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SCSL-2003-11-PT
(2953 - 3e07)

2953

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe
Registrar: Mr. Robin Vincent
Date: 30 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

REPLY TO THE PROSECUTION RESPONSE TO THE PRELIMINARY DEFENCE MOTION ON THE LACK OF PERSONAL JURISDICTION: ILLEGAL DELEGATION OF JURISDICTION BY SIERRA LEONE

Office of the Prosecutor:
Mr. Desmond de Silva, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole

Defence Office:
Mr. Sylvain Roy, Acting Chief
Mr. Ibrahim Yillah

For Mr. Fofana:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

SPECIAL COURT FOR SIERRA LEONE
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1. In the Preliminary Defence Motion of 14 November 2003 the Defence for Mr. Fofana filed a preliminary motion alleging a lack of personal jurisdiction of the Special Court as Sierra Leone unlawfully transferred jurisdiction over the defendant. Since Sierra Leone no longer had the right to try the defendant due to the amnesty granted to him by the Lomé Agreement, Sierra Leone could not transfer jurisdiction over the defendant to the Special Court. Consequently, the Special Court lacks personal jurisdiction over the defendant.

2. In its response to this Preliminary Defence Motion, the Prosecution argues, first, that the Lomé Agreement could not deprive Sierra Leone of the capacity under international law to enter into the Special Court Agreement, as the Lomé Agreement is not a treaty under international law. Second, the Prosecution argues that, even if it is assumed that the consent of the government of Sierra Leone to be bound by the Special Court Agreement was expressed in violation of the Lomé Ratification Act, that the Act was not a provision of Sierra Leone's internal law "regarding competence to conclude treaties" for the purposes of article 46 of the Vienna Conventions. According to the prosecution, it cannot be said that there was any "manifest" breach of a provision of Sierra Leone's internal law regarding competence to conclude treaties. Finally, the prosecution argues that in any case the Government cannot grant amnesty for serious violations of crimes under international law. The first and third of these three points will be addressed below. The Defence reserves its right to address the second argument at a later stage. For the reasons given below, the Prosecution response should be dismissed in its entirety.

The Lomé Agreement is an agreement under international law

3. The Lomé Agreement is an agreement under international law. It is signed by two entities having international legal personality: the Republic of Sierra Leone and the RUF. In so far as armed opposition groups, such as the RUF, have international obligations they are subjects of international law. Their legal personality is based on their position as parties to an armed conflict, such as the conflict in Sierra Leone.

4. Armed groups are bound by international law as *de facto* authorities in a particular territory. At the time of the signature of the Lomé Agreement, the RUF was a *de facto*

authority, exercising effective control over significant parts of the country. The RUF existed as an independent entity side-by-side with the Government of Sierra Leone. The international legal personality of armed groups, such as the RUF, recognises the reality of the internal conflict and the politically weakened position of the established authorities. The RUF sought to exercise public authority, and in doing so it questioned the authority of the established Government of Sierra Leone, including the Government's laws. It would be unrealistic and serve no purpose to deny legal personality on the grounds that armed opposition groups have no legal personality in the traditional sense. As Judge Kooijmans rightly pointed out,

> "[m]odern international law should be a *'ius inter potestates'* and therefore should encompass every political organization that acts as an effective factor in international relations".[1]

5. Armed opposition groups, such as the RUF, are bound by common article 3 of the 1949 Geneva Conventions, Protocol II additional to the Geneva Conventions, other rules of international humanitarian law, and general international law. Special agreements concluded by armed opposition groups are another source of humanitarian obligations of these groups.

6. Common Article 3 recognizes the legal capacity of armed opposition groups to conclude agreements, stipulating:

> "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".[2]

7. The capacity to conclude treaties under international law is thus not limited to states. It also extends to *de facto* authorities. International law recognises that such *de facto* authorities posses limited international personality and that agreements concluded by them can be regarded as agreements under international law.

8. This conclusion is supported by practice of international bodies. The Yugoslavia Tribunal affirmed that agreements constitute evidence of legal obligations of the parties to an

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[1] P.H. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in: K. Wellens (ed.) *International Law: Theory and Practice,* The Hague: Kluwer Law International, 1998, p. 333-346 at p. 339.
[2] Article 3 (2) common to the Geneva Conventions of 1949, 3rd sentence.

armed conflict. In the *Tadic* case (Appeal on Jurisdiction), in the section entitled "May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?", the Tribunal considered that it is authorised to apply, in addition to customary international law, any treaty which: '(i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law'.[3] At the time the Appeals Chamber made this statement, it had not decided whether the conflict in the former Yugoslavia was international or internal in nature. It may therefore be inferred that the Tribunal referred to agreements concluded by both states and armed opposition groups.

9. A final and itself decisive argument supporting the international legal nature of the Lomé Agreement is the fact that Sierra Leone adopted the Lomé Peace Agreement (Ratification) Act 1999. Sierra Leone is a dualist state. Treaties have to be transformed into national law. The Lomé Peace Agreement (Ratification) Act 1999 gave the Lomé Agreement a basis in national law, as acknowledged by the Prosecutor.[4] Ratification acts are not adopted for instruments that have no legal status. The preambule of the Lomé Peace Agreement (Ratification) Act 1999 expressly states that the Peace Agreement alters the law of Sierra Leone and that therefore it needs to be ratified. From the very fact that Sierra Leone considered it necessary to adopt this act, it can be inferred that Sierra Leone considered this an agreement under international law. In determining the legal nature of an instrument, the intention of parties is decisive.[5]

10. It follows that the Lomé Agreement is a treaty under international law. Having force under international law, the Lomé Agreement affected the capacity of Sierra Leone under international law to enter into an agreement for the establishment of an International Criminal Court. Sierra Leone – through the Lomé Agreement – gave up its right to prosecute the defendant, who is covered by article IV of this Agreement, and thereby disabled itself from transfering the right to prosecute him to the Special Court. The Special Court therefore lacks jurisdiction over the defendant.

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[3] Appeals Chamber of the ICTY "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor vs. Dusko Tadić*, Case No. IT-94-1-T, 2 October 1995, (*Tadic Interlocutory Appeal)*, para. 143; *compare* Kooijmans, *supra*, p. 333, 338 stating "insurrectionist movements who are parties to an internationalized peace-agreement or who have committed themselves in such an agreement have legal obligations under international law."

[4] Prosecution Response, para. 7.

11. As a Court established under international law, the Special Court is empowered and obliged to examine whether the transfer of jurisidiction is in accordance with international law. Any international legal limitations on the powers of the states or organizations that have created the Special Court are to be upheld and applied. Just as the Special Court could not accept a tranfer by Sierra Leone of jurisdiction over a Dutch national who commits an ordinary crime in the Netherlands (a jurisdiction that Sierra Leone does not possess under international law), it can not accept a transfer by Sierra Leone of jurisdiction over persons over who under international law Sierra Leone has given up its jurisdiction.

International law does not prohibit the granting of amnesties for international crimes

12. The Prosecution submits that Article IX of the Lomé Agreement was not intended to over crimes under Articles 2-4 of the Statute.[6] In support, the Prosecution offers two arguments: the statement of understanding expressed by the United Nations, and that international law prohibits the granting of amnesty for these crimes.

13. The first argument lacks any legal merit. The Lomé Agreement is an Agreement between the RUF and the Government of Sierra Leone. As accepted by the Prosecution, the United Nations was not a party to the Agreement.[7] The interpretation of a treaty may be influenced by interpretative understandings or reservations by parties to a treaty. Statements of understandings by non-parties are legally irrelevant. If the United Nations had been a party, the RUF might have considered it necessary to reject the statement of the United Nations in order to prevent it from having legal consequences. Since the United Nations was not a party, no such action was necessary. The statement of understanding by the United Nations therefore cannot affect the legal rights of parties to a treaty to which the United Nations was not a party.

14. As to the second argument, it is well-established that international law does does not prohibit the granting of amnesties for international crimes. On the contrary, an amnesty is an accepted legal instrument and an important means for achieving peace and reconciliation at

[5] International Court of Justice, Aegean Sea Continental Shelf (Greece *v.* Turkey), par. 107.
[6] Prosecution Response, para. 10.
[7] Prosecution Response, para. 6.

the end of an armed conflict. The denial of amnesty in the Statute of the Special Court thus cannot be justified by any alleged invalidity of the amnesty under the Lomé Agreement.

15. Modern history has shown many examples where states have sought to secure peace through the granting of amnesties. In many cases, parties to a conflict have deemed it desirable or necessary to insert amnesty clauses in peace agreements:

> "Amnesty clauses are frequently found in peace treaties and signify the will of the parties to apply the principle of *tabula rasa* to past offences, generally political delicts such as treason, sedition and rebellion, but also to war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders.".[8]

16. The Constitutional Court of South Africa stated, after reviewing world wide practice:

> "South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.
>
> What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves,

but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.".[9]

The Constitutional Court concluded that the amnesty granted by South Africa is not contrary to international law.[10]

17. Lord Lloyd of Berwick stated in the judgment of the House of Lords in the Pinochet Case:

"Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about 1 million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under article 17) reported on the Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.".[11]

18. In considering whether present international law prohibits the granting of amnesties, Professor Dugard notes that

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[8] R. Bernhardt (ed), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, Volume I, p. 148 and R. Bernhardt (ed), *Encyclopedia of Public International Law,* Amsterdam: North-Holland, 1997, Volume III, pp. 938-939.

[9] Constitutional Court of South Africa, *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others,* Case no. CCT17/96, 25 July 1996, paras. 22, 24.

[10] *Idem*, para. 32.

[11] R. v. Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet, House of Lords, 25 November 1998, speech of Lord Lloyd of Berwick, available at:
http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino07.htm

> "state practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them.".[12]

and concludes that international law does not prohibit the granting of amnesty[13].

19. The most exhaustive study so far on the legality of amnesties concludes that an unmitigated duty to prosecute only exists for torture and genocide. For all other crimes, the duty to prosecute can be avoided, and non-prosecution thus can be legalised, by negotiation of peace treaties[14].

20. It follows from these authorities that states often consider amnesties indispensable to the transition from armed conflict to peace. State practice does not allow the conclusion that such amnesties are illegal. The amnesty under the Lomé Agreement thus is valid under international law.

Conclusion

21. By signing the Lomé Agreement, Sierra Leone granted absolute and free pardon 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" (article IV (2)). As a consequence, Sierra Leone gave up its right to exercise jurisdiction over the persons covered by article IV (2). The defence submits that the Special Court cannot accept a transfer by Sierra Leone of jurisdiction over persons over whom it has given up its right to exercise jurisdiction under international law.

