the Government appointed by the President;

ii) Two representatives of the political party to be formed by the RUF/SL;

iii) Three representatives of the civil society; and

iv) Two representatives of other political parties appointed by Parliament.

13. The Government shall take the required administrative actions to implement the commitments made in the present Agreement; and in the case of enabling legislation, it shall draft and submit to Parliament within thirty days of the signature of the present Agreement, the relevant bills for their enactment into law.

14. The Government commits itself to propose and support an amendment to the Constitution to make the exploitation of gold and diamonds the legitimate domain of the people of Sierra Leone, and to determine that the proceeds be used for the development of Sierra Leone, particularly public education, public health, infrastructure development, and compensation of incapacitated war victims as well as post-war reconstruction and development.

ARTICLE VIII

COUNCIL OF ELDERS AND RELGIOUS LEADERS

1. The signatories agree to refer any conflicting differences of interpretation of this Article or any other Article of the present Agreement or its protocols, to a Council of Elders and Religious Leaders comprised as follows:

i) Two members appointed by the Inter-Religious Council;

ii) One member each appointed by the Government and the RUF/SL; and

iii) One member appointed by ECOWAS.

2. The Council shall designate its own chairperson from among its members. All of its decisions shall be taken by the concurrence of at least four members, and shall be binding and public, provided that an aggrieved party may appeal to the Supreme Court.

PART THREE

OTHER POLITICAL ISSUES

This Part of the present Agreement Consists of the following Articles :

Article IX Pardon and Amnesty

Article X Review of the Present Constitution

Article XI Elections

Article XII National Electoral Commission

ARTICLE IX

PARDON AND AMNESTY

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.

2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

ARTICLE X

REVIEW OF THE PRESENT CONSTITUTION

In order to ensure that the Constitution of Sierra Leone represents the needs and aspirations of the people of Sierra Leone and that no constitutional or any other legal provision prevents the implementation of the present Agreement, the Government of Sierra Leone shall take the necessary steps to establish a Constitutional Review Committee to review the provisions of the present Constitution, and where deemed appropriate recommend revisions and amendments, in accordance with Part V, Section 108 of the Constitution of 1991.

ARTICLE XI

DATE OF NEXT ELECTIONS

The next national elections in Sierra Leone shall be held in accordance with the present Constitution of Sierra Leone.

ARTICLE XII

NATIONAL ELECTORAL COMMISSION

1. A new independent National Electoral Commission (hereinafter termed the NEC) shall be set up by the Government, not later than three months after the signing of the present Agreement.

2. In setting up the new NEC the President shall consult all political parties, including the RUF/SL, to determine the membership and terms of reference of the Commission, paying particular attention to the need for a level playing field in the nation's elections.

3. No member of the NEC shall be eligible for appointment to political office by any government formed as a result of an election he or she was mandated to conduct.

4. The NEC shall request the assistance of the International Community, including the UN, the OAU, ECOWAS and the Commonwealth of Nations, in monitoring the next presidential and parliamentary elections in Sierra Leone.

PART FOUR

POST-CONFLICT MILITARY AND SECURITY ISSUES

1. The Government of Sierra Leone and the RUF/SL, recognizing that the maintenance of peace and security is of paramount importance for the achievement of lasting peace in Sierra Leone and for the welfare of its people, have agreed to the following formulas for dealing with post-conflict military and security matters. Each of these formulas (not in priority order) is contained in separate Articles of this Part of the present Agreement and may be further detailed in protocols annexed to the Agreement.

Article XIII Transformation and New Mandate of ECOMOG

Article XIV New Mandate of UNOMSIL

Article XV Security Guarantees for Peace Monitors

Article XVI Encampment, Disarmament, Demobilization and Reintegration

Article XVII Restructuring and Training of the Sierra Leone Armed Forces

Article XVIII Withdrawal of Mercenaries

Article XIX Notification to Joint Monitoring Commission

Article XX Notification to Military Commands.

ARTICLE XIII

TRANSFORMATION AND NEW MANDATE OF ECOMOG

1. Immediately upon the signing of the present Agreement, the parties shall request ECOWAS to revise the mandate of ECOMOG in Sierra Leone as follows:

(i) Peacekeeping;

(ii) Security of the State of Sierra Leone;

(iii) Protection of UNOMSIL.

(iv) Protection of Disarmament, Demobilisation and Reintegration personnel.

2. The Government shall, immediately upon the signing of the present Agreement, request ECOWAS for troop contributions from at least two additional countries. The additional contingents shall be deployed not later than 30 days from the date of signature of the present Agreement. The Security Council shall be requested to provide assistance in support of ECOMOG.

3. The Parties agree to develop a timetable for the phased withdrawal of ECOMOG, including measures for securing all of the territory of Sierra Leone by the restructured armed forces. The phased withdrawal of ECOMOG will be linked to the phased creation and deployment of the restructured armed forces.

ARTICLE XIV

NEW MANDATE OF UNOMSIL

1 The UN Security Council is requested to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the present Agreement.

ARTICLE XV

SECURITY GUARANTEES FOR PEACE MONITORS

1. The Government of Sierra Leone and the RUF/SL agree to guarantee the safety, security and freedom of movement of UNOMSIL Military Observers throughout Sierra Leone. This guarantee shall be monitored by the Joint Monitoring Commission.

2. The freedom of movement includes complete and unhindered access for UNOMSIL Military Observers in the conduct of their duties throughout Sierra Leone. Before and during the process of Disarmament, Demobilization and Reintegration, officers and escorts to be provided by both Parties shall be required to facilitate this access.

3. Such freedom of movement and security shall also be accorded to non-military UNOMSIL personnel such as Human Rights Officers in the conduct of their duties. These personnel shall, in most cases, be accompanied by UNOMSIL Military Observers.

4. The provision of security to be extended shall include United Nations aircraft, vehicles and other property.

ARTICLE XVI

ENCAMPMENT, DISARMAMENT, DEMOBILIZATION AND REINTEGRATION

1. A neutral peace keeping force comprising UNOMSIL and ECOMOG shall disarm all combatants of the RUF/SL, CDF, SLA and paramilitary groups. The encampment, disarmament and demobilization process shall commence within six weeks of the signing of the present Agreement in line with the deployment of the neutral peace keeping force.

2. The present SLA shall be restricted to the barracks and their arms in the armoury and their ammunitions in the magazines and placed under constant surveillance by the neutral peacekeeping force during the process of disarmament and demobilization.

3 UNOMSIL shall be present in all disarmament and demobilization locations to monitor the process and provide security guarantees to all ex-combatants.

4. Upon the signing of the present Agreement, the Government of Sierra Leone shall immediately request the International Community to assist with the provision of the necessary financial and technical resources needed for the adaptation and extension of the existing Encampment, Disarmament, Demobilization and Reintegration Programme in Sierra Leone, including payment of retirement benefits and other emoluments due to former members of the SLA.

ARTICLE XVII

RESTRUCTURING AND TRAINING OF THE SIERRA LEONEARMED FORCES

1. The restructuring, composition and training of the new Sierra Leone armed forces will be carried out by the Government with a view to creating truly national armed forces, bearing loyalty solely to the State of Sierra Leone, and able and willing to perform their constitutional role.

2. Those ex-combatants of the RUF/SL, CDF and SLA who wish to be integrated into the new restructured national armed forces may do so provided they meet established criteria.

3. Recruitment into the armed forces shall reflect the geo-political structure of Sierra Leone within the established strength.

ARTICLE XVIII

WITHDRAWAL OF MERCENARIES

All mercenaries, in any guise, shall be withdrawn from Sierra Leone immediately upon the signing of the present Agreement. Their withdrawal shall be supervised by the Joint Monitoring Commission.

ARTICLE XIX

NOTIFICATION TO JOINT MONITORING COMMISSION

Immediately upon the establishment of the JMC provided for in Article II of the present Agreement, each party shall furnish to the JMC information regarding the strength and locations of all combatants as well as the positions and descriptions of all known unexploded bombs (UXBs), explosive ordnance devices (EODs), minefields, booby traps, wire entanglements, and all other physical or military hazards. The JMC shall seek all necessary technical assistance in mine clearance and the disposal or destruction of similar devices and weapons under the operational control of the neutral peacekeeping force. The parties shall keep the JMC updated on changes in this information so that it can notify the public as needed, to prevent injuries.

ARTICLE XX

NOTIFICATION TO MILITARY COMMANDS

Each party shall ensure that the terms of the present Agreement, and written orders requiring compliance, are immediately communicated to all of its forces.

PART FIVE

HUMANITARIAN, HUMAN RIGHTS AND SOCIO-ECONOMIC ISSUES

1. The Government of Sierra Leone and the RUF/SL recognizing the importance of upholding, promoting and protecting the human rights of every Sierra Leonean as well as the enforcement of humanitarian law, agree to the following formulas for the achievement of these laudable objectives. Each of these formulas (not in priority order) is contained in separate Articles of this Part of the present Agreement

Article XXI Release of Prisoners and Abductees

Article XXII Refugees and Displaced Persons

Article XXIII Guarantee of the Security of Displaced Persons and Refugees

Article XXIV Guarantee and Promotion of Human Rights

Article XXV Human Rights Commission

Article XXVI Human Rights Violations

Article XXVII Humanitarian Relief

Article XXVIII Post War Rehabilitation and Reconstruction

Article XXIX Special Fund for War Victims

Article XXX Child Combatants

Article XXXI Education and Health

ARTICLE XXI

RELEASE OF PRISONERS AND ABDUCTEES

All political prisoners of war as well as all non-combatants shall be released immediately and unconditionally by both parties, in accordance with the Statement of June 2, 1999, which is contained in Annex 3 and constitutes an integral part of the present Agreement.