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[12] J. Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?," *Leiden Journal of International Law,* (12) 1999, pp. 1001-1015 at p. 1003.
[13] *Idem,* p. 1004.
[14] A. O'Shea, *Amnesty for Crime in International Law and Practice,* The Hague: Kluwer 2002, p. 265.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman

Prof. André Nollkaemper

Dr. Liesbeth Zegveld

Defence Index of Authorities

1. P.H. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in: K. Wellens (ed.) *International Law: Theory and Practice,* The Hague: Kluwer Law International, 1998, pp. 336-340.

2. ICTY, Prosecutor v. Dusko Tadic, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, 2 October 1995, para. 143.

3. International Court of Justice, Aegean Sea Continental Shelf (Greece *v.* Turkey), 19 December 1978, para. 107.

4. R. Bernhardt (ed), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, Volume I, p. 148 and R. Bernhardt (ed), *Encyclopedia of Public International Law,* Amsterdam: North-Holland, 1997, Volume III, pp. 938-939.

5. Constitutional Court of South Africa, Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others, Case no. CCT17/96, 25 July 1996. Full text in pdf-format available at: http://www.concourt.gov.za/files/azapo/azapo.pdf.

6. R. v. Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet, House of Lords, 25 November 1998, speech of Lord Lloyd of Berwick, available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino07.htm

7. J. Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?," *Leiden Journal of International Law,* (12) 1999, pp. 1002-1006.

8. A. O'Shea, *Amnesty for Crime in International Law and Practice,* The Hague: Kluwer 2002, p. 265.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/96

THE AZANIAN PEOPLES ORGANIZATION (AZAPO)	First Applicant
NONTSIKELELO MARGARET BIKO	Second Applicant
CHURCHILL MHLELI MXENGE	Third Applicant
CHRIS RIBEIRO	Fourth Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE MINISTER OF SAFETY AND SECURITY	Fourth Respondent
THE CHAIRPERSON OF THE TRUTH AND RECONCILIATION COMMISSION	Fifth Respondent

Heard on: 30 May 1996

Decided on: 25 July 1996

JUDGMENT

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[1] South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted

with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

[2] The Argentinean truth commission was created by Executive Decree 187 of 15 December 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the investigations.[1] The Chilean Commission on Truth and Reconciliation was established on 25 April 1990. It came to be known as the Rettig Commission after its chairman, Raul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify "the truth about the most serious human right violations ... in order to bring about the reconciliation of all Chileans".[2] The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth".[3] In many cases amnesties followed in all these countries.[4]

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1 Pasqualucci "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System" 12 *Boston University International Law Journal* 321 (1994) at 337-8.

2 Id at 338, quoting the National Commission on Truth and Reconciliation "Report of the Chilean Commission on Truth and Reconciliation" Berryman (trans) (1993).

3 Id at 339, quoting the Report of the Commission on the Truth for El Salvador "From Madness to Hope: The 12-Year War in El Salvador" United Nations s/25500 (1993).

4 Id at 343.

[3] What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

[4] Considered in this context, I am not persuaded that there is anything in the Act and more particularly in the impugned section 20(7) thereof, which can properly be said to be a breach of the obligations of this country in terms of the instruments of public international law relied on by Mr Soggot. The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful

criteria listed in section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued.

1967

Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)
Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)

HOUSE OF LORDS
Lord Slynn of Hadley Lord Lloyd of Berwick Lord Nicholls of Birkenhead
Lord Steyn Lord Hoffmann
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE
REGINA
v.
BARTLE AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS (APPELLANTS)
EX PARTE PINOCHET (RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION)
REGINA

v.
EVANS AND ANOTHER AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS (APPELLANTS)
EX PARTE PINOCHET (RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION)
ON 25 NOVEMBER 1998
UNAMENDED

(...)

LORD LLOYD OF BERWICK

My Lords, *Background*

On 11 September 1973 General Augusto Pinochet Ugarte assumed power in Chile after a military coup. He was appointed president of the Governing Junta the same day. On 22 September the new regime was recognised by Her Majesty's Government. By a decree dated 11 December 1974 General Pinochet assumed the title of President of the Republic. In 1980 a new constitution came into force in Chile, approved by a national referendum. It provided for executive power in Chile to be exercised by the President of the Republic as head of state. Democratic elections were held in December 1989. As a result, General Pinochet handed over power to President Aylwin on 11 March 1990.

In opening the appeal before your Lordships Mr. Alun Jones Q.C. took as the first of the three main issues for decision whether General Pinochet was head of state throughout the whole period of the allegations against him. It is clear beyond doubt that he was. So I say no more about that.

I return to the narrative. On 19 April 1978, while General Pinochet was still head of state, the senate passed a decree granting an amnesty to all persons involved in criminal acts (with certain exceptions) between 11 September 1973 and 10 March 1978. The purpose of the amnesty was stated to be for the "general tranquillity, peace and order" of the nation. After General Pinochet fell from power, the new democratic government appointed a Commission for Truth and Reconciliation, thus foreshadowing the appointment of a similar commission in South Africa. The Commission consisted of eight civilians of varying political viewpoints under the chairmanship of Don Raul Rettig. Their terms of reference were to investigate all violations of human rights between 1973 and 1990, and to make recommendations. The Commission reported on 9 February 1991.

In 1994 Senator Pinochet came to the United Kingdom on a special diplomatic mission: (he had previously been appointed senator for life). He came again in 1995 and 1997. According to the evidence of Professor Walters, a former foreign minister and ambassador to the United Kingdom, Senator Pinochet was accorded normal diplomatic courtesies. The Foreign Office was informed in advance of his visit to London in September 1998, where at the age of 82 he has undergone an operation at the London Clinic.

At 11.25 p.m. on 16 October he was arrested while still at the London Clinic pursuant to a provisional warrant ("the first provisional warrant") issued under section 8(1)(b) of the Extradition Act 1989. The warrant had been issued by Mr. Evans, a metropolitan stipendiary magistrate, at his home at about 9 p.m. the same evening. The reason for the urgency was said to be that Senator Pinochet was returning to Chile the next day. We do not know the terms of the Spanish international warrant of arrest, also issued on 16 October. All we know is that in the first provisional warrant Senator Pinochet was accused of the murder of Spanish citizens in Chile between 11 September 1973 and 31 December 1983.

For reasons explained by the Divisional Court the first provisional warrant was bad on its face. The murder of Spanish citizens in Chile is not an extradition crime under section 2(1)(b) of the Extradition Act for which Senator Pinochet could be extradited, for the simple reason that the murder of a *British* citizen in Chile would not be an offence against *our* law. The underlying principle of all extradition agreements between states, including the European Extradition Convention of 1957, is reciprocity. We do not extradite for offences for which we would not expect and could not request extradition by others.

On 17 October the Chilean Government protested. The protest was renewed on 23 October. The purpose of the protest was to claim immunity from suit on behalf of Senator Pinochet both as a visiting diplomat and as a former head of state, and to request his immediate release.

Meanwhile the flaw in the first provisional warrant must have become apparent to the Crown Prosecution Service, acting on behalf of the State of Spain. At all events, Judge Garzon in Madrid issued a second international warrant of arrest dated 18 October, alleging crimes of genocide and terrorism. This in turn led to a second provisional warrant of arrest in England issued on this occasion by Mr. Ronald Bartle. Senator Pinochet was re-arrested in pursuance of the second warrant on 23 October.

The second warrant alleges five offences, the first being that Senator Pinochet "being a public official conspired with persons unknown to intentionally inflict severe pain or suffering on another in the . . . purported performance of his official duties . . . within the jurisdiction of the government of Spain." In other words, that he was guilty of torture. The reason for the unusual language is that the second provisional warrant was carefully drawn to follow the wording of section 134 of the Criminal Justice Act 1988 which itself reflects article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Section 134(1) provides:

> "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

It will be noticed that unlike murder, torture is an offence under English law wherever the act of torture is committed. So unlike the first provisional warrant, the second provisional warrant is not bad on its face. The alleged acts of torture are extradition crimes under section 2 of the Extradition Act, as article 8 of the Convention required, and as Mr. Nichols conceded. The same is true of the third alleged offence, namely, the taking of hostages. Section 1 of the Taking of Hostages Act 1982 creates an offence under English law wherever the act of hostage-taking takes place. So hostage taking, like torture, is an extradition crime. The remaining offences do not call for separate mention.

It was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither section 134 of the Criminal Justice Act 1988, nor section 1 of the Taking of Hostages Act 1982 are retrospective. But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would have* constituted an offence *then*.

The torture allegations in the second provisional warrant are confined to the period from 1 January 1988 to 31 December 1992. Mr. Alun Jones does not rely on conduct subsequent to 11 March 1990. So we are left with the period from 1 January 1988 to 11 March 1990. Only one of the alleged acts of torture took place during that period. The hostage-taking allegations relate to the period from 1 January 1982 to 31 January 1992.

There are no alleged acts of hostage-taking during that period. So the second provisional warrant hangs on a very narrow thread. But it was argued that the second provisional warrant is no longer the critical document, and that we ought now to be looking at the complete list of crimes alleged in the formal request of the Spanish Government. I am content to assume, without deciding, that this is so.

Returning again to the narrative, Senator Pinochet made an application for certiorari to quash the first provisional warrant on 22 October and a second application to quash the second provisional warrant on 26 October. It was these applications which succeeded before the Divisional Court on 28 October 1998, with a stay pending an appeal to your Lordships' House. The question certified by the Divisional Court was as to "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state."

On 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British Government had disregarded Senator Pinochet's immunity from jurisdiction as a former head of state. This latter protest may be based on a misunderstanding. The British Government has done nothing. This is not a case where the Secretary of State has already issued an authority to proceed under section 7 of the Extradition Act, since the provisional warrants were issued without his authority (the case being urgent) under section 8(1)(b) of the Act. It is true that the Secretary of State might have cancelled the warrants under section 8(4). But as the Divisional Court pointed out, it is not the duty of the Secretary of State to review the validity of provisional warrants. It was submitted that it should have been obvious to the Secretary of State that Senator Pinochet was entitled to immunity as a former head of state. But the Divisional Court rejected that submission. In the event leave to move against the Secretary of State was refused.

There are two further points made by Professor Walters in his evidence relating to the present state of affairs in Chile. In the first place he gives a list of 11 criminal suits which have been filed against Senator Pinochet in Chile and five further suits where the Supreme Court has ruled that the 1978 amnesty does not apply. Secondly, he has drawn attention to public concern over the continued detention of Senator Pinochet.

> "I should add that there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile. It is felt that the current stable position has been achieved by a number of internal measures including the establishment and reporting of the Rettig Commission on Truth and Reconciliation. The intervention of a foreign court in matters more proper to internal domestic resolution may seriously undermine the balance achieved by the present democratic government."

Summary of Issues

The argument has ranged over a very wide field in the course of a hearing lasting six days. The main issues which emerged can be grouped as follows:

(1) Is Senator Pinochet entitled to immunity as a former head of state at common law? This depends on the requirements of customary international law, which are observed and enforced by our courts as part of the common law.

(2) Is Senator Pinochet entitled to immunity as a former head of state under Part 1 of the State Immunity Act 1978? If not, does Part 1 of the State Immunity Act cut down or affect any immunity to which he would otherwise be entitled at common law?

(3) Is Senator Pinochet entitled to immunity as a former head of state under Part 3 of the State Immunity Act, and the articles of the Vienna Convention as set out in the schedule to the Diplomatic Privileges Act 1964? It should be noticed that despite an assertion by the Chilean Government that Senator Pinochet is present in England on a diplomatic passport at the request of the Royal Ordnance, Miss Clare Montgomery Q.C. does not seek to argue that he is entitled to diplomatic immunity on that narrow ground, for which, she says, she cannot produce the appropriate evidence.

(4) Is this a case where the court ought to decline jurisdiction on the ground that the issues raised are non-justiciable?

The last of these four heads is sometimes referred to as "the Act of State" doctrine, especially in the United States. But Act of State is a confusing term. It is used in different senses in many different contexts. So it is better to refer to non-justiciability. The principles of sovereign immunity and non-justiciability overlap in practice. But in legal theory they are separate. State immunity, including head of state immunity, is a principle of public international law. It creates a procedural bar to the jurisdiction of the court. Logically therefore it comes first. Non-justiciability is a principle of private international law. It goes to the substance of the issues to be decided. It requires the court to withdraw from adjudication on the grounds that the issues are such as the court is not competent to decide. State immunity, being a procedural bar to the jurisdiction of the court, can be waived by the state. Non-justiciability, being a substantive bar to adjudication, cannot.

Issue one: head of state immunity at common law

As already mentioned, the common law incorporates the rules of customary international law. The matter is put thus in *Oppenheim's International Law* 9th ed. 1992, p. 57:

> "The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be

recognised and given effect by English courts without the need for any specific Act adopting those rules into English law."

So what is the relevant rule of customary international law? I cannot put it better than it is put by the appellants themselves in para. 26 of their written case:

"No international agreement specifically provides for the immunities of a former head of state. However, under customary international law, it is accepted that a state is entitled to expect that its former head of state will not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head. The immunity is accorded for the benefit not of the former head of state himself but for the state of which he was once the head and any international law obligations are owed to that state and not to the individual."

The important point to notice in this formulation of the immunity principle is that the rationale is the same for former heads of state as it is for current heads of state. In each case the obligation in international law is owed to the state, and not the individual, though in the case of a current head of state he will have a concurrent immunity *ratione personae*. This rationale explains why it is the state, and the state alone, which can waive the immunity. Where, therefore, a state is seeking the extradition of its own former head of state, as has happened in a number of cases, the immunity is waived ex hypothesi. It cannot be asserted by the former head of state. But here the situation is the reverse. Chile is not waiving its immunity in respect of the acts of Senator Pinochet as former head of state. It is asserting that immunity in the strongest possible terms, both in respect of the Spanish international warrant, and also in respect of the extradition proceedings in the United Kingdom.

Another point to notice is that it is only in respect of "certain categories of acts" that the former head of state is immune from the jurisdiction of municipal courts. The distinction drawn by customary international law in this connection is between private acts on the one hand, and public, official or governmental acts on the other. Again I cannot put it better than it is put by the appellants in para. 27 of their written case. Like para. 26 it has the authority of Professor Greenwood; and like para. 26 it is not in dispute.

"It is generally agreed that private acts performed by the former head of state attract no such immunity. Official acts, on the other hand, will normally attract immunity. . . . Immunity in respect of such acts, which has sometimes been applied to officials below the rank of head of state, is an aspect of the principle that the courts of one state will not normally exercise jurisdiction in respect of the sovereign acts of another state."

The rule that a former head of state cannot be prosecuted in the municipal courts of a foreign state for his official acts as head of state has the universal support of writers on international law. They all speak with one voice. Thus Sir Arthur Watts K.C.M.G. Q.C. in his monograph on the Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers (1994) *Recueil des Cours* vol. 247 at p. 89 says:

"A head of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state."

In Satow's *Guide to Diplomatic Practice* 5th ed. we find:

"2.2 The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity--probably without exception - from criminal and civil jurisdiction . . . 2.4 A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state."

In *Oppenheim's International Law* 9th ed. para. 456, we find:

"All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity."

It was suggested by Professor Brownlie that the American Restatement of the Foreign Relations Law of the United States was to the contrary effect. But I doubt if this is so. In vol. 1, para. 464 we find:

> "Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states. However a former head of state appears to have no immunity from jurisdiction to adjudicate."

The last sentence means only that it is competent for the court of the foreign state to inquire whether the acts complained of were official acts of the head of state, or private acts. Unless the court is persuaded that they were private acts the immunity is absolute.

Decided cases support the same approach. In *Duke of Brunswick v. King of Hanover* (1848) 2 H.L. Cas. p. 1, a case discussed by Professor F. A. Mann in his illuminating article published in 59 L.Q.R. (1943) p. 42, the reigning King of Hanover (who happened to be in England) was sued by the former reigning Duke of Brunswick. It was held by this House that the action must fail, not on the ground that the King of Hanover was entitled to personal immunity so long as he was in England (*ratione personae*) but on the wider ground (*ratione materiae*) that a foreign sovereign

> "cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad."

In *Hatch v. Baez* (1876) 7 Hun. 596 the plaintiff complained of an injury which he sustained at the hands of the defendant when president of the Dominican Republic. After the defendant had ceased to be president, he was arrested in New York at the suit of the plaintiff. There was a full argument before what would now, I think, be called the Second Circuit Court of Appeals, with extensive citation of authority including *Duke of Brunswick v. King of Hanover*. The plaintiff contended (just as the appellants have contended in the present appeal) that the acts of the defendant must be regarded as having been committed in his private capacity. I quote from the argument at p. 596-597:

> "No unjust or oppressive act committed by his direction upon any one of his subjects, or upon others entitled to protection, is in any true sense the act of the executive in his public and representative capacity, but of the *man* simply, rated as other men are rated in private stations; for in the perpetration of unauthorised offences of this nature, he divests himself of his "regal prerogatives" and descends to the level of those untitled offenders, against whose crimes it is the highest purpose of government to afford protection."

But the court rejected the plaintiff's argument. At p. 599 Gilbert J. said:

> "The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of president of that republic. The sole question is, whether he is amenable to the jurisdiction of the courts of this state for those acts."

A little later we find, at p. 600:

> "The general rule, no doubt, is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is

> essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge."

The court concluded:

> "The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

In *Underhill v. Hernandez* (1897) 168 U.S. 250 the plaintiff was an American citizen resident in Venezuela. The defendant was a general in command of revolutionary forces, which afterwards prevailed. The plaintiffs brought proceedings against the defendant in New York, alleging wrongful imprisonment during the revolution. In a celebrated passage Chief Justice Fuller said, at 252:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The Supreme Court approved, at p. 254 a statement by the Circuit Court of Appeals "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

On the other side of the line is *Jimenez v. Aristeguieta* (1962) 311 F. 2d547. In that case the State of Venezuela sought the extradition of a former chief executive alleging four charges of murder, and various financial crimes. There was insufficient evidence to connect the defendant with the murder charges. But the judge found that the alleged financial crimes were committed for his private financial benefit, and that they constituted "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it." The defendant argued that as a former chief executive he was entitled to sovereign immunity, and he relied on *Underhill v. Hernandez*. Not surprisingly the Fifth Circuit Court of Appeals rejected this argument. At p. 557, they said:

> "It is only when officials having sovereign authority act in an official capacity that the act of state doctrine applies."

To the same effect is *United States of America v. Noriega* (1990) 746 F.Supp. 1506. The defendant was charged with various drug offences. He claimed immunity as de facto head of the Panamanian government. The court considered the claim under three heads, sovereign immunity, the act of state doctrine and diplomatic immunity. Having referred to *Hatch v. Baez* and *Underhill v. Hernandez* the court continued, at pp. 1521-1522:

> "In order for the act of state doctrine to apply, the defendant must establish that his activities are 'acts of state', i.e. that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself. . . . That the acts must be *public* acts of the *sovereign* has been repeatedly affirmed. . . . Though the distinction between the public and private acts of government officials may prove elusive, this difficulty has not prevented courts from scrutinising the character of the conduct in question."

The court concluded that *Noriega*'s alleged drug trafficking could not conceivably constitute public acts on behalf of the Panamanian state.

These cases (and there are many others to which we were referred) underline the critical distinction between personal or private acts on the one hand, and public or official acts done in the execution or under colour of sovereign authority on the other. Despite the plethora of authorities, especially in the United States, the appellants were unable to point to a single case in which official acts committed by a head of state have been made the subject of suit or prosecution after he has left office. The nearest they got was *Hilao v. Marcos* (1994) 25 F. 3d 1467, in which a claim for immunity by the estate of former President Marcos failed. But the facts were special. Although there was no formal waiver of immunity in the case, the government of the Philippines made plain their view that the claim should proceed. Indeed they filed a brief in which they asserted that foreign relations with the United States would *not* be adversely affected if claims against ex-President Marcos and his estate were litigated in U.S. courts. There is an obvious contrast with the facts of the present case.

So the question comes to this: on which side of the line does the present case come? In committing the crimes which are alleged against him, was Senator Pinochet acting in his private capacity or was he acting in a sovereign capacity as head of state? In my opinion there can be only one answer. He was acting in a sovereign capacity. It has not been suggested that he was personally guilty of any of the crimes of torture or hostage-taking in the sense that he carried them out with his own hands. What is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean government, and that he did so in co-operation with other governments under Plan Condor, and in particular with the government of Argentina. I do not see how in these circumstances he can be treated as having acted in a private capacity.