ARTICLE XXII

REFUGEES AND DISPLACED PERSONS

The Parties through the National Commission for Resettlement, Rehabilitation and Reconstruction agree to seek funding from and the involvement of the UN and other agencies, including friendly countries, in order to design and implement a plan for voluntary repatriation and reintegration of Sierra Leonean refugees and internally displaced persons, including non-combatants, in conformity with international conventions, norms and practices.

ARTICLE XXIII

GUARANTEE OF THE SECURITY OF DISPLACED PERSONS AND REFUGEES

As a reaffirmation of their commitment to the observation of the conventions and principles of human rights and the status of refugees, the Parties shall take effective and appropriate measures to ensure that the right of Sierra Leoneans to asylum is fully respected and that no camps or dwellings of refugees or displaced persons are violated.

ARTICLE XXIV

GUARANTEE AND PROMOTION OF HUMAN RIGHTS

1. The basic civil and political liberties recognized by the Sierra Leone legal system and contained in the declarations and principles of Human Rights adopted by the UN and OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and People's Rights, shall be fully protected and promoted within Sierra Leonean society.

2. These include the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one's country.

ARTICLE XXV

HUMAN RIGHTS COMMISSION

1. The Parties pledge to strengthen the existing machinery for addressing grievances of the people in respect of alleged violations of their basic human rights by the creation, as a matter of urgency and not later than 90 days after the signing of the present Agreement, of an autonomous quasi-judicial national Human Rights Commission.

2. The Parties further pledge to promote Human Rights education throughout the various sectors of Sierra Leonean society, including the schools, the media, the police, the military and the religious community.

3. In pursuance of the above, technical and material assistance may be sought from the UN High Commissioner for Human Rights, the African Commission on Human and Peoples Rights and other relevant international organisations.

4. A consortium of local human rights and civil society groups in Sierra Leone shall be encouraged to help monitor human rights observance.

ARTICLE XXVI

HUMAN RIGHTS VIOLATIONS

1. A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.

2 In the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991.

This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

3. Membership of the Commission shall be drawn from a cross-section of Sierra Leonean society with the participation and some technical support of the International Community. This Commission shall be established within 90 days after the signing of the present Agreement and shall, not later than 12 months after the commencement of its work, submit its report to the Government for immediate implementation of its recommendations.

ARTICLE XXVII

HUMANITARIAN RELIEF

1. The Parties reaffirm their commitment to their Statement on the Delivery of Humanitarian Assistance in Sierra Leone of June 3, 1999 which is contained in Annex 4 and constitutes an integral part of the present Agreement. To this end, the Government shall request appropriate international humanitarian assistance for the people of Sierra Leone who are in need all over the country.

2. The Parties agree to guarantee safe and unhindered access by all humanitarian organizations throughout the country in order to facilitate delivery of humanitarian assistance, in accordance with international conventions, principles and norms which govern humanitarian operations. In this respect, the parties agree to guarantee the security of the presence and movement of humanitarian personnel.

3. The Parties also agree to guarantee the security of all properties and goods transported, stocked or distributed by humanitarian organizations, as well as the security of their projects and beneficiaries.

4. The Government shall set up at various levels throughout the country, the appropriate and effective administrative or security bodies which will monitor and facilitate the implementation of these guarantees of safety for the personnel, goods and areas of operation of the humanitarian organizations.

ARTICLE XXVIII

POST - WAR REHABILITATION AND RECONSTRUCTION

1. The Government, through the National Commission for Resettlement, Rehabilitation and Reconstruction and with the support of the International Community, shall provide appropriate financial and technical resources for post-war rehabilitation, reconstruction and development.

2. Given that women have been particularly victimized during the war, special attention shall be accorded to their needs and potentials in formulating and implementing national rehabilitation, reconstruction and development programmes, to enable them to play a central role in the moral, social and physical reconstruction of Sierra Leone.

ARTICLE XXIX

SPECIAL FUND FOR WAR VICTIMS

The Government, with the support of the International Community, shall design and implement a programme for the rehabilitation of war victims. For this purpose, a special fund shall be set up.

ARTICLE XXX

CHILD COMBATANTS

The Government shall accord particular attention to the issue of child soldiers. It shall, accordingly, mobilize resources, both within the country and from the International Community, and especially through the Office of the UN Special Representative for Children in Armed Conflict, UNICEF and other agencies, to address the special needs of these children in the existing disarmament, demobilization and reintegration processes.

ARTICLE XXXI

EDUCATION AND HEALTH

The Government shall provide free compulsory education for the first nine years of schooling (Basic Education) and shall endeavour to provide free schooling for a further three years. The Government shall also endeavour to provide affordable primary health care throughout the country.

PART SIX

IMPLEMENTATION OF THE AGREEMENT

ARTICLE XXXII

JOINT IMPLEMENTATION COMMITTEE

A Joint Implementation Committee consisting of members of the Commission for the Consolidation of Peace (CCP) and the Committee of Seven on Sierra Leone, as well as the Moral Guarantors, provided for in Article XXXIV of the present Agreement and other international supporters shall be established. Under the chairmanship of ECOWAS, the Joint Implementation Committee shall be responsible for reviewing and assessing the state of implementation of the Agreement, and shall meet at least once every three months. Without prejudice to the functions of the Commission for the Consolidation of Peace as provided for in Article VI, the Joint Implementation Committee shall make recommendations deemed necessary to ensure effective implementation of the present Agreement according to the Schedule of Implementation, which appears as Annex 5.

ARTICLE XXXIII

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 of the signing of this Agreement. The signed Agreement shall also be published in the Sierra Leone Gazette not later than 48 (Forty - Eight) hours after the date of registration of this Agreement. This Agreement shall be laid before the Parliament of Sierra Leone not later than 21 (Twenty - One) days after the signing of this Agreement.

ARTICLE XXXVII

ENTRY INTO FORCE

The present Agreement shall enter into force immediately upon its signing by the Parties.

Done in Lomé this seven day of the month of July 1999
in twelve (12) original texts in English and French, each text being equally authentic.

ALHAJI DR AHMAD TEJAN KABBAH
PRESIDENT OF THE REPUBLIC
OF SIERRA LEONE

CORPORAL FODAY SAYBANA SANKOH
LEADER OF THE REVOLUTIONARY
UNITED FRONT OF SIERRA LEONE

HIS EXCELLENCY GNASSINGBE EYADEMA
PRESIDENT OF THE TOGOLESE REPUBLIC,
CHAIRMAN OF ECOWAS

HIS EXCELLENCY BLAISE COMPAORE
PRESIDENT OF BURKINA FASO

HIS EXCELLENCY DAHKPANAH
DR. CHARLES GHANKEY TAYLOR
PRESIDENT OF THE REPUBLIC OF LIBERIA

/...

HIS EXCELLENCY OLUSEGUN OBASANJO
PRESIDENT AND COMMANDER-IN-CHIEF OF THE ARMED
FORCES OF THE FEDERAL REPUBLIC OF NIGERIA

HIS EXCELLENCY VICTOR GBEHO,
MINISTER OF FOREIGN AFFAIRS
OF THE REPUBLIC OF GHANA

HIS EXCELLENCY YOUSSOUFOU BAMBA
MINISTER OF STATE AT THE
FOREIGN MINISTRY IN CHARGE OF
INTERNATIONAL COOPERATION
OF COTE D'IVOIRE

Mr. Roger LALOUPO
REPRESENTATIVE OF THE ECOWAS
EXECUTIVE SECRETARY

Ambassador Francis G. OKELO
SPECIAL REPRESENTATIVE
OF THE UNITED NATIONS
SECRETARY GENERAL

Ms. Adwoa COLEMAN
REPRESENTATIVE OF THE
ORGANIZATION OF AFRICAN UNITY

Dr. Moses K.Z. ANAFU
REPRESENTATIVE OF THE
COMMONWEALTH OF NATIONS

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ANNEX 1

AGREEMENT ON CEASEFIRE IN SIERRA LEONE

****

President Ahmad Tejan KABBAH and Rev. Jesse Jackson met on 18 May 1999 with Corporal Foday Saybana SANKOH, under the auspices of President Gnassingbe EYADEMA. At that meeting, the question of the peace process for Sierra Leone was discussed.

* * *

The Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL),

- Desirous to promote the ongoing dialogue process with a view to establishing durable peace and stability in Sierra Leone ; and

- Wishing to create an appropriate atmosphere conducive to the holding of peace talks in Lome, which began with the RUF internal consultations to be followed by dialogue between the Government and the RUF ;

- Have jointly decided to :

1- Agree to ceasefire as from 24 May 1999, the day that President EYADEMA invited Foreign Ministers of ECOWAS to discuss problems pertaining to Sierra Leone. It was further agreed that the dialogue between the Government of Sierra Leone and RUF would commence on 25 May 1999 ;

2- Maintain their present and respective positions in Sierra Leone as of the 24th May 1999 ; and refrain from any hostile or aggressive act which could undermine the peace process ;

3- Commit to start negotiations in good faith, involving all relevant parties in the discussions, not later than May 25 in Lome ;

/...

4- Guarantee safe and unhindered access by humanitarian organizations to all people in need ; establish safe corridors for the provision of food and medical supplies to ECOMOG soldiers behind RUF lines, and to RUF combatants behind ECOMOG lines ;

5- Immediate release of all prisoners of war and non-combatants ;

6- Request the United Nations, subject to the Security Council's authorization, to deploy military observers as soon as possible to observe compliance by the Government forces (ECOMOG and Civil Defence Forces) and the RUF, including former AFRC forces, with this ceasefire agreement.

This agreement is without prejudice to any other agreement or additional protocols which may be discussed during the dialogue between the Government and the RUF.

Signed in Lome (Togo) 18 May 1999, in Six (6) Originals in English and French.