In order to make the above point good it is necessary to quote some passages from the second international warrant.

> "It can be inferred from the inquiries made that, since September 1973 in Chile and since 1976 in the Republic of Argentina a series of events and punishable actions were committed under the fiercest ideological repression against the citizens and residents in these countries. The plans and instructions established beforehand from the government enabled these actions to be carried out. . . .
> It has been ascertained that there were coordination actions at international level that were called 'Operativo Condor' in which different countries, Chile and Argentina among them, were involved and whose purpose was to coordinate the oppressive actions among them.
> In this sense Augusto Pinochet Ugarte, Commander-in-Chief of the Armed Forces and head of the Chilean government at the time, committed punishable acts in coordination with the military authorities in Argentina between 1976 and 1983 . . . as he gave orders to eliminate, torture and kidnap persons and to cause others to disappear, both Chileans and individuals from different nationalities, in Chile and in other countries, through the actions of the secret service (D.I.N.A.) and within the framework of the above-mentioned 'Plan Condor'."

Where a person is accused of organising the commission of crimes as the head of the government, in cooperation with other governments, and carrying out those crimes through the agency of the police and the secret

service, the inevitable conclusion must be that he was acting in a sovereign capacity and not in a personal or private capacity.

But the appellants have two further arguments. First they say that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the ordinary rule of customary international law. Secondly they say that the crimes in question are crimes against international law, and that international law cannot both condemn conduct as a breach of international law and at the same time grant immunity from prosecution. It cannot give with one hand and take away with the other.

As to the first submission, the difficulty, as the Divisional Court pointed out, is to know where to draw the line. Torture is, indeed, a horrific crime, but so is murder. It is a regrettable fact that almost all leaders of revolutionary movements are guilty of killing their political opponents in the course of coming to power, and many are guilty of murdering their political opponents thereafter in order to secure their power. Yet it is not suggested (I think) that the crime of murder puts the successful revolutionary beyond the pale of immunity in customary international law. Of course it is strange to think of murder or torture as "official" acts or as part of the head of state's "public functions." But if for "official" one substitutes "governmental" then the true nature of the distinction between private acts and official acts becomes apparent. For reasons already mentioned I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature. I agree with Collins J. in the Divisional Court that it would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes. Otherwise one would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes. That would not make sense.

As to the second submission, the question is whether there should be an exception from the general rule of immunity in the case of crimes which have been made the subject of international conventions, such as the International Convention against the Taking of Hostages (1980) and the Convention against Torture (1984). The purpose of these conventions, in very broad terms, was to ensure that acts of torture and hostage-taking should be made (or remain) offences under the criminal law of each of the state parties, and that each state party should take measures to establish extra-territorial jurisdiction in specified cases. Thus in the case of torture a state party is obliged to establish extra-territorial jurisdiction when the alleged offender is a national of that state, but not where the victim is a national. In the latter case the state has a discretion: see article 5.1(b)

and (c). In addition there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory--aut dedere aut judicare: see article 7. But there is nothing in the Torture Convention which touches on state immunity. The contrast with the Convention on the Prevention and Punishment of the Crime of Genocide (1948) could not be more marked. Article 4 of the Genocide Convention provides:

> "Persons committing genocide or any of the other acts enumerated in article 3 shall be punished whether they are constitutionally responsible rulers or public officials or private individuals."

There is no equivalent provision in either the Torture Convention or the Taking of Hostages Convention.

Moreover when the Genocide Convention was incorporated into English law by the Genocide Act 1969, article 4 was omitted. So Parliament must clearly have intended, or at least contemplated, that a head of state accused of genocide would be able to plead sovereign immunity. If the Torture Convention and the Taking of Hostages Convention had contained a provision equivalent to article 4 of the Genocide Convention (which they did not) it is reasonable to suppose that, as with genocide, the equivalent provisions would have been omitted when Parliament incorporated those conventions into English law. I cannot for my part see any inconsistency between the purposes underlying these Conventions and the rule of international law which allows a head of state procedural immunity in respect of crimes covered by the Conventions.

Nor is any distinction drawn between torture and other crimes in state practice. In *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536 the plaintiff brought civil proceedings against the government of Kuwait alleging that he had been tortured in Kuwait by government agents. He was given leave by the Court of Appeal to serve out of the jurisdiction on the ground that state immunity does not extend to acts of torture. When the case came back to the Court of Appeal on an application to set aside service, it was argued that a state is not entitled to immunity in respect of acts that are contrary to international law, and that since torture is a violation of jus cogens, a state accused of torture forfeits its immunity. The argument was rejected. Stuart Smith L.J. observed that the draftsman of the State Immunity Act must have been well aware of the numerous international conventions covering torture (although he could not, of course, have been aware of the convention against torture in 1984). If civil claims based on acts of torture were intended to be excluded from the immunity afforded by section 1(1) of the Act of 1978, because of the horrifying nature of such acts, or because they are condemned by international law, it is inconceivable that section 1(1) would not have said so.

The same conclusion has been reached in the United States. In *Siderman de Blake v. Republic of Argentina* (1992) 965F 2d 699 the plaintiff brought civil proceedings for alleged acts of torture against the Government of Argentina. It was held by the 9th Circuit Court of Appeals that although prohibition against torture has attained the status of jus cogens in international law (citing *Filartiga v. Pena-Irala* (1980) 630F 2d 876) it did not deprive the defendant state of immunity under the Foreign Sovereign Immunities Act.

Admittedly these cases were civil cases, and they turned on the terms of the Sovereign Immunity Act in England and the Foreign Sovereign Immunity Act in the United States. But they lend no support to the view that an allegation of torture "trumps" a plea of immunity. I return later to the suggestion that an allegation of torture excludes the principle of non-justiciability.

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about 1 million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under article 17) reported on the Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators. Notwithstanding the wide terms of the Torture Convention and the Taking of Hostages Convention, state practice does not at present support an obligation to extradite or prosecute in all cases. Mr. David Lloyd Jones (to whom we are all much indebted for his help as amicus) put the matter as follows:

> "It is submitted that while there is some support for the view that generally applicable rules of state immunity should be displaced in cases concerning infringements of jus cogens, e.g. cases of torture, this does not yet constitute a rule of public international law. In particular it must be particularly doubtful whether there exists a rule of public international law requiring states not to accord immunity in such circumstances. Such a rule would be inconsistent with the practice of many states."

Professor Greenwood took us back to the charter of the International Military Tribunal for the trial of war criminals at Nuremburg, and drew attention to article 7, which provides:

> "The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

One finds the same provision in almost identical language in article 7(2) of the Statute of the International Tribunal for the Former Yugoslavia (1993), article 6(2) of the Statue of the International Tribunal for Rwanda (1994) and most recently in article 27 of the Statute of the International Criminal Court (1998). Like the Divisional Court, I regard this as an argument more against the appellants than in their favour. The setting up of these special international tribunals for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states. If they could, there would be little need for the international tribunal.

Professor Greenwood's reference to these tribunals also provides the answer to those who say, with reason, that there must be a means of bringing such men as Senator Pinochet to justice. There is. He may be tried (1) in his own country, or (2) in any other country that can assert jurisdiction, provided his own country waives state immunity, or (3) before the International Criminal Court when it is established, or (4) before a specially constituted international court, such as those to which Professor Greenwood referred. But in the absence of waiver he cannot be tried in the municipal courts of other states.

On the first issue I would hold that Senator Pinochet is entitled to immunity as former head of state in respect of the crimes alleged against him on well established principles of customary international law, which principles form part of the common law of England.

Issue two: Immunity under Part I of the State Immunity Act 1978

The long title of the State Immunity Act 1978 states as its first purpose the making of *new* provision with respect to proceedings in the United Kingdom by or against other states. Other purposes include the making of *new* provision with respect to immunities and privileges of heads of state. It is common ground that the Act of 1978 must be read against the background of customary international law current in 1978; for it is highly unlikely, as Lord Diplock said in *Alcom Ltd. v. Republic of Colombia* [1984] 4 A.C. 580 at p. 600 that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compels such a conclusion. It is for this reason that it made sense to start with customary international law before coming to the statute.

The relevant sections are as follows:

> "1. *General immunity from jurisdiction*
> (1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
> (2) A court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question.
> "14. *States entitled to immunities and privileges*
> "(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth state other than the United Kingdom; and references to a state include references to -
> (a) the sovereign or other head of that state in his public capacity;

(b) the government of that state; and
(c) any department of that government,
but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the state and capable of suing or being sued.
(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if -
(a) the proceedings relate to anything done by it in the exercise of sovereign authority; . . .
"16. *Excluded matters*
(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 . . .
(4) This Part of this Act does not apply to criminal proceedings."

Mr. Nichols drew attention to the width of section 1(1) of the Act. He submitted that it confirms the rule of absolute immunity at common law, subject to the exceptions contained in sections 2-11, and that the immunity covers criminal as well as civil proceedings. Faced with the objection that Part I of the Act is stated not to apply to criminal proceedings by virtue of the exclusion in section 16(4), he argues that the exclusion applies only to sections 2-11. In other words section 16(4) is an exception on an exception. It does not touch section 1. This was a bold argument, and I cannot accept it. It seems clear that the exclusions in section 16(2)(3) and (5) all apply to Part I as a whole, including section 1(1). I can see no reason why section 16(4) should not also apply to section 1(1). Mr. Nichols referred us to an observation of the Lord Chancellor in moving the Second Reading of the Bill in the House of Lords: Hansard 17 January 1978 col. 52. In relation to Part I of the Bill he said "immunity from criminal jurisdiction is not affected, and that will remain." I do not see how this helps Mr. Nicholls. It confirms that the purpose of Part I was to enact the restrictive theory of sovereign immunity in relation to commercial transactions and other matters of a civil nature. It was not intended to affect immunity in criminal proceedings.

The remaining question under this head is whether the express exclusion of criminal proceedings from Part I of the Act, including section 1(1), means that the immunity in respect of criminal proceedings which exists at common law has been abolished. In *Al Adsani v. Government of Kuwait* 107 I.L.R. 536 at 542 Stuart Smith L.J. referred to the State Immunity Act as providing a "comprehensive code." So indeed it does. But obviously it does not provide a code in respect of matters which it does not purport to cover. In my opinion the immunity of a former head of state in respect of criminal acts committed by him in exercise of sovereign power is untouched by Part I of the Act.

Issue 3: Immunity under Part III of the State Immunity Act

The relevant provision is section 20 which reads:

"(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to -
(a) a sovereign or other head of State;
(b) members of his family forming part of his household; and
(c) his private servants,
as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants. . . .

"(5) This section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity."

The Diplomatic Privileges Act 1964 was enacted to give force to the Vienna Convention on diplomatic privileges. Section 1 provides that the Act is to have effect in *substitution* for any previous enactment or rule of law.

So again the question arises whether the common law immunities have been abolished by statute. So far as the immunities and privileges of diplomats are concerned, this may well be the case. Whether the same applies to heads of state is more debatable. But it does not matter. For in my view the immunities to which Senator Pinochet is entitled under section 20 of the State Immunity Act are identical to the immunities which he enjoys at common law.

The Vienna Convention provides as follows:

"Article 29: The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. . . .

"Article 31: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. . . .

"Article 39(1): Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

(2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

The critical provision is the second sentence of article 39(2). How is this sentence to be applied (as it must) to a head of state? What are the "necessary modifications" which are required under section 20 of the State Immunity Act? It is a matter of regret that in such an important sphere of international law as the immunity of heads of state from the jurisdiction of our courts Parliament should have legislated in such a round-about way. But we must do our best.

The most extreme view, advanced only, I think, by Professor Brownlie for the Interveners and soon abandoned, is that the immunity extends only to acts performed by a visiting head of state while within the United Kingdom. I would reject this submission. Article 39(2) is not expressly confined to acts performed in the United Kingdom, and it is difficult to see what functions a visiting heads of state would be able to exercise in the United Kingdom as head of state other than purely ceremonial functions.

A less extensive view was advanced by Mr. Alun Jones as his first submission in reply. This was that the immunity only applies to the acts of heads of state in the exercise of their external functions, that is to say, in the conduct of international relations and foreign affairs generally. But in making the "necessary modifications" to article 39 to fit a head of state, I

see no reason to read "functions" as meaning "external functions." It is true that diplomats operate in foreign countries as members of a mission. But heads of state do not. The normal sphere of a head of state's operations is his own country. So I would reject Mr. Alun Jones's first submission.

Mr. Alun Jones's alternative submission in reply was as follows:

> "However, if this interpretation is wrong, and Parliament's intention in section 20(1)(a) of the State Immunity Act was to confer immunity in respect of the exercise of the internal, as well as the external, functions of the head of state, then the second sentence of article 39(2) must be read as if it said: 'with respect to official acts performed by a head of state in the exercise of his functions as head of state, immunity shall continue to subsist.'"

Here Mr. Alun Jones hits the mark. His formulation was accepted as correct by Mr. Nicholls and Miss Clare Montgomery on behalf of the respondents, and by Mr. David Lloyd Jones as amicus curiae.

So the question on his alternative submission is whether the acts of which Senator Pinochet is accused were "official acts performed by him in the exercise of his functions as head of state." For the reasons given in answer to issue 1, the answer must be that they were.

So the answer is the same whether at common law or under the statute. And the rationale is the same. The former head of state enjoys continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself.

Issue 4--non-justiciability

If I am right that Senator Pinochet is entitled to immunity at common law, and under the statute, then the question of Non-justiciability does not arise. But I regard it as a question of overriding importance in the present context, so I intend to say something about it.

The principle of non-justiciability may be traced back to the same source as head of state immunity, namely, the *Duke of Brunswick v. The King of Hanover*. Since then the principles have developed separately; but they frequently overlap, and are sometimes confused. The authoritative expression of modern doctrine of non-justiciability is to be found in the speech of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888. One of the questions in that case was whether there exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Lord Wilberforce answered the question in the affirmative. At 932 he said:

> "In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."

Lord Wilberforce traces the principle from *Duke of Brunswick v. King of Hanover* through numerous decisions of the Supreme Court of the United

States including *Underhill v. Hernandez*, *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297 and *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398. In the latter case Lord Wilberforce detected a more flexible use of the principle on a case-by-case basis. This is borne out by the most recent decision of the Supreme Court in *W.S. Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International* (1990) 493 U.S. 400. These and other cases are analysed in depth by Mance J. in his judgment in *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported) 29 July 1998, from which I have derived much assistance. In the event Mance J. held that judicial restraint was not required on the facts of that case. The question is whether it is required (or would be required if head of state immunity were not a sufficient answer) on the facts of the present case. In my opinion there are compelling reasons for regarding the present case as falling within the non-justiciability principle.

In the *Buttes Gas* case the court was being asked "to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law." Lord Wilberforce concluded that the case raised issues upon which a municipal court could not pass. In the present case the State of Spain is claiming the right to try Senator Pinochet, a former head of state, for crimes committed in Chile, some of which are said to be in breach of international law. They have requested his extradition. Other states have also requested extradition. Meanwhile Chile is demanding the return of Senator Pinochet on the ground that the crimes alleged against him are crimes for which Chile is entitled to claim state immunity under international law. These crimes were the subject of a general amnesty in 1978, and subsequent scrutiny by the Commission of Truth and Reconciliation in 1990. The Supreme Court in Chile has ruled that in respect of at least some of these crimes the 1978 amnesty does not apply. It is obvious, therefore, that issues of great sensitivity have arisen between Spain and Chile. The United Kingdom is caught in the crossfire. In addition there are allegations that Chile was collaborating with other states in South America, and in particular with Argentina, in execution of Plan Condor.

If we quash the second provisional warrant, Senator Pinochet will return to Chile, and Spain will complain that we have failed to comply with our international obligations under the European Convention on Extradition. If we do not quash the second provisional warrant, Chile will complain that Senator Pinochet has been arrested in defiance of Chile's claim for immunity, and in breach of our obligations under customary international law. In these circumstances, quite apart from any embarrassment in our foreign relations, or potential breach of comity, and quite apart from any fear that, by assuming jurisdiction, we would only serve to "imperil the amicable relations between governments and vex the peace of nations" (see *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297 at 304) we would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court. For an English court to investigate and pronounce on the validity of the amnesty in Chile would be to assert jurisdiction over the internal affairs of that state at the very time when the Supreme Court in Chile is itself performing the same task. In my view this is a case in which, even if there were no valid claim to sovereign immunity, as I think there is, we should exercise judicial restraint by declining jurisdiction.

There are three arguments the other way. The first is that it is always open to the Secretary of State to refuse to make an order for the return of Senator Pinochet to Spain in the exercise of his discretion under section 12 of the Extradition Act. But so far as Chile is concerned, the damage will by then have been done. The English courts will have condoned the arrest. The Secretary of State's discretion will come too late. The fact that these proceedings were initiated by a provisional warrant under section 8(1)(b) without the Secretary of State's authority to proceed, means that the courts cannot escape responsibility for deciding now whether or not to accept jurisdiction.

Secondly it is said that by allowing the extradition request to proceed, we will not be adjudicating ourselves. That will be the task of the courts in Spain. In an obvious sense this is true. But we will be taking an essential step towards allowing the trial to take place, by upholding the validity of the arrest. It is to the taking of that step that Chile has raised objections, as much as to the trial itself.

Thirdly it is said that in the case of torture Parliament has removed any concern that the court might otherwise have by enacting section 134 of the Criminal Justice Act 1988 in which the offence of torture is defined as the intentional infliction of severe pain by "a public official or . . . person acting in an official capacity." I can see nothing in this definition to override the obligation of the court to decline jurisdiction (as Lord Wilberforce pointed out it is an obligation, and not a discretion) if the circumstances of the case so require. In some cases there will be no

difficulty. Where a public official or person acting in an official capacity is accused of torture, the court will usually be competent to try the case if there is no plea of sovereign imunity, or if sovereign immunity is waived. But here the circumstances are very different. The whole thrust of Lord Wilberforce's speech was that non-justiciability is a flexible principle, depending on the circumstances of the particular case. If I had not been of the view that Senator Pinochet is entitled to immunity as a former head of state, I should have held that the principle of non-justiciability applies.

For these reasons, and the reasons given in the judgment of the Divisional Court with which I agree, I would dismiss the appeal.

(...)

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Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?*

*John Dugard***

Keywords: amnesty; international criminal law; International Criminal Tribunal; truth commissions.

Abstract: From time immemorial amnesty has been employed as a means of promoting a political settlement and advancing reconciliation in societies that have emerged from repression. At present there is a trend in support of prosecution of those who have committed international crimes, such as torture and crimes against humanity, which excludes the possibility of amnesty. That amnesty is no longer favored is illustrated by the failure of the Rome Statute of the International Criminal Court to recognize amnesty as a defence to prosecution. While there is no place for unconditional amnesty in the contemporary international legal order an intermediate solution such as a Truth and Reconciliation Commission with power to grant amnesty after investigation, of the South African kind, may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution.

1. INTRODUCTION

How to deal with the crimes of removed repressive regimes is now a principal preoccupation of international law. Amnesty is no longer accepted as the natural price to be paid for transition from repression to democracy. Inspired by the establishment of *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, and the prospect of a permanent International Criminal Court, prosecution has become the preferred choice. Whether it is the wisest course to pursue remains a matter of debate. In some situations amnesty may still offer the best prospect for peace – if not for justice. In others an intermediate course may be more suitable. The Truth and Reconciliation Commission, of the kind established in several Latin-American countries and South Africa, may serve the interests of peace and justice better than prosecution or amnesty. In this article I shall examine this debate in the context of contemporary international law, with special reference to the case of Augusto Pinochet.

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* This article is based on the Third Manfred Lachs Memorial Lecture, delivered at the Peace Palace, The Hague, on 15 April 1999.

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2. AMNESTY, PROSECUTION OR TRUTH COMMISSION?

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial successor regimes have sought to secure peace through the pardoning of their enemies. The sole alternative, until present times, was brutal punishment without trial. Consequently, human rights advocates pleaded for amnesty for political prisoners, even for those from fallen regimes.

The past decade has seen a change in attitude. There is now a demand for prosecution of the villains of past regimes. There are many reasons for this. The abuse of amnesty by military dictatorships that have enacted 'self-amnesty' laws before surrendering power is an obvious reason. Perhaps the most important reason, however, is the internationalization of crime in the global village. Most of the atrocities committed by dictators today are not merely national crimes. They are frequently international crimes – genocide, crimes against humanity, torture, hostage-taking and apartheid – which concern the international community as well as the national state. Moreover, international criminal courts have been, and are being, established to punish the perpetrators of such crimes. In these circumstances the international community has an interest in the treatment of human rights violations, and sees punishment before national courts or international courts as the best solution.