For the Government of Sierra Leone

ALHADJI Dr. Ahmad Tejan KABBAH
President of the Republic of Sierra Leone

For the Revolutionary United Front of Sierra Leone

Corporal Foday Saybana SANKOH
Leader of the Revolutionary United Front (RUF)

Witnessed by :

For the Government of Togo and Current Chairman of ECOWAS

Gnassingbe EYADEMA
President of the Republic of Togo

For the United Nations

Francis G. OKELO
Special Representative of the Secretary General

For the Organization of African Unity

Adwoa COLEMAN
Representative of the Organization of African Unity

US Presidential Special Envoy for the Promotion of Democracy in Africa

Rev. Jesse JACKSON

ANNEX 2

DEFINITION OF CEASE-FIRE VIOLATIONS

1. In accordance with Article II of the present Agreement, both parties agree that the following constitute cease-fire violations and a breach of the Cease-fire Agreement:

a. The use of weapons of any kind in any circumstance including:

(i) Automatic and semi-automatic rifles, pistols, machine guns and any other small arms weapon systems.

(ii) Heavy machine guns and any other heavy weapon systems.

(iii) Grenades and rocket-propelled grenade weapon systems.

(iv) Artillery, rockets, mortars and any other indirect fire weapon systems.

(v) All types of mine, explosive devices and improvised booby traps.

(vi) Air assets outside of respective areas of control, of any nature, including reconnaissance aircraft with the exception of pre-agreed flights.

(vii) Air Defence weapon systems of any nature.

(viii) Any other weapon not included in the above paragraphs.

b. Troop movements of any nature outside of the areas recognized as being under the control of respective fighting forces without prior notification to the Cease-fire Monitoring Committee of any movements at least 48 hours in advance.

c. The movement of arms and ammunition. To be considered in the context of Security Council Resolution 1171 (1998).

d. Troop movements of any nature;

e. The construction and/or the improvement of defensive works and positions within respective areas of control, but outside a geographical boundary of 500m from existing similar positions.

f. Reconnaissance of any nature outside of respective areas of control.

g. Any other offensive or aggressive action.

2. Any training or other military activities not provided for in Articles XIII to XIX of the present Agreement, constitute a cease-fire violation.

3. In the event of a hostile external force threatening the territorial integrity or sovereignty of Sierra Leone, military action may be undertaken by the Sierra Leone Government.

ANNEX 3

STATEMENT BY THE GOVERNMENT OF SIERRA LEONE AND THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE ON THE RELEASE OF PRISONERS OF WAR AND NON-COMBATANTS

The Government of Sierra Leone (GOSL) and the Revolutionary United Front (RUF/SL) have agreed to implement as soon as possible the provision of the Cease-fire Agreement which was signed on 18 May 1999 in Lome, relating to the immediate release of prisoners of war and non-combatants.

Both sides reaffirmed the importance of the implementation of this provision in the interest of the furtherance of the talks.

They therefore decided that an appropriate Committee is established to handle the release by them of all prisoners of war and non-combatants.

Both the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone decided that such a Committee be established by the UN and chaired by the UN Chief Military Observer in Sierra Leone and comprising representatives of the International Committee of the Red Cross (ICRC), UNICEF and other relevant UN Agencies and NGOS

This Committee should begin its work immediately by contacting both parties to the conflict with a view to effecting the immediate release of these prisoners of war and non-combatants.

Lomé - 2 June 1999

ANNEX 4

STATEMENT BY THE GOVERNMENT OF SIERRA LEONE AND THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE ON THE DELIVERY OF HUMANITARIAN ASSISTANCE IN SIERRA LEONE

The parties to the conflict in Sierra Leone meeting in Lome Togo on 3rd June 1999 in the context of the Dialogue between the Government of Sierra Leone (GSL) and the Revolutionary United Front of Sierra Leone (RUF/SL):

Reaffirm their respect for international convention, principles and norms, which govern the right of people to receive humanitarian assistance and the effective delivery of such assistance.

Reiterate their commitment to the implementation of the Cease-fire Agreement signed by the two parties on 18th May 1999 in Lome.

Aware of the fact that the protracted civil strife in Sierra Leone has created a situation whereby the vast majority of Sierra Leoneans in need of humanitarian assistance cannot be reached.

Hereby agree as follows:

1. That all duly registered humanitarian agencies shall be guaranteed safe and unhindered access to all areas under the control of the respective parties in order that humanitarian assistance can be delivered safely and effectively, in accordance with international conventions, principles and norms govern humanitarian operations.

2. In this respect the two parties shall:

   a. guarantee safe access and facilitate the fielding of independent assessment missions by duly registered humanitarian agencies.

/...

b. identify, in collaboration with the UN Humanitarian Co-ordinator in Sierra Leone and UNOMSIL, mutually agreed routes (road, air and waterways) by which humanitarian goods and personnel shall be transported to the beneficiaries to provide needed assistance.

c. allow duly registered humanitarian agencies to deliver assistance according to needs established through independent assessments.

d. guarantee the security of all properties of and goods transported, stocked or distributed by the duly registered humanitarian agencies, as well as the security of their project areas and beneficiaries.

3. The two parties undertake to establish with immediate effect, and not later later than seven days, an Implementation Committee formed by appropriately designated and mandated representatives from the Government of Sierra Leone, the Revolutionary United Front of Sierra Leone, the Civil Society, the NGO community, and the UNOMSIL ; and chaired by the United Nations Humanitarian Co-ordinator, in co-ordination with the Special Representative of the Secretary General in Sierra Leone.

The Implementation Committee will be mandated to:

a. Ascertain and assess the security of proposed routes to be used by the humanitarian agencies, and disseminate information on routes to interested humanitarian agencies.

b. Receive and review complaints which may arise in the implementation of this arrangement, in order to re-establish full compliance.

4. The parties agree to set up at various levels in their areas of control, the appropriate and effective administrative and security bodies which will monitor and facilitate the effective delivery of humanitarian assistance in all approved points of delivery, and ensure the security of the personnel, goods and project areas of the humanitarian agencies as well as the safety of the beneficiaries.

Issued in Lomé
June 3 1999

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ANNEX 5

DRAFT SCHEDULE OF IMPLEMENTATION OF THE PEACE AGREEMENT

I. ACTIVITIES WITH SPECIFIC TIMING:

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 1	Signing of the Peace Agreement		
	Amnesty	The Government to grant absolute and free pardon to the RUF leader Foday Sankoh through appropriate legal steps	
	Transformation and new mandate of ECOMOG	Request to ECOWAS by the parties for revision of the mandate of ECOMOG in Sierra Leone Request to the UN Security Council : to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the present Agreement; Request to the international community to provide substantial financial and logistical assistance to facilitate implementation of the Peace Agreement. Request to ECOWAS by the parties for contribution of additional troops	
	Transformation of the RUF into a political party	RUF/SL to commence to organize itself to function as a political party	
	Encampment, disarmament, demobilization and reintegration (DDR)	Request for international assistance in adapting and extending the existing DDR programme	
	Withdrawal of mercenaries	Supervision by Joint Monitoring Commission	
	Notification to Joint Monitoring Commission	Communication by the parties of positions and description of all known warlike devices/materials	
	Notification to Military Commands	Communication by the parties of written orders requiring compliance	

DAY 15	Enabling members of the RUF/SL to hold public office, and to join a broad-based Government of National Unity through Cabinet appointments	Removal by the Government of all legal impediments	
	Commission for the Consolidation of Peace (CCP)	Creation of the Commission to implement a post-conflict reconciliation and welfare programme	Mandate of the Commission to terminate at the end of next general elections Jan.-Feb.2001
TIMING	**ACTIVITIES**	**ACTION REQUIRED**	**FOLLOW-UP ACTION**
DAY 15 (cont.)	Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD)	Ban on all exploitation, sale, export, or any transaction of gold and diamonds except those sanctioned by the CMRDD	
DAY 22	Enabling members of the RUF/SL to hold public office	Discussion and agreement between both parties on the appointments of RUF/SL members to positions in parastatal, diplomacy and any other public sector	For a period of fourteen days
DAY 31	Transformation of the RUF into a political party Commission for the management of Strategic Resources, National Reconstruction and Development (CMRRD) Transformation, new mandate, and phased withdrawal of ECOMOG	Necessary legal steps by the Government for registration of the RUF as a political party Preparation and submission by Government to the Parliament of relevant bills for enabling legislation commitments made under the peace agreement Deployment of troops from at least two additional countries	
DAY 60	Completion of encampment, disarmament and demobilization	Restriction of SLA soldiers to the barracks and storage of their arms and ammunition under constant surveillance by the Neutral Peace-Keeping Force during the disarmament process Monitoring of disarmament and demobilization by UNOMSIL	
DAY 90	Human Rights Commission	Creation of an autonomous quasi judicial national Human Rights Commission Request for technical and material assistance from the UN High	

		Commissioner for Human Rights, the African Commission on Human and Peoples Rights and other relevant organizations Creation of a Truth and Reconciliation Commission	
	Elections	Establishment of a new independent National Electoral Commission (NEC), in consultation with all political parties including the RUF/SL Request for financial and logistical support for the operations of the NEC Request for assistance from the international community in monitoring the next presidential and parliamentary elections in Sierra Leone	
DAY 456	Human Rights Violations	Submission by the Truth and Reconciliation Commission of its report and recommendation to the Government for immediate implementation	