Consequently successor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.

Support for this argument is to be found in the Genocide Convention of 1948, which contains an absolute obligation to prosecute offenders;[1] in decisions of the Inter-American Court and Commission of Human Rights[2] holding that amnesties granted by Argentina and Uruguay were incompatible with the American Convention on Human Rights; in the decision of the American Court of Human Rights in the *Velasquez Rodriguez Case*[3] holding, in respect of Honduras, that Article 1 (1) of the Convention, requiring states to "ensure the rights set forth in the Convention", obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights; in a comment by the UN Human Rights Committee that amnesties covering acts of torture are "generally incompatible with the duty of states to investigate such acts";[4] in the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, which obliges states to try or extra-

1. Art. 4 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).
2. Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) 82nd session OEA/LV/11.82 Doc. 25 (2 Oct. 1992); *id.*, Report No. 24/92 (Argentina), Doc. 24.
3. 1988 IACHR (Ser. C), No. 4, para. 165.
4. General Comment No. 20 (44), (Art. 7), UN Doc. CCPR/C21/Rev. 1/Add 3., para 15 (1992).

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dite those alleged to have committed crimes against humanity;[5] in the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights[6] calling on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes; in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968;[7] and in the Statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY)[8] and the International Criminal Tribunal for Rwanda (ICTR)[9] which require prosecution of those responsible for the crimes punishable under these statutes. Support for prosecution is also derived from the obligation to prosecute or extradite those guilty of grave breaches of the 1949 Geneva Conventions.[10] Here it is argued that the distinction between international and non-international armed conflicts has largely disappeared and that the obligation to prosecute grave breaches or similar war crimes extends to internal conflicts. Finally, of course, there is a substantial body of academic writing to support this argument.[11]

The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija*[12] which held that amnesties for torture are null and void and will not receive foreign recognition.

It is, however, doubtful, whether international law has reached this stage. State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution.[13]

The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of

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5. Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission of the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1966).
6. Part II, para. 60, UN Doc. A/Conf/57/24 (1993); 32 ILM 166 (1992).
7. 8 ILM 68 (1969).
8. Security Council Resolution 827 (1993); 32 ILM 1192 (1993).
9. Security Council Resolution 955; 33 ILM 1598 (1994).
10. *See, for example*, Arts.146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
11. *See, for example*, M Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law and Contemporary Problems 9 (1996); D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537, 2568 (1991); C. Edelenbos, *Human Rights Violations: A Duty to Prosecute?* 7 Leiden Journal of International Law 5, 15 (1994).
12. Case No. IT-95-17/1-T (10 December 1998); (1999) 39 ILM, at paras. 151-157 (1999).
13. *See* M. Scharf, *The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 41, 47 (1996).

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South Africa[14] and El Salvador,[15] expressing the view that international law not only fails to prohibit amnesty but rather encourages it. These courts have invoked Article 6 (5) of Additional Protocol II of 1977 which on the face of it, although this is disputed by the International Committee of the Red Cross,[16] encourages amnesty by providing that at the end of hostilities in internal conflicts the authorities "shall endeavour to grant the broadest possible amnesty to persons who have participated in the conflict."

Of the twelve Law Lords who heard the *Pinochet* case, only one commented on the question of amnesty. Although he was one of the minority judges (in the first *Pinochet* case), few would disagree with Lord Lloyd's statement that:

> Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government [...] It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[17]

Although international law does not – yet – prohibit the granting of amnesty for international crimes it is clearly moving in this direction. The Statute of the International Criminal Court (ICC),[18] adopted in Rome in 1998, makes no provision for amnesty. Moreover, the adoption of the principle of 'complementarity' in the Rome Statute,[19] which gives both national courts and the ICC jurisdiction over war crimes, crimes against humanity and genocide, suggests that national courts will assert their permissive jurisdiction over such crimes with more enthusiasm than in the past. Moreover, it can confidently be expected that NGO's will, in future, bring pressure on both national and international courts to prosecute international criminals and that the granting of amnesty will be challenged with new vigor.

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14. Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC), at 691, para. 32.
15. Proceedings No. 10-93 (May 20, 1993), *reprinted in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, 549, 555 (1995).
16. *See* D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 Law and Contemporary Problems 196, 212 (1996).
17. R. v. Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet [1998] 4 All ER 897 (HL), at 929 h-i.
18. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), *reprinted in* 37 ILM 999 (1998).
19. Preamble, para. 10, Art. 17.

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Strangely, at the very point in time that international opinion is moving towards prosecution and away from amnesty, a new institution has appeared on the scene which challenges prosecution as the only option. This is the truth or truth and reconciliation commission.

Since 1974 some seventeen truth commissions have been established to enquire into the past of particular societies, to "tell the truth" of what happened.[20] Probably the best known are those of Chile, Argentina, El Salvador, South Africa and Guatemala. There are now proposals to establish truth commission for Cambodia and Bosnia.

Truth commissions vary considerably in respect of composition, independence and mandate, although they are all committed to healing by means of truth telling. They are not, *in theory*, antithetical to prosecution. Thus Louis Joinet in his 1997 Report on the "Question of the Impunity of Perpetrators of Human Rights Violations" to the Sub-Commission on Prevention of Discrimination and Protection of Minorities[21] recommends that an extrajudicial commission of enquiry into the events of the past should go hand in hand with prosecution and punishment of human rights violators. *In practice* the position is very different. In most cases a truth commission is established because the new regime lacks the power to embark on prosecution – as in the case of Chile where President Aylwin's democratic government operated in the shadow of the Pinochet-led military; or because the political compact that has produced democracy is premised on a compromise between old and new regimes which precludes prosecution – as in the case of South Africa, whose democracy was founded on an agreement between the National Party apartheid regime and the African National Congress (ANC) based on conditional amnesty. In her study of fifteen truth commissions Priscilla Hayner states that prosecutions are "very rare" after a truth commission report even where the identity of the perpetrators is known. She adds "[i]n only a few of the fifteen cases looked at [...] was there an amnesty law passed explicitly preventing trials, but in most other cases there was in effect a *de facto* amnesty – prosecutions were never seriously considered."[22]

So in practice truth commissions and prosecutions are competing mechanisms for dealing with crimes of the past. Blanket, unconditional amnesty, unaccompanied by a truth commission is no longer an acceptable option. The choice is between prosecution or amnesty accompanied by a truth commission.

Each has its merits. Prosecution emphasizes the right to justice, and society's demand for retribution. The truth commission seeks to satisfy the right to know and understand the past, and aims at reconciliation rather than retribution. Which course is most likely to heal a divided society is unclear. While interna-

20. P Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 Human Rights Quarterly 600 (1994).
21. UN Doc. E/CN, 4/sub 2/1997/20/Rev 1 (1997).
22. *Supra* note 20, at n. 4.

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tional opinion increasingly demands prosecution and justice, domestic opinion has other priorities. One has only to read the eloquent judgment of South Africa's present Chief Justice, Ismail Mahomed, in the challenge to the constitutionality of South Africa's amnesty legislation in *Azapo v. President of the Republic of South Africa*[23] to understand why societies prefer truth to prosecution:

> Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [Promotion of National Unity and Reconciliation] Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.
>
> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire [...]

International opinion, often driven by NGO's and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution; and to the argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals.

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23. 1996 (4) SA 671, at 683-685

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Amnesty for Crime in International Law and Practice

by

Andreas O'Shea

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A more significant source of state practice of amnesties is the long-standing practice of including amnesty clauses in peace treaties.[308] This practice clearly covered violations of the laws of war and was so constant that where it was not express, it was implied. For centuries it would seem states have acted under the belief that they were entitled to negotiate these clauses, even in relation to crimes that constituted violations *erga omnes*. Consequently, there was a customary right to include amnesty clauses in peace agreements. To what extent has this right survived?

The right would not in itself prevent the development of a rule requiring the punishment of international criminals, subject to an exception where there is an amnesty clause in a peace treaty. For the right to be reversed there would need to be a clear and uniform practice to the contrary. This is the case with respect to torture and genocide. With respect to these crimes, a solid body of state practice has grown out of clearly expressed treaty provisions that are irreconcilable with a right to agree on amnesty. It is less clearly so with respect to those other crimes falling under the general duty to prosecute. However, while there is a customary duty to prosecute or extradite perpetrators of extra-judicial executions, because this duty does not originally derive from clearly defined treaty provisions, its existence is subject to a customary exception permitting states to contract out of the duty following conflict. While there is no logical distinction to be drawn between arbitrary executions and torture, this result would appear to follow by default.

Here, the older customary right to agree on amnesty may be viewed not as inconsistent state practice, but as a surviving exception to the new customary duty in the particular moment in time of a society emerging from conflict or oppression.[309] There is no inconsistency in state practice here because, as Professor Teitel aptly points out as the central theme of her inspiring work on transitional justice,[310] transitional justice mechanisms are an exceptional response to an extraordinary event in a particular moment in time.[311] Normal considerations and understandings of the rule of law are inapplicable and this is why general state practice supporting a general duty to

[308] See chapter 2, *supra*, at 15–20.

[309] See the incorporation of this exception in the suggestion solution in Annex I, *infra*.

[310] See R. G. Teitel, *Transitional Justice* (2000).

[311] Ibid. chapter 1, "The Rule of Law in Transition."

prosecute can emerge and can be reconciled as consistent with a right not to prosecute in exceptional circumstances.

B. *Conclusion*

This chapter has highlighted a determination on the part of the international community to ensure the punishment of international criminals and establish an unmitigated respect for the international rule of law. This has led to the emergence of a number of distinct customary rules requiring the prosecution, in the absence of extradition, of offenders. Attempts to assimilate the accumulated evidence into a general customary duty to prosecute international crimes do not hold up to scrutiny.

In my judgement, in the current climate of state practice and *opinio juris*, the current obligations to prosecute or extradite cover the most serious and systematic violations of human rights and humanitarian norms. More specifically, there is a particular obligation to prosecute torture and extra-legal executions, and there is a general duty to prosecute customary crimes and those covered by the jurisdiction of the International Criminal Court.[312] There is also an unmitigated duty to punish or extradite torturers and those that commit genocide. The duty to punish extra-judicial executions and customary crimes other than torture and genocide, while emergent, may be avoided through the negotiation of a peace treaty between states. This would also apply to crimes against humanity and serious violations of human rights in the case of purely civil wars, an amnesty covering these crimes would need to be negotiated between the state and the international community as a whole, possibly through the agency of the UN.