II. ACTIVITIES WITHOUT SPECIFIC TIMING: (SHORT/MEDIUM/LONG TERM):

SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
1.	Ceasefire monitoring (Ceasefire Agreement signed on 18 May 1999	Establishment of Ceasefire Monitoring Committees at provincial and district levels Request for international assistance in providing funds and other logistics for the operations of the JMC	JMC already established and operational
2.	Review of the present Constitution	Establishment of a Constitutional Review Committee	
3.	Mediation by the Council of Elders and Religious Leaders	Appointment of members of the Council by the Interreligious Council, the Government, the RUF and ECOWAS	
4.	Timetable for the phased withdrawal of ECOMOG	Formulation of the timetable in connection with the phased creation and deployment of the restructured armed forces	
5.	Security guarantees for peace monitors	Communication, in writing, of security guarantees to UNMILOBs	
6.	Restructuring and training of the SLA	Creation by the Government of truly national armed forces reflecting the geo-political structure of Sierra Leone within the established	

		strength	
7.	Release of prisoners of war and abductees	Establishment of a Committee on the Release of Prisoners of War and Non-combatants	Operation underway. Parties to be encouraged to continue vigorously
8.	Refugees and displaced persons	Formulation of plan of voluntary repatriation and reintegration of Sierra Leonean refugees and IDPs, with the financial assistance and involvement of UN and other agencies and friendly countries	
9.	Guarantee and protection of Human Rights	Respect of the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one's country	
10.	Guarantee of the security of displaced persons and refugees	Adoption by the parties of effective and appropriate security measures	
11.	Humanitarian relief	Continued delivery of humanitarian assistance with appropriate international support Establishment by the Government of appropriate and effective administrative or security bodies to monitor and facilitate implementation of security guarantees to personnel, goods and areas of operations	
12.	Post-war rehabilitation and reconstruction	Provision by the Government of appropriate financial and technical ressources	
13.	Special Fund for war victims	Formulation and implementation by the Government of a programme for the rehabilitation of war victims	
14.	Child combatants	Mobilization of internal and international resources by the Government to address the needs of child combatants	
15.	Education and Health	Mobilization of adequate funding for free compulsory basic education and primary health care	
16.	Amnesty	The Government to grant amnesty and pardon to RUF and AFRC personnel through appropriate legal steps	

ANNEX 14

Lomé Peace Agreement (Ratification) Act 1999 (including the text of the "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (the "Lomé Agreement").

SIGNED this *18th* day of *July, 1999.*

ALHAJI AHMAD TEJAN KABBAH,
President.

LS

No. 3 **1999**

Sierra Leone

The Lomé Peace Agreement (Ratification) Act, 1999

Short title.

Being an Act to ratify a Peace Agreement dated 7th July, 1999 and signed by the President in the name of Sierra Leone, of the one part, and the Leader of the Revolutionary United Front of Sierra Leone, of the other part.

[22nd July, 1999] Date of Commencement.

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SIGNED this *18th* day of *July, 1999.*

ALHAJI AHMAD TEJAN KABBAH,
President.

LS

No. 3 **1999**

Sierra Leone

The Lomé Peace Agreement (Ratification) Act, 1999

Short title.

Being an Act to ratify a Peace Agreement dated 7th July, 1999 and signed by the President in the name of Sierra Leone, of the one part, and the Leader of the Revolutionary United Front of Sierra Leone, of the other part.

[22nd July, 1999] Date of Commencement.

WHEREAS a Peace Agreement was, on 7th July, 1999, signed in Lomé, Togo, between the President, Alhaji Ahmad Tejan Kabbah in the name of Sierra Leone, of the one part, and Corporal Foday Saybana Sankoh, Leader of the Revolutionary United Front of Sierra Leone, of the other part:

AND WHEREAS the Peace Agreement contains provisions which alter the law of Sierra Leone and impose a charge on the Consolidated Fund and other funds of Sierra Leone to be established under the Peace Agreement by Acts of Parliament:

AND WHEREAS by the proviso to subsection (4) of section 40 of the Constitution of Sierra Leone, 1991, it is necessary in the light of the foregoing, for the Peace Agreement to be ratified by Act of Parliament:

NOW, THEREFORE, it is enacted by the President and Members of Parliament in this present Parliament assembled as follows:—

Ratification of Peace Agreement

1. The Peace Agreement referred to in the preamble and set out more fully in the Schedule is hereby ratified by Parliament.

Ratification to include alteration of the law, etc., of Sierra Leone.

2. The ratification effected by section 1 shall extend to the alteration of the law of Sierra Leone and the charge imposed on the Consolidated Fund and other funds to be established under the Peace Agreement by Acts of Parliament.

Interpretation. Act No. 6 of 1991.

3. In this Act, "law" has the same meaning assigned thereto in subsection (1) of Section 171 of the Constitution of Sierra Leone, 1991.

SCHEDULE *(Section 1)*

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

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

Having met in Lomé, Togo, from the 25 May, 1999, to 7 July, 1999 under the auspices of the Current Chairman of ECOWAS, President Gnassingbé Eyadéma;

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 Lomé 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 ;

Recommitting themselves to the total observance and compliance with the Cease-fire Agreement signed in Lomé 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 I

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.

Article III Transformation of the RUF/SL into a Political Party

Article IV Enabling Members of the RUF/SL to Hold Public Office

Article V Enabling the RUF/SL to Join a Broad-based Government of National Unity through Cabinet Appointment

Article VI Commission for the Consolidation of Peace

Article VII Commission for the Management of Strategic Resources, National Reconstruction and Development

Article VIII Council of Elders and Religious Leaders.

ARTICLE III

TRANSFORMATION OF THE RUF/SL INTO A POLITICAL PARTY

1. The Government of Sierra Leone shall accord every facility to the RUF/SL to transform itself into a political party and enter the mainstream of the democratic process. To that end:

2. Immediately upon the signing of the present Agreement, the RUF/SL shall commence to organize itself to function as a political movement, with the rights, privileges and duties accorded to all political parties in Sierra Leone. These include the freedom to publish, unhindered access to the media, freedom of association, freedom of expression, freedom of assembly, and the right to mobilize and associate freely.

3. Within a period of thirty days, following the signing of the present Agreement, the necessary legal steps shall be taken by the Government of Sierra Leone to enable the RUF/SL to register as a political party.

4. The Parties shall approach the International Community with a view to mobilizing resources for the purposes of enabling the RUF/SL to function as a political party. These resources may include but shall not be limited to:

(i) Setting up a trust fund;

(ii) Training for RUF/SL membership in party organization and functions; and

(iii) Providing any other assistance necessary for achieving the goals of this section.

ARTICLE IV

ENABLING MEMBERS OF THE RUF/SL TO HOLD PUBLIC OFFICE

1. The Government of Sierra Leone shall take the necessary steps to enable those RUF/SL members nominated by the RUF/SL to hold public office, within the time-frames agreed and contained in the present Agreement for the integration of the various bodies named herein.

2. Accordingly, necessary legal steps shall be taken by the Government of Sierra Leone, within a period of fourteen days following the signing of the present Agreement, to amend relevant laws and regulations that may constitute an impediment or bar to RUF/SL and AFRC personnel holding public office.

3. Within seven days of the removal of any such legal impediments, both parties shall meet to discuss and agree on the appointment of RUF/SL members to positions in parastatals, diplomacy and any other public sector.

ARTICLE V

ENABLING THE RUF/SL TO JOIN A BROAD-BASED GOVERNMENT OF NATIONAL UNITY THROUGH CABINET APPOINTMENTS

1. The Government of Sierra Leone shall accord every opportunity to the RUF/SL to join a broad-based government of national unity through cabinet appointments. To that end:

2. The Chairmanship of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD) as provided for in Article VII of the present Agreement shall be offered to the leader of the RUF/SL, Corporal Foday Sankoh. For this purpose he shall enjoy the status of Vice President and shall therefore be answerable only to the President of Sierra Leone.

3. The Government of Sierra Leone shall give ministerial positions to the RUF/SL in a moderately expanded cabinet of 18, bearing in mind that the interests of other political parties and civil society organizations should also be taken into account, as follows:

(i) One of the senior cabinet appointments such as finance, foreign affairs and justice;

(ii) Three other cabinet positions.

4. In addition, the Government of Sierra Leone shall, in the same spirit, make available to the RUF/SL the following senior government positions: Four posts of Deputy Minister.

5. Within a period of fourteen days following the signing of the present Agreement, the necessary steps shall be taken by the Government of Sierra Leone to remove any legal impediments that may prevent RUF/SL members from holding cabinet and other positions.

ARTICLE VI

COMMISSION FOR THE CONSOLIDATION OF PEACE

1. A Commission for the Consolidation of Peace (hereinafter after termed the CCP), shall be established within two weeks of the signing of the present Agreement to implement a post-conflict programme that ensures reconciliation and the welfare of all parties to the conflict, especially the victims of war. The CCP shall have the overall goal and responsibility for supervising and monitoring the implementation of and compliance with the provisions of the present Agreement relative to the promotion of national reconciliation and the consolidation of peace.

2. The CCP shall ensure that all structures for national reconciliation and the consolidation of peace already in existence and those provided for in the present Agreement are operational and given the necessary resources for realizing their respective mandates. These structures shall comprise:

(i) the Commission for the Management of Strategic Resources, National Reconstruction and Development;

(ii) the Joint Monitoring Commission;

(iii) the Provincial and District Cease-fire Monitoring Committees;

(iv) the Committee for the Release of Prisoners of War and Non-Combatants;

(v) the Committee for Humanitarian Assistance;

(vi) the National Commission on Disarmament, Demobilization and Reintegration;

(vii) the National Commission for Resettlement, Rehabilitation and Reconstruction;

(viii) the Human Rights Commission; and

(ix) the Truth and Reconciliation Commission.

3. The CCP shall have the right to inspect any activity or site connected with the implementation of the present Agreement.

4. The CCP shall have full powers to organize its work in any manner it deems appropriate and to appoint any group or sub-committee which it deems necessary in the discharge of its functions.

5. The Commission shall be composed of the following members:

(i) Two representatives of the civil society;

(ii) One representative each named by the Government, the RUF/SL and the Parliament.

6. The CCP shall have its own offices, adequate communication facilities and secretariat support staff.

7. Recommendations for improvements or modifications shall be made to the President of Sierra Leone for appropriate action. Likewise, failures of the structures to perform their assigned duties shall also be brought to the attention of the President.

8. Disputes arising out of the preceding paragraph shall be brought to the Council of Elders and Religious Leaders for resolution, as specified in Article VIII of the present Agreement.

9. Should Protocols be needed in furtherance of any provision in the present Agreement the CCP shall have the responsibility for their preparation.

10. The mandate of the CCP shall terminate at the end of the next general elections.

ARTICLE VII

COMMISSION FOR THE MANAGEMENT OF STRATEGIC RESOURCES, NATIONAL RECONSTRUCTION AND DEVELOPMENT

1. Given the emergency situation facing the country, the parties agree that the Government shall exercise full control of the exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone. Accordingly, a Commission for the Management of Strategic Resources, National Reconstruction and Development (hereinafter termed the CMRRD) shall be established and charged with the responsibility of securing and monitoring the legitimate exploitation of Sierra Leone's gold and diamonds, and other resources that are determined to be of strategic importance for national security and welfare as well as cater for post-war rehabilitation and reconstruction, as provided for under Article XXVIII of the present Agreement.

2. The Government shall take the necessary legal action within a period not exceeding two weeks from the signing of the present Agreement to the effect that all exploitation, sale, export, or any other transaction of gold and diamonds shall be forbidden except those sanctioned by the CMRRD. All previous concessions shall be null and void.

3. The CMRRD shall authorize licensing of artisanal production of diamonds and gold, in accordance with prevailing laws and regulations. All gold and diamonds extracted or otherwise sourced from any Sierra Leonean territory shall be sold to the Government.

4. The CMRRD shall ensure, through the appropriate authorities, the security of the areas covered under this Article, and shall take all necessary measures against unauthorized exploitation.

5. For the export or local resale of gold and diamonds by the Government, the CMRRD shall authorize a buying and selling agreement with one or more reputable international and specialized mineral companies. All exports of Sierra Leonean gold and diamonds shall be transacted by the Government, under these agreements.

6. The proceeds from the transactions of gold and diamonds shall be public monies which shall enter a special Treasury account to be spent exclusively on the development of the people of Sierra Leone, with appropriations for public education, public health, infrastructural development, and compensation for incapacitated war victims as well as post-war rehabilitation and reconstruction. Priority spending shall go to rural areas.

7. The Government shall, if necessary, seek the assistance and cooperation of other governments and their instruments of law enforcement to detect and facilitate the prosecution of violations of this Article.

8. The management of other natural resources shall be reviewed by the CMRRD to determine if their regulation is a matter of national security and welfare, and recommend appropriate policy to the Government.

9. The functions of the Ministry of Mines shall continue to be carried out by the current authorized ministry. However, in respect of strategic mineral resources, the CMRRD shall be an autonomous body in carrying out its duties concerning the regulation of Sierra Leone's strategic natural resources.

10. All agreements and transactions referred to in this Article shall be subject to full public disclosure and records of all correspondence, negotiations, business transactions and any other matters related to exploitation, management, local or international marketing, and any other matter shall be public documents.

11. The Commission shall issue monthly reports, including the details of all the transactions related to gold and diamonds, and other licenses or concessions of natural resources, and its own administrative costs.

12. The Commission shall be governed by a Board whose Chairmanship shall be offered to the Leader of the RUF/SL, Corporal Foday Sankoh. The Board shall also comprise:

(i) Two representatives of the Government appointed by the President;

(ii) Two representatives of the political party to be formed by the RUF/SL;

(iii) Three representatives of the civil society; and

(iv) Two representatives of other political parties appointed by Parliament.

13. The Government shall take the required administrative actions to implement the commitments made in the present Agreement; and in the case of enabling legislation, it shall draft and submit to Parliament within thirty days of the signature of the present Agreement, the relevant bills for their enactment into law.

14. The Government commits itself to propose and support an amendment to the Constitution to make the exploitation of gold and diamonds the legitimate domain of the people of Sierra Leone, and to determine that the proceeds be used for the development of Sierra Leone, particularly public education, public health, infrastructure development, and compensation of incapacitated war victims as well as post-war reconstruction and development.

ARTICLE VIII

COUNCIL OF ELDERS AND RELIGIOUS LEADERS

1. The signatories agree to refer any conflicting differences of interpretation of this Article or any other Article of the present Agreement or its protocols, to a Council of Elders and Religious Leaders comprised as follows:

(i) Two members appointed by the Inter-Religious Council;

(ii) One member each appointed by the Government and the RUF/SL; and

(iii) One member appointed by ECOWAS.

2. The Council shall designate its own chairperson from among its members. All of its decisions shall be taken by the concurrence of at least four members, and shall be binding and public, provided that an aggrieved party may appeal to the Supreme Court.

PART THREE

OTHER POLITICAL ISSUES

This Part of the present Agreement Consists of the following Articles:

Article IX Pardon and Amnesty

Article X Review of the Present Constitution

Article XI Elections

Article XII National Electoral Commission

ARTICLE IX

PARDON AND AMNESTY

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.

2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

ARTICLE X

REVIEW OF THE PRESENT CONSTITUTION

In order to ensure that the Constitution of Sierra Leone represents the needs and aspirations of the people of Sierra Leone and that no constitutional or any other legal provision prevents the implementation of the present Agreement, the Government of Sierra Leone shall take the necessary steps to establish a Constitutional Review Committee to review the provisions of the present Constitution, and where deemed appropriate, recommend revisions and amendments, in accordance with Part V, Section 108 of the Constitution of 1991.

ARTICLE XI

DATE OF NEXT ELECTIONS

The next national elections in Sierra Leone shall be held in accordance with the present Constitution of Sierra Leone.

ARTICLE XII

NATIONAL ELECTORAL COMMISSION

1. A new independent National Electoral Commission (hereinafter termed the NEC) shall be set up by the Government, not later than three months after the signing of the present Agreement.

2. In setting up the new NEC the President shall consult all political parties, including the RUF/SL, to determine the membership and terms of reference of the Commission, paying particular attention to the need for a level playing field in the nation's elections.

3. No member of the NEC shall be eligible for appointment to political office by any government formed as a result of an election he or she was mandated to conduct.

4. The NEC shall request the assistance of the International Community, including the UN, the OAU, ECOWAS and the Commonwealth of Nations, in monitoring the next presidential and parliamentary elections in Sierra Leone.

PART FOUR

POST-CONFLICT MILITARY AND SECURITY ISSUES

1. The Government of Sierra Leone and the RUF/SL, recognizing that the maintenance of peace and security is of paramount importance for the achievement of lasting peace in Sierra Leone and for the welfare of its people, have agreed to the following formulas for dealing with post-conflict military and security matters. Each of these formulas (not in priority order) is contained in separate Articles of this Part of the present Agreement and may be further detailed in protocols annexed to the Agreement.

Article XIII Transformation and New Mandate of ECOMOG

Article XIV New Mandate of UNOMSIL and Phased Withdrawal of ECOMOG

Article XV Security Guarantees for Peace Monitors

Article XVI Encampment, Disarmament, Demobilization and Reintegration

Article XVII Restructuring and Training of the Sierra Leone Armed Forces

Article XVIII Withdrawal of Mercenaries

Article XIX Notification to Joint Monitoring Commission

Article XX Notification to Military Commands.

ARTICLE XIII

TRANSFORMATION AND NEW MANDATE OF ECOMOG

1. Immediately upon the signing of the present Agreement, the parties shall request ECOWAS to revise the mandate of ECOMOG in Sierra Leone as follows:

(i) Peacekeeping;

(ii) Security of the State of Sierra Leone;

(iii) Protection of UNOMSIL.

(iv) Protection of Disarmament, Demobilization and Reintegration personnel.

2. The Government shall, immediately upon the signing of the present Agreement, request ECOWAS for troop contributions from at least two additional countries. The additional contingents shall be deployed not later than 30 days from the date of signature of the present Agreement. The Security Council shall be requested to provide assistance in support of ECOMOG.

3. The Parties agree to develop a timetable for the phased withdrawal of ECOMOG, including measures for securing all of the territory of Sierra Leone by the restructured armed forces. The phased withdrawal of ECOMOG will be linked to the phased creation and deployment of the restructured armed forces.

ARTICLE XIV

NEW MANDATE OF UNOMSIL

1. The UN Security Council is requested to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the present Agreement.

ARTICLE XV

SECURITY GUARANTEES FOR PEACE MONITORS

1. The Government of Sierra Leone and the RUF/SL agree to guarantee the safety, security and freedom of movement of UNOMSIL Military Observers throughout Sierra Leone. This guarantee shall be monitored by the Joint Monitoring Commission.

2. The freedom of movement includes complete and unhindered access for UNOMSIL Military Observers in the conduct of their duties throughout Sierra Leone. Before and during the process of Disarmament, Demobilization and Reintegration, officers and escorts to be provided by both Parties shall be required to facilitate this access.

3. Such freedom of movement and security shall also be accorded to non-military UNOMSIL personnel such as Human Rights Officers in the conduct of their duties. These personnel shall, in most cases, be accompanied by UNOMSIL Military Observers.

4. The provision of security to be extended shall include United Nations aircraft, vehicles and other property.

ARTICLE XVI

ENCAMPMENT, DISARMAMENT, DEMOBILIZATION AND REINTEGRATION

1. A neutral peace keeping force comprising UNOMSIL and ECOMOG shall disarm all combatants of the RUF/SL, CDF, SLA and paramilitary groups. The encampment, disarmament and demobilization process shall commence within six weeks of the signing of the present Agreement in line with the deployment of the neutral peace keeping force.