This state of affairs has its advantages in reconciling the need to secure peace with the need to maintain the international rule of law. States can lawfully give amnesty from prosecution in their own courts providing they are prepared to surrender an individual to the International Court. In the event that the establishment of peace absolutely requires amnesty from both prosecution and extradition, this can be negotiated between the parties and the international community as a whole. In chapter 16, I will consider how this reality can be reconciled with the emerging regime of the International Criminal

[312] See further Article 5(1) of the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations on National Amnesties Promulgated in Times of Transition, Annex I, *supra*.

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the compensation or what it regarded as Aminoil's legitimate expectations. It pointed out that "over the years Aminoil had come to accept the principle of a moderate estimate of profits, and that it was this that constituted its legitimate expectations" (para. 161, at p. 1037).

Although the Tribunal did not give precise details about how it arrived at its final figure, it would seem that the latter represented an aggregate of two elements. One was the present replacement cost of the physical assets as at the date of transfer, and taking due account of the depreciation they had undergone by reason of wear and tear and obsolescence. The other was the value of the undertaking itself, as a source of profit, based on the 1977 annual rate of return and worked out for the term of the service contract that would have replaced the 1948 concession. In this way, the Tribunal finally arrived at a figure of US $ 209 041 000.

6. *Interest*

Since the Aminoil Arbitration took place during a period of extreme economic instability, which was characterized by an exceptionally high rate of inflation, the Tribunal decided that, in order to establish what was due in 1982, the outcome of the balance sheet of the rights and obligations of the parties as at September 19, 1977 had to be subjected not only to a reasonable rate of interest, which it put at 7,5 per cent per annum, but also to a level of inflation which it fixed at an overall rate of 10 per cent per annum. Applying the rate of 17,5 per cent per annum compounded, the Tribunal awarded Aminoil US $ 139 750 764 as at July 1, 1982.[2]

[2] Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (Aminoil), 24 March 1982, 21 ILM (1982) 976, 1032.

AMNESTY CLAUSE

1. *Definition and Types of Amnesty*

Amnesty clauses are frequently found in → peace treaties and signify the will of the parties to apply the principle of *tabula rasa* to past offences, generally political delicts such as treason, sedition and rebellion, but also to → war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders.

It is important to draw distinctions between various types of amnesty, i.e. between general amnesty providing immunity for all wrongful acts done by the belligerents themselves, the members of their forces and their subjects during the war, and limited amnesty which provides immunity, for example, only for political offences committed by the enemy before or during the war. While the typical amnesty clause prevents the parties from punishing enemy war offenders after the conclusion of peace, it does not necessarily prevent them from punishing members of their own forces or any of their own subjects who, during the war, may have deserted or committed treason (→ Desertion) unless the contrary has been expressly stipulated in the treaty of peace.

One should also distinguish between internal and external amnesties: the former are frequently issued after revolutions or civil wars by municipal authorities, and are political acts of primarily domestic significance, whereas the latter are provided for in treaties of peace after international wars.

2. *Purpose*

The idea of clemency is the opposite of the old principle of *vae victis*. It also goes beyond doing mere justice to the vanquished (*reditus boni hostis*), since retribution demands the just punishment of offenders, indeed, the main argument against amnesties has always been that murderers and deserters should not be allowed to go unpunished. However, justice is not the only consideration in peacemaking (*fiat justitia, pereat mundus*) and many statesmen have given priority to the political goal of placating passions inflamed not only by the war itself but also by the → propaganda that accompanied it; they have thus considered an official act of "forgetting" ("Vergessen und Vergeben") (cf. Art. 4 of the Treaty of Nimegen of 1678; Art. 2 of the Treaty of Utrecht of 1713; Art. 2 of the Treaty of Aix-la-Chapelle of 1748; Art. 2 of the Treaty of Paris of 1763), as indispensable to facilitating a new beginning. Nevertheless, customary international law does not require that peace treaties contain amnesty clauses.

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for the disappearance of threats to international peace in the foreseeable future.

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Addendum 1996

The fall of the Communist regimes in Eastern Europe and the ensuing end of the Cold War also reduced antagonisms among the permanent members of the United Nations Security Council. As a result, the Security Council was able to agree on action in several conflicts, including measures against the invasion of Kuwait by Iraq (→ Gulf Conflict (1990/1991)) and against parties to the armed conflicts in the former Yugoslavia (→ Yugoslavia, Dissolution of) as well as in the fighting in Somalia and against Libya for the latter's involvement in international terrorism.

In most cases, the Security Council simply stated that it was acting under Chapter VII of the UN Charter. Occasionally, however, it referred to a threat to international peace and security. Its Res. 733 (1992) on the situation in Somalia, Res. 748 (1992) against Libya, and Res. 757 (1992) on sanctions against the then recently proclaimed Federal Republic of Yugoslavia (Serbia and Montenegro) may be mentioned as examples. The Security Council continued to apply a broad notion of such threats.

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H.N.

PEACE TREATIES

1. Historical Development. 2. Function: (a) Termination of war. (b) Restoring friendly relations. 3. Negotiation and Conclusion: (a) Participants. (b) Negotiating procedure. (c) Preliminaries. (d) Relevance of compulsion. 4. Structure and Scope of the Treaty Document: (a) General order of contents. (b) Preamble. (c) Political and territorial clauses. (d) Financial, economic and juridical clauses. 5. Safeguards and Guarantees. 6. Revision and Peaceful Change. 7. Current Significance. 8. Philosophy of Peacemaking.

1. Historical Development

Termination of → war by conclusion of a peace treaty is one of the oldest institutions of international law. A famous example from a period which knew an international order with the characteristics of a truly → international law is the peace treaty concluded circa 1280 B.C. between the Egyptian Pharaoh, Rameses II, and Hattusilis II, the King of the Hittites. In addition to the → armistices and temporary peace settlements, which prevailed in the termination of disputes of the Greek *polis* with rival communities, the political system of ancient Greece was also familiar with a general type of peace treaty. Not only the participants in the preceding hostilities but also third parties were included in these, and they regularly stipulated a joint commitment to → sanctions against the perpetrator of a breach of the peace.

In his definition of *jus gentium*, Isidore of Seville (c. 560–636) mentioned *paces* as one of the elements of international law. In medieval practice, peace was closely interwoven with the legal institutions of feudalism. Christian theology, linking the concepts of peace with justice, deeply influenced the meaning of peace (→ Peace, Historical Movement towards), but with the schisms of the Reformation, it became increasingly difficult to agree on a concept of *justitia* as *fundamentum pacis*. Philosophers like Spinoza and

Hobbes laid the emphasis on peace as a state of assured internal order, the *pax civilis*. Peace between States could only be conceived as an interruption of the normal *bellum omnium (civitatum) contra omnes* by means of a treaty. Whereas most of the classic proponents of the rationalist → natural law theory continued to regard peace as the normal relationship between States, they agreed with Hobbes in viewing peace as the product of contractual arrangements. *Status pacis* and *pactum pacis* became identical.

With peace and justice thus categorized separately, it became the main function of a peace treaty to terminate hostilities and violence, to settle controversial claims by compromise or renunciation, and to establish a new order which, regardless of right or wrong, insured stability, security and tranquility. However, peace continued to be considered as more than a mere state of non-violence, an absence of armed hostilities, or a period of non-belligerence (→ Peace and War). The task and function of a peace treaty was to achieve a durable accommodation and reconciliation between former enemies, and oblivion and amnesty for their citizens who perpetrated acts of hostility, violence, offence, injury or damnification ("perpetua oblivio et amnestia", Art. II, Instrumentum Pacis Osnabrugense, 1648; → Amnesty Clause). Good neighbour relations and friendship were to be restored ("fida vicinitas et secura studiorum pacis atque amicitiae cultura revirescant et florescant", Art. I, Instrumentum Pacis Osnabrugense).

In another sense the major peace treaties of modern times tried to achieve more than the cessation of hostilities; they endeavoured to construct a new political order on the European Continent. It is this that gives the Westphalian Peace Treaties of Münster and Osnabrück (→ Westphalia, Peace of (1648)) their historical reputation, a reputation which at times has been exaggerated by claims that they gave birth to modern international law and upon which doubt has been cast by modern research.

Similarly, the Peace Treaties of Utrecht (1713), Aix-la-Chapelle (1748), Vienna (→ Vienna Congress (1815)), Paris (→ Paris Peace Treaty (1856)), and → Versailles (together with the → Saint-Germain, → Trianon, → Neuilly and → Lausanne Peace Treaties, 1919–1923) in turn modified and renewed the European political order. They were general peace treaties, in most cases including States which had not participated in the preceding war, but were at the same time indispensable for the establishment of a workable and effective political system. Significantly, these general peace treaties often included principles and rules which were considered to be essential for a stable and viable political system, such as the equality in law of the Catholic and Protestant religions and the principle *cuius regio eius religio* linked with the right of emigration (Peace of Westphalia). This ended the period of religious wars. Another instance is the principle of the → balance of power in Europe, which was expressly mentioned in the Peace Treaty of Utrecht (Art. 2): "ad firmandam stabiliendamque Pacem ac Tranquillitatem Christiani Orbis, iusto Potentiae Aequilibrio, quod optimum et maxima solidum mutuae Amicitiae at duraturae undiquaque Concordiae fundamentum est." This was tacitly also contained in the Vienna peace settlement of 1815. The Paris Peace Treaties of 1919 included the Covenant of the → League of Nations, by which a new type of international organization for peacekeeping and the maintenance of the → *status quo* was created.

Another significant feature of these general peace treaties was that they constituted or confirmed rules of general international law. The Final Act of the Vienna Congress (Arts. 108 to 117) included: "Reglement pour la libre navigation des rivieres" (→ International Rivers; → Navigation, Freedom of), another document with respect to the *céremonel diplomatique* (→ Diplomacy), and an annex which included a "Déclaration contre la traite des negres" (→ Slavery).

The Paris Peace Treaty of 1856 incorporated Turkey into the *droit public de l'Europe*; that peace conference adopted the "Déclaration sur le droit de guerre maritime" (→ Sea Warfare; → War, Laws of, History).