2. The present SLA shall be restricted to the barracks and their arms in the armoury and their ammunitions in the magazines and placed under constant surveillance by the neutral peacekeeping force during the process of disarmament and demobilization.

3. UNOMSIL shall be present in all disarmament and demobilization locations to monitor the process and provide security guarantees to all ex-combatants.

4. Upon the signing of the present Agreement, the Government of Sierra Leone shall immediately request the International Community to assist with the provision of the necessary financial and technical resources needed for the adaptation and extension of the existing Encampment, Disarmament, Demobilization and Reintegration Programme in Sierra Leone, including payment of retirement benefits and other emoluments due to former members of the SLA.

ARTICLE XVII

RESTRUCTURING AND TRAINING OF THE SIERRA LEONE ARMED FORCES

1. The restructuring, composition and training of the new Sierra Leone armed forces will be carried out by the Government with a view to creating truly national armed forces, bearing loyalty solely to the State of Sierra Leone, and able and willing to perform their constitutional role.

2. Those ex-combatants of the RUF/SL, CDF and SLA who wish to be integrated into the new restructured national armed forces may do so provided they meet established criteria.

3. Recruitment into the armed forces shall reflect the geo-political structure of Sierra Leone within the established strength.

ARTICLE XVIII

WITHDRAWAL OF MERCENARIES

All mercenaries, in any guise, shall be withdrawn from Sierra Leone immediately upon the signing of the present Agreement. Their withdrawal shall be supervised by the Joint Monitoring Commission.

ARTICLE XIX

NOTIFICATION TO JOINT MONITORING COMMISSION

Immediately upon the establishment of the JMC provided for in Article II of the present Agreement, each party shall furnish to the JMC information regarding the strength and locations of all combatants as well as the positions and descriptions of all known Unexploded Bombs (UXBs), Explosive Ordnance Devices (EODs), minefields, booby traps, wire entanglements, and all other physical or military hazards. The JMC shall seek all necessary technical assistance in mine clearance and the disposal or destruction of similar devices and weapons under the operational control of the neutral peacekeeping force. The parties shall keep the JMC updated on changes in this information so that it can notify the public as needed, to prevent injuries.

ARTICLE XX

NOTIFICATION TO MILITARY COMMANDS

Each party shall ensure that the terms of the present Agreement, and written orders requiring compliance, are immediately communicated to all of its forces.

PART FIVE

HUMANITARIAN, HUMAN RIGHTS AND SOCIO-ECONOMIC ISSUES

1. The Government of Sierra Leone and the RUF/SL recognizing the importance of upholding, promoting and protecting the human rights of every Sierra Leonean as well as the enforcement of humanitarian law, agree to the following formulas for the achievement of these laudable objectives. Each of these formulas (not in priority order) is contained in separate Articles of this Part of the present Agreement

Article XXI Release of Prisoners and Abductees

Article XXII Refugees and Displaced Persons

Article XXIII Guarantee of the Security of Displaced Persons and Refugees

Article XXIV Guarantee and Promotion of Human Rights

Article XXV Human Rights Commission

Article XXVI Human Rights Violations

Article XXVII Humanitarian Relief

Article XXVIII Post War Rehabilitation and Reconstruction

Article XXIX Special Fund for War Victims

Article XXX Child Combatants

Article XXXI Education and Health

ARTICLE XXI

RELEASE OF PRISONERS AND ABDUCTEES

All political prisoners of war as well as all non-combatants shall be released immediately and unconditionally by both parties, in accordance with the Statement of June 2, 1999, which is contained in Annex 3 and constitutes an integral part of the present Agreement.

ARTICLE XXII

REFUGEES AND DISPLACED PERSONS

The Parties through the National Commission for Resettlement, Rehabilitation and Reconstruction agree to seek funding from and the involvement of the UN and other agencies, including friendly countries, in order to design and implement a plan for voluntary repatriation and reintegration of Sierra Leonean refugees and internally displaced persons, including non-combatants, in conformity with international conventions, norms and practices.

ARTICLE XXIII

GUARANTEE OF THE SECURITY OF DISPLACED PERSONS AND REFUGEES

As a reaffirmation of their commitment to the observation of the conventions and principles of human rights and the status of refugees, the Parties shall take effective and appropriate measures to ensure that the right of Sierra Leoneans to asylum is fully respected and that no camps or dwellings of refugees or displaced persons are violated.

ARTICLE XXIV

GUARANTEE AND PROMOTION OF HUMAN RIGHTS

1. The basic civil and political liberties recognized by the Sierra Leone legal system and contained in the declarations and principles of Human Rights adopted by the UN and OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and People's Rights, shall be fully protected and promoted within Sierra Leonean society.

2. These include the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one's country.

ARTICLE XXV

HUMAN RIGHTS COMMISSION

1. The Parties pledge to strengthen the existing machinery for addressing grievances of the people in respect of alleged violations of their basic human rights by the creation, as a matter of urgency and not later than 90 days after the signing of the present Agreement, of an autonomous quasi-judicial national Human Rights Commission.

2. The Parties further pledge to promote Human Rights education throughout the various sectors of Sierra Leonean society, including the schools, the media, the police, the military and the religious community.

3. In pursuance of the above, technical and material assistance may be sought from the UN High Commissioner for Human Rights, the African Commission on Human and Peoples Rights and other relevant international organisations.

4. A consortium of local human rights and civil society groups in Sierra Leone shall be encouraged to help monitor human rights observance.

ARTICLE XXVI

HUMAN RIGHTS VIOLATIONS

1. A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.

2. In the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991.

This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

3. Membership of the Commission shall be drawn from a cross-section of Sierra Leonean society with the participation and some technical support of the International Community. This Commission shall be established within 90 days after the signing of the present Agreement and shall, not later than 12 months after the commencement of its work, submit its report to the Government for immediate implementation of its recommendations.

ARTICLE XXVII

HUMANITARIAN RELIEF

1. The Parties reaffirm their commitment to their Statement on the Delivery of Humanitarian Assistance in Sierra Leone of June 3, 1999 which is contained in Annex 4 and constitutes an integral part of the present Agreement. To this end, the Government shall request appropriate international humanitarian assistance for the people of Sierra Leone who are in need all over the country.

2. The Parties agree to guarantee safe and unhindered access by all humanitarian organizations throughout the country in order to facilitate delivery of humanitarian assistance, in accordance with international conventions, principles and norms which govern humanitarian operations. In this respect, the parties agree to guarantee the security of the presence and movement of humanitarian personnel.

3. The Parties also agree to guarantee the security of all properties and goods transported, stocked or distributed by humanitarian organizations, as well as the security of their projects and beneficiaries.

4. The Government shall set up at various levels throughout the country, the appropriate and effective administrative or security bodies which will monitor and facilitate the implementation of these guarantees of safety for the personnel, goods and areas of operation of the humanitarian organizations.

ARTICLE XXVIII

POST-WAR REHABILITATION AND RECONSTRUCTION

1. The Government, through the National Commission for Resettlement, Rehabilitation and Reconstruction and with the support of the International Community, shall provide appropriate financial and technical resources for post-war rehabilitation, reconstruction and development.

2. Given that women have been particularly victimized during the war, special attention shall be accorded to their needs and potentials in formulating and implementing national rehabilitation, reconstruction and development programmes, to enable them to play a central role in the moral, social and physical reconstruction of Sierra Leone.

ARTICLE XXIX

SPECIAL FUND FOR WAR VICTIMS

The Government, with the support of the International Community, shall design and implement a programme for the rehabilitation of war victims. For this purpose, a special fund shall be set up.

ARTICLE XXX

CHILD COMBATANTS

The Government shall accord particular attention to the issue of child soldiers. It shall, accordingly, mobilize resources, both within the country and from the International Community, and especially through the Office of the UN Special Representative for Children in Armed Conflict, UNICEF and other agencies, to address the special needs of these children in the existing disarmament, demobilization and reintegration processes.

ARTICLE XXXI

EDUCATION AND HEALTH

The Government shall provide free compulsory education for the first nine years of schooling (Basic Education) and shall endeavour to provide free schooling for a further three years. The Government shall also endeavour to provide affordable primary health care throughout the country.

PART SIX

IMPLEMENTATION OF THE AGREEMENT

ARTICLE XXXII

JOINT IMPLEMENTATION COMMITTEE

A Joint Implementation Committee consisting of members of the Commission for the Consolidation of Peace (CCP) and the Committee of Seven on Sierra Leone, as well as the Moral Guarantors, provided for in Article XXXIV of the present Agreement and other international supporters shall be established. Under the chairmanship of ECOWAS, the Joint Implementation Committee shall be responsible for reviewing and assessing the state of implementation of the Agreement, and shall meet at least once every three months. Without prejudice to the functions of the Commission for the Consolidation of Peace as provided for in Article VI, the Joint Implementation Committee shall make recommendations deemed necessary to ensure effective implementation of the present Agreement according to the Schedule of Implementation, which appears as Annex 5.

ARTICLE XXXIII

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 of the signing of this Agreement. The signed Agreement shall also be published in the Sierra Leone *Gazette* not later than 48 (Forty - Eight) hours after the date of registration of this Agreement. This Agreement shall be laid before the Parliament of Sierra Leone not later than 21 (Twenty - One) days after the signing of this Agreement.

ARTICLE XXXVII

ENTRY INTO FORCE

The present Agreement shall enter into force immediately upon its signing by the Parties.

Done in Lomé this *7th* day of the month of *July, 1999* in (12) twelve original texts in English and French, each text being equally authentic.

ALHAJI DR. AHMAD TEJAN KABBAH
PRESIDENT OF THE REPUBLIC
OF SIERRA LEONE

CORPORAL FODAY SAYBANA SANKOH
LEADER OF THE REVOLUTIONARY
UNITED FRONT OF SIERRA LEONE

HIS EXCELLENCY GNASSINGBÉ EYADÉMA
PRESIDENT OF THE TOGOLESE REPUBLIC,
CHAIRMAN OF ECOWAS

HIS EXCELLENCY BLAISÉ COMPAORÉ
PRESIDENT OF BURKINA FASO

HIS EXCELLENCY DAHKPANAH
DR. CHARLES GHANKEY TAYLOR
PRESIDENT OF THE REPUBLIC OF LIBERIA

HIS EXCELLENCY OLUSEGUN OBASANJO
PRESIDENT AND COMMANDER-IN-CHIEF OF THE ARMED
FORCES OF THE FEDERAL REPUBLIC OF NIGERIA

HIS EXCELLENCY YOUSSOUFOU BAMBA
SECRETARY OF STATE AT THE
FOREIGN MINISTRY IN CHARGE OF
INTERNATIONAL COOPERATION
OF CÔTE D'IVOIRE

HIS EXCELLENCY VICTOR GBEHO
MINISTER OF FOREIGN AFFAIRS
OF THE REPUBLIC OF GHANA

Mr. Roger LALOUPO
REPRESENTATIVE OF THE ECOWAS
EXECUTIVE SECRETARY

Ambassador Francis G. OKELO
SPECIAL REPRESENTATIVE
OF THE UNITED NATIONS
SECRETARY-GENERAL

Ms. Adwoa COLEMAN
REPRESENTATIVE OF THE
ORGANIZATION OF AFRICAN UNITY

Dr. Moses K. Z. ANAFU
REPRESENTATIVE OF THE
COMMONWEALTH OF NATIONS

ANNEX 1

AGREEMENT ON CEASEFIRE IN SIERRA LEONE

President Ahmad Tejan KABBAH and Rev. Jesse Jackson met on 18 May 1999 with Corporal Foday Saybana SANKOH, under the auspices of President Gnassingbé EYADÉMA. At that meeting, the question of the peace process for Sierra Leone was discussed.

The Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL),

— Desirous to promote the ongoing dialogue process with a view to establishing durable peace and stability in Sierra Leone; and

— Wishing to create an appropriate atmosphere conducive to the holding of peace talks in Lomé, which began with the RUF internal consultations to be followed by dialogue between the Government and the RUF ;

— Have jointly decided to:

1– Agree to ceasefire as from 24 May, 1999, the day that President EYADÉMA invited Foreign Ministers of ECOWAS to discuss problems pertaining to Sierra Leone. It was further agreed that the dialogue between the Government of Sierra Leone and RUF would commence on 25 May, 1999;

2– Maintain their present and respective positions in Sierra Leone as of the 24th May, 1999; and refrain from any hostile or aggressive act which could undermine the peace process;

3– Commit to start negotiations in good faith, involving all relevant parties in the discussions, not later than May 25 in Lomé;

4– Guarantee safe and unhindered access by humanitarian organizations to all people in need; establish safe corridors for the provision of food and medical supplies to ECOMOG soldiers behind RUF lines, and to RUF combatants behind

5– Immediate release of all prisoners of war and non-combatants;

6– Request the United Nations, subject to the Security Council's authorization, to deploy military observers as soon as possible to observe compliance by the Government forces (ECOMOG and Civil Defence Forces) and the RUF, including former AFRC forces, with this cease-fire agreement.

This agreement is without prejudice to any other agreement or additional protocols which may be discussed during the dialogue between the Government and the RUF.

Signed in Lomé (Togo) 18 May, 1999, in Six (6) Originals in English and French.

For the Government of Sierra Leone

ALHAJI Dr. Ahmad Tejan KABBAH
President of the Republic of Sierra Leone

For the Revolutionary United Front of Sierra Leone

Corporal Foday Saybana SANKOH
Leader of the Revolutionary United Front (RUF)

Witnessed by:

For the Government of Togo and Current Chairman of ECOWAS

Gnassingbé EYADÉMA
President of the Republic of Togo

For the United Nations

Francis G. OKELO
Special Representative of the Secretary-General

For the Organization of African Unity

Adwoa COLEMAN
Representative of the Organization of African Unity

US Presidential Special Envoy for the Promotion of Democracy in Africa

Rev. Jesse JACKSON

ANNEX 2

DEFINITION OF CEASE-FIRE VIOLATIONS

1. In accordance with Article II of the present Agreement, both parties agree that the following constitute cease-fire violations and a breach of the Cease-fire Agreement:

a. The use of weapons of any kind in any circumstance including:

(i) Automatic and semi-automatic rifles, pistols, machine guns and any other small arms weapon systems.

(ii) Heavy machine guns and any other heavy weapon systems.

(iii) Grenades and rocket-propelled grenade weapon systems.

(iv) Artillery, rockets, mortars and any other indirect fire weapon systems.

(v) All types of mine, explosive devices and improvised booby traps.

(vi) Air assets outside of respective areas of control, of any nature, including reconnaissance aircraft, with the exception of pre-agreed flights.

(vii) Air Defence weapon systems of any nature.

(viii) Any other weapon not included in the above paragraphs.

b. Troop movements of any nature outside of the areas recognized as being under the control of respective fighting forces without prior notification to the Cease-fire Monitoring Committee of any movements at least 48 hours in advance.

c. The movement of arms and ammunition. To be considered in the context of Security Council Resolution 1171 (1998).

d. Troop movements of any nature;

e. The construction and/or the improvement of defensive works and positions within respective areas of control, but outside a geographical boundary of 500m from existing similar positions.

f. Reconnaissance of any nature outside of respective areas of control.

g. Any other offensive or aggressive action.

2. Any training or other military activities not provided for in Articles XIII to XIX of the present Agreement, constitute a cease-fire violation.

3. In the event of a hostile external force threatening the territorial integrity or sovereignty of Sierra Leone, military action may be undertaken by the Sierra Leone Government.

ANNEX 3

STATEMENT BY THE GOVERNMENT OF SIERRA LEONE AND THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE ON THE RELEASE OF PRISONERS OF WAR AND NON-COMBATANTS

The Government of Sierra Leone (GOSL) and the Revolutionary United Front (RUF/SL) have agreed to implement as soon as possible the provision of the Cease-fire Agreement which was signed on 18 May, 1999 in Lomé, relating to the immediate release of prisoners of war and non-combatants.

Both sides reaffirmed the importance of the implementation of this provision in the interest of the furtherance of the talks.

They therefore decided that an appropriate Committee is established to handle the release by them of all prisoners of war and non-combatants.

Both the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone decided that such a Committee be established by the UN and chaired by the UN Chief Military Observer in Sierra Leone and comprising representatives of the International Committee of the Red Cross (ICRC), UNICEF and other relevant UN Agencies and NGOs.

This Committee should begin its work immediately by contacting both parties to the conflict with a view to effecting the immediate release of these prisoners of war and non-combatants.

Lomé — 2 June, 1999

ANNEX 4

STATEMENT BY THE GOVERNMENT OF SIERRA LEONE AND THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE ON THE DELIVERY OF HUMANITARIAN ASSISTANCE IN SIERRA LEONE

The parties to the conflict in Sierra Leone meeting in Lomé Togo on 3rd June, 1999 in the context of the Dialogue between the Government of Sierra Leone (GOSL) and the Revolutionary United Front of Sierra Leone (RUF/SL):

Reaffirm their respect for international convention, principles and norms, which govern the right of people to receive humanitarian assistance and the effective delivery of such assistance.

Reiterate their commitment to the implementation of the Cease-fire Agreement signed by the two parties on 18th May, 1999 in Lomé.

Aware of the fact that the protracted civil strife in Sierra Leone has created a situation whereby the vast majority of Sierra Leoneans in need of humanitarian assistance cannot be reached.

Hereby agree as follows:

1. That all duly registered humanitarian agencies shall be guaranteed safe and unhindered access to all areas under the control of the respective parties in order that humanitarian assistance can be delivered safely and effectively, in accordance with international conventions, principles and norms which govern humanitarian operations.

2. In this respect the two parties shall:

   a. guarantee safe access and facilitate the fielding of independent assessment missions by duly registered humanitarian agencies.

   b. identify, in collaboration with the UN Humanitarian Co-ordinator in Sierra Leone and UNOMSIL, mutually agreed routes (road, air and waterways) by which humanitarian goods and personnel shall be transported to the beneficiaries to provide needed assistance.

c. allow duly registered humanitarian agencies to deliver assistance according to needs established through independent assessments.

d. guarantee the security of all properties and of goods transported, stocked or distributed by the duly registered humanitarian agencies, as well as the security of their project areas and beneficiaries.

3. The two parties undertake to establish with immediate effect, and not later than seven days, an Implementation Committee formed by appropriately designated and mandated representatives from the Government of Sierra Leone, the Revolutionary United Front of Sierra Leone, the Civil Society, the NGO community, and the UNOMSIL ; and chaired by the United Nations Humanitarian Co-ordinator, in co-ordination with the Special Representative of the Secretary General in Sierra Leone.

The Implementation Committee will be mandated to:

a. Ascertain and assess the security of proposed routes to be used by the humanitarian agencies, and disseminate information on routes to interested humanitarian agencies.

b. Receive and review complaints which may arise in the implementation of this arrangement, in order to re-establish full compliance.

4. The parties agree to set up at various levels in their areas of control, the appropriate and effective administrative and security bodies which will monitor and facilitate the effective delivery of humanitarian assistance in all approved points of delivery, and ensure the security of the personnel, goods and project areas of the humanitarian agencies as well as the safety of the beneficiaries.

Issued in Lomé
June 3, 1999

ANNEX 5

DRAFT SCHEDULE OF IMPLEMENTATION OF THE PEACE AGREEMENT

I. ACTIVITIES WITH SPECIFIC TIMING:

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 1	Signing of the Peace Agreement		
	Amnesty	The Government to grant absolute and free pardon to the RUF Leader Foday Sankoh through appropriate legal steps	
	Transformation, new mandate, and phased withdrawal of ECOMOG	Request to ECOWAS by the parties for revision of the mandate of ECOMOG in Sierra Leone Request to the UN Security Council: (i) to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the present Agreement; Request to the international community to provide substantial financial and logistical assistance to facilitate implementation of the Peace Agreement. Request to ECOWAS by the parties for contribution of additional troops	

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
	Transformation of the RUF into a political party	RUF/SL to commence to organize itself to function as a political party	
	Encampment, disarmament, demobilization and reintegration (DDR)	Request for international assistance in adapting and extending the existing DDR programme	
	Withdrawal of mercenaries	Supervision by Joint Monitoring Commission	
	Notification to Joint Monitoring Commission	Communication by the parties of positions and description of all known warlike devices/materials	
	Notification to Military Commands	Communication by the parties of written orders requiring compliance	
DAY 15	Enabling members of the RUF/SL to hold public office, and to join a broad-based Government of National Unity through Cabinet appointments	Removal by the Government of all legal impediments	
	Commission for the Consolidation of Peace (CCP)	Creation of the Commission to implement a post-conflict reconciliation and welfare programme	Mandate of the Commission to terminate at the end of next General Elections Jan.–Feb., 2001

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 15 (cont.)	Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD	Ban on all exploitation, sale, export, or any transaction of gold and diamonds except those sanctioned by the CMRDD	
DAY 22	Enabling members of the RUF/SL to hold public office	Discussion and agreement between both parties on the appointments of RUF/SL members to positions in parastatal, diplomacy and any other public sector	For a period of fourteen days
DAY 31	Transformation of the RUF into a political party Commission for the management of Strategic Resources, National Reconstruction and Development (CMRRD) Transformation, new mandate, and phased withdrawal of ECOMOG	Necessary legal steps by the Government for registration of the RUF as a political party Preparation and submission by Government to the Parliament of relevant bills for enabling legislation commitments made under the Peace Agreement Deployment of troops from at least two additional countries	
DAY 60	Completion of encampment, disarmament and demobilization	Restriction of SLA soldiers to the barracks and storage of their arms and ammunition under constant surveillance by the Neutral Peace-Keeping Force during the disarmament process Monitoring of disarmament and demobilization by UNOMSIL	

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION,
DAY 90	Human Rights Commission	Creation of an autonomous quasi judicial national Human Rights Commission Request for technical and material assistance from the UN High Commissioner for Human Rights, the African Commission on Human and Peoples Rights and other relevant organizations Creation of a Truth and Reconciliation Commission	
	Elections	Establishment of a new independent National Electoral Commission (NEC), in consultation with all political parties including the RUF/SL Request for financial and logistical support for the operations of the NEC Request for assistance from the international community in monitoring the next presidential and parliamentary elections in Sierra Leone	

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 456	Human Rights Violations	Submission by the Truth and Reconciliation Commission of its report and recommendation to the Government for immediate implementation	
II. ACTIVITIES WITHOUT SPECIFIC TIMING: (SHORT/MEDIUM/LONG TERM):			
SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
1.	Ceasefire monitoring (Ceasefire Agreement signed on 18 May, 1999	Establishment of Ceasefire Monitoring Committees at provincial and district levels Request for international assistance in providing funds and other logistics for the operations of the JMC	JMC already established and operational
2.	Review of the present Constitution	Establishment of a Constitutional Review Committee	
3.	Mediation by the Council of Elders and Religious Leaders	Appointment of members of the Council by the Inter-Religious Council, the Government, the RUF and ECOWAS	
4.	Timetable for the phased withdrawal of ECOMOG	Formulation of the timetable in connection with the phased creation and deployment of the restructured armed forces	

SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
5.	Security guarantees for peace monitors	Communication, in writing, of security guarantees to UNMILOBs	
6.	Restructuring and training of the SLA	Creation by the Government of truly national armed forces reflecting the geo-political structure of Sierra Leone within the established strength	
7.	Release of prisoners of war and abductees	Establishment of a Committee on the Release of Prisoners of War and Non-combatants	Operation under-way. Parties to be encouraged to continue vigorously
8.	Refugees and displaced persons	Formulation of plan of voluntary repatria-tion and reintegration of Sierra Leonean refugees and IDPs, with the financial assistance and involvement of UN and other agencies and friendly countries	
9.	Guarantee and protection of Human Rights	Respect of the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one's country	

SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
10.	Guarantee of the security of displaced persons and refugees	Adoption by the parties of effective and appropriate security measures	
11.	Humanitarian relief	Continued delivery of humanitarian assistance with appropriate international support Establishment by the Government of appropriate and effective administrative or security bodies to monitor and facilitate implementation of security guarantees to personnel, goods and areas of operations	
12.	Post-war rehabilitation and reconstruction	Provision by the Government of appropriate financial and technical resources	
13.	Special Fund for war victims	Formulation and implementation by the Government of a programme for the rehabilitation of war victims	
14.	Child combatants	Mobilization of internal and international resources by the Government to address the needs of child combatants	
15.	Education and Health	Mobilization of adequate funding for free compulsory basic education and primary health care	
16.	Amnesty	The Government to grant amnesty and pardon to RUF and AFRC personnel through appropriate legal steps.	

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PASSED IN Parliament this *15th* day of *July*, in the year of our Lord one thousand, nine hundred and ninety-nine.

J. A. CARPENTER,
Clerk of Parliament.

THIS PRINTED IMPRESSION has been carefully compared by me with the Bill which has passed Parliament and found by me to be a true and correctly printed copy of the said Bill.

J. A. CARPENTER,
Clerk of Parliament.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTING DEPARTMENT, SIERRA LEONE.
GAZETTE No. 34 OF 22ND JULY, 1999.

ANNEX 15

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,

00-60532 (E)

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.

ANNEX 16

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

INTERNATIONAL CRIMINAL LAW

ANTONIO CASSESE

OXFORD
UNIVERSITY PRESS

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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

ANNEX 17

Declaration on the Protection of all Persons from Enforced Disappearances (1992) [Extract].

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.

ANNEX 18

Prosecutor v. Furundzija, Judgement, IT-95-17/1, Trial Chamber, 10 December 1998 [Extract].

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-95-17/1-T
		Date:	10 December 1998
		Original:	English

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 FURUND@IJA

JUDGEMENT

The Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers

142. Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.

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

[163] These provisions are contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; the United Nations Covenant on Civil and Political Rights of 1966, hereafter "ICCPR"; the Inter-American Convention on Human Rights of 1969; the African Charter on Human and Peoples' Rights of 1981; the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, hereafter "Torture Convention"; and the Inter-American Convention to Prevent and Punish Torture of 1985, hereafter "Inter-American Convention".

[164] Reference can be made to such mechanisms as the United Nations Special Rapporteur on Torture, hereafter "Special Rapporteur"; the European Committee against Torture, set up under the European Convention for the Prevention of Torture of 1987; and the United Nations Committee against Torture, set up under the Torture Convention.

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. Peña-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

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[165] *See* Art. 3 of the Torture Convention; Art. 13(4) of the Inter-American Convention Human Rights Committee, General Comment on Art. 7, para. 9, *Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev. 1 at 30 (1994); *Soering v. United Kingdom*, Judgement of 7 July 1989, Eur. Ct. H.R., *Series A*, No.161, para. 91, hereafter "Soering"; *Cruz Varas and others v. Sweden,* Judgement of 20 March 1991, Eur. Ct. H.R., *Series A*, No. 201, paras. 69-79; *Chahal v. United Kingdom*, Judgement of 5 Nov. 1996, Eur. Ct. H.R., *Series A,* No. 22.

[166] Torture Convention, Art. 5.

[167] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980).

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 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

[168] The Court stated: "It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him, if implemented, be contrary to Article 3 [prohibiting torture and inhuman or degrading treatment] by reason of its foreseeable consequences in the requesting country, a departure from this

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.

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principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article." (para. 90).

[169] *See Mariposa Development Company and Others*, Decision, U.S.-Panama General Claims Commission, 27 June 1933, *U.N. Reports of International Arbitral Awards*, Vol. VI, pp. 340- 341; *German Settlers in Upper Silesia,* Advisory Opinion of 10 Sept. 1923, PCIJ, *Series B,* No. 6, pp. 19-20, 35-38; the arbitral award of 1922 in the *Affaire de l'impôt sur les benefices de guerre*, in *U.N. Reports of International Arbitral Awards*, Vol. I, pp. 302-305.

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 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

[170] *See also* the General Comment No. 24 on "Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant", issued on 4 Nov. 1994 by the United Nations Human Rights Committee, para. 10 ("the prohibition of torture has the status of a peremptory norm"). In 1986, the United Nations Special Rapporteur, P. Kooijmans, in his report to the Commission on Human Rights, took a similar view (E/CN. 4/1986/15, p. 1, para 3). That the international proscription of torture has turned into *jus cogens* has been among others held by U.S. courts in *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992) Cert. Denied, *Republic of Argentina v. De Blake*, 507 U.S. 1017,123L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al. v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d

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,

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493 (9th Cir. 1992) Cert. Denied, *Marcos Manto v. Thajane*, 508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993).

[171] Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969.

[172] As for amnesty laws, it bears mentioning that in 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR stated the following: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." (*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev. 1 at 30 (1994)).

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.

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[173] IMT, Vol. 1, p. 223.

[174] *See Attorney-General of the Government of Israel v. Adolf Eichmann 36 I.L.R. 298*; *In the Matter of the Extradition of John Demjanjuk*, 612 F. Supp.544, 558 (N.D. Ohio 1985). *See also Demjanjuk v. Petrovsky,* 776 F. 2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986), for a discussion of the universality principle as applied to the commission of war crimes.

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.