2. *Function*

(a) Termination of war

Legally, the main purpose of a peace treaty is the termination of a state of war and the restoration of normal friendly relations between the former belligerents based on a settlement of matters arising out of the war. But a peace treaty is

... its Member States for a range of domains which relate to the organisation and voting competence to take decisions on questions that engage the Member States" (personal translation).
17 "Under Article 2 (3) ... any reference to the constitutive act to the Member states also applies to any Member Organisation, unless there are provisions to the contrary" (personal translation).
16 "Every regional organisation of economic integration who applies for admission to the Organisation deposits at the same time a declaration of competence which makes explicit the questions for which its Member States have transferred competence to it" (personal translation).
17 These modifications should be examined during the next ordinary session of the Council scheduled in Moscow in October 1997.
18 See our study, Le statut de l'Union européenne dans les organisations internationales, [illegible] 13; also see our book L'action internationale relative au commerce des produits de base. Contribution à l'étude juridique du nouvel ordre économique international, Paris, Pédone, 1986, which analyses the community agreements and in which the question of the participation of the Community in international organisations was for the first time focused on.
19 See our study, op.cit. (note 13). The specific problems related to the joint participation of the Community and its Member States in conferences and organisations when competences are mixed or shared, were the object of negotiations during the Intergovernmental Conference.
20 Ibidem.
21 "The meetings and works of the Committee of Ministers, the Delegates of the Ministers, the Groups of Reporters of the Delegates and any other work group ... shall be open to participation of the Commission on invitation from the competent authorities of the Council of Europe".
22 Exchange of letters between Mr Daniel Tarschys, Secretary General of the Council of Europe and Mr Jacques Santer, President of the Commission of the European Communities. This agreement comes under the exercise by the Commission of the powers that Article 229 conferred rather than under Article 238 of the Treaty of Rome, according to which the conclusion of a comprehensive agreement between the Community and the Council of Europe was planned.
23 "Even though the Community is not a Member of the C.S.D., it shall fully participate in the works of the Commission and its subsidiary organs" (personal translation).

THE SECURITY COUNCIL AND NON-STATE ENTITIES AS PARTIES TO CONFLICTS

P.H. Kooijmans

I. Introduction

On 28 August 1997 - shortly before I wrote this contribution for Eric Suy's Liber Amicorum - the Security Council adopted Resolution 1127 (1997) on the situation in Angola.[1] In this resolution the Council expressed its grave concern at the serious difficulties in the peace process which it ascribed mainly to the National Union for the Total Independence of Angola (UNITA)'s slowness in implementing its obligations under the peace agreements. It called on both parties (but in particular on UNITA) to comply fully and without delay with their obligations.

In the operative part of Section B, however, the Council went further and, acting under Chapter VII of the Charter, ordered mandatory selective sanctions against UNITA. These sanctions would come into force on 30 September unless UNITA could provide evidence that it had by that time taken "concrete and irreversible steps" to comply with its obligations.

This resolution (as its predecessor Resolution 864 (1993) in which the Council also imposed sanctions on UNITA) is remarkable since on the one hand it is addressed to an entity which is not a state and does not even presume to be a state, while on the other this entity is evidently held to be legally responsible for its wrongful conduct. This raises a number of legal questions to which I will return later.

First, however, something must be said about the practice of the Security Council with regard to non-state entities who are parties to a dispute or a conflict.

II. Non-State Entities as Parties to a Conflict

From the history and also from the wording of the Charter (see, e.g. the first paragraph of the Preamble) it is evident that the United Nations Organization was established with one of its main purposes being the prevention of inter-state wars. Internal conflicts, where by definition at least one of the parties is a non-state entity, were generally considered to be outside the competence of the Organization by virtue of Article 2, paragraph 7 of the Charter. In the last sentence of Article 2, paragraph 7, there is an important proviso, viz. that the principle of non-intervention as laid down in this paragraph "shall not prejudice the application of enforcement measures under Chapter VII". Only when the effects of an internal conflict constituted a threat to *international* peace and security was the Security Council entitled to take enforcement measures to prevent or control trans-border effects which might lead to, for example, a clash with or between neighbouring states. The Council was, however - at least

K. Wellens (ed.), *International Law: Theory and Practice*, [illegible]
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condition that multi-racial institutions were established was satisfied. However, in both cases there were more or less stabilized *de facto* regimes[11]. In the case of Rhodesia as with Republika Srpska, we are dealing with state-like entities whose claim to statehood was denied.

A completely different situation can be found in two other cases where the Security Council threatened to take or actually took enforcement measures against a non-state entity, viz. the Khmer Rouge in Cambodia and UNITA in Angola. In these cases it was not the refusal to *accept* a settlement endorsed by the Council, but the refusal to *implement* an agreed settlement, which moved the Council to envisage or actually impose sanctions.

When during the implementation period of the 1991 Paris Agreement on a Comprehensive Political Settlement of the Cambodia Conflict one of the parties to the agreement, the Party of Democratic Kampuchea (Khmer Rouge) sabotaged the peace-process by its conduct, the Security Council first expressed its concern and demanded that the PDK complied with its obligations, and then expressed its intention to "consider appropriate measures to be implemented should the PDK obstruct the implementation of the peaceplan, such as the freezing of the assets it holds outside Cambodia"[12]. No mention was made of Chapter VII; therefore the Council left open whether such measures would be recommendatory or mandatory in character. In the meantime the Council took some quasi-sanctions; invoking certain provisions of the peace-agreement itself it called on "those concerned" to prevent the supply of petroleum products to the areas occupied by any Cambodian party not complying with the military provisions of the agreement. The Council did not carry through its threat to take further measures.

Such further measures *were* taken in the case of Angola to which I referred already at the beginning of this article. Resolution 1127 (1997) which is mentioned above was, however, not the first occasion the Council took enforcement measures against UNITA.

On 8 May 1991 the Government of Angola informed the Secretary-General of the United Nations that a peace-agreement had been signed by the Government and UNITA. This agreement was the result of mediation by Portugal while the United States and the Soviet Union participated in the peace process as observers[13].

After elections were held in 1992 and which were won by MPLA, the government party, UNITA began to obstruct the implementation of the peace accords and it started anew its military activities. In Resolution 851 (1993) of 15 July 1993 the Security Council condemned UNITA and expressed its readiness to consider the imposition of measures, including a mandatory arms embargo. Two months later, on 15 September 1993[14] the Council determined that, as a result of UNITA's military actions, the situation in Angola constituted a threat to international peace and security and imposed a mandatory embargo on arms and petroleum products against UNITA, subject to further reporting by the Secretary-General of the United Nations.

On 15 November 1994 a new agreement was signed, the Lusaka Protocol, in which the peace accords of 1991 were again confirmed[15]. Again UNITA failed to comply with the agreement and thus once again caused the Security Council to take action. This time it ordered mandatory travel restrictions to be imposed on senior UNITA officials. If UNITA continued its obstruction the Council would take further measures, such as trade and financial restrictions. There is, however, an interesting difference between Resolution 864 (1993) and Resolution 1127 (1997). The basis for the enforcement measures taken in 1993 were UNITA's continued military activities, a finding of fact which led the Council to a determination of a threat to the peace[16]. Res. 1127 (1997) on the other hand, seems to be based on a quasi-judicial finding. Having deplored in the last preambular paragraph UNITA's failure to comply with its *obligations*, the Security Council demanded in operative section A that UNITA implemented immediately its *obligations* under the Lusaka Protocol. The fact that it failed to do so resulted in a situation that, according to the Council constitutes a threat to international peace and security (first preambular paragraph of section B) and entitled the Council to take measures under Chapter VII.

In this respect it is also noteworthy that in paragraph 7 the Security Council decided that the enforcement measures shall take effect on 30 September 1997, unless it concludes on the basis of a report by the Secretary-General, that UNITA has taken "concrete and irreversible steps to comply with all the *obligations* set out in para.s 2 and 3 above" (these paragraphs refer to the Lusaka Protocol) (emphasis added). This use of juridical language raises a number of legal questions: are the obligations to which the Security Council constantly refers obligations under international law? And if that is the case then, how could UNITA, a non-state entity, commit itself to obligations under international law? Is the Lusaka Protocol, the peace agreement to which reference is made in section B of the resolution, an internationally binding agreement? And if this is so, does that mean that UNITA has some kind of international legal personality? These and other questions will be dealt with in the following paragraph.

III. The Position of Non-State Parties to an Internal Conflict under International Law

It is not unusual that internal conflicts are settled through agreements of an internationalized character. Sometimes they take the form of genuine international instruments. The Agreement of 23 October 1991[17] on the Political Settlement of the Cambodian Conflict can be found in a document signed by the 19 States participating in the Paris Conference on Cambodia. The Dayton Agreement[18] which brought an end to the Bosnian conflict was signed by three independent states (Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia) and was witnessed by the members of the so-called Contact Group and the European Union. In such cases the parties to the (internal) conflict are often not separate signatories in themselves but their consent is a precondition for the conclusion of the agreement.[19]

It is interesting to note that in Resolution 792 (1994), in which the Security Council condemned the failure of the Khmer Rouge to comply with its obligations under the Paris agreements, similar language is used to that of Resolution 1127 (1997). Does this mean that the Council is of the opinion that the Lusaka Protocol can nevertheless create similar obligations, considering that it is not an inter-state agreement in the sense of the Paris and Dayton Agreements but was signed by the Presidents of the Republic of Angola and of UNITA and by the

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Special Representative of the Secretary-General of the United Nations as Mediator in the presence of the representatives of the observer states, the United States, Russia and Portugal? The answer seems to be in the affirmative. The fact that it is concluded between a government and an insurrectionist party does not in itself detract from its internationalized character. The United Nations as an organization of states has been deeply involved in the conflict, peace-keeping forces have been deployed, the Secretary-General through his Special Representative has continuously mediated. If a settlement is reached which is co-signed by the Secretary-General's representative, the non-state entity must be assumed to have not only committed itself to its counterpart, (the Government) but also to the United Nations. If the latter interpretation is correct then the contractual bond must necessarily have an international law character since such an agreement is by definition governed by public law.

In this respect it is interesting that in section B of Resolution 1127 reference is made only to UNITA's obligations under the Lusaka Protocol of 1994, while in the preamble the Security Council deplores UNITA's non-compliance with the Peace Accords of 1991, the Lusaka Protocol and the relevant Security Council resolutions. The Peace Accords of 1991 were, however, signed by the two Angolan parties only. Despite the fact that they were the result of international mediation, they were not internationalized agreements. They only obtained that status when they were confirmed in the Lusaka Protocol.

By means of a preliminary conclusion, therefore, we might say that insurrectionist movements who are parties to an internationalized peace-agreement or who have committed themselves in such an agreement have legal obligations under international law. If this is the correct conclusion it may also be presumed that they have rights under international law if the other party, i.e. the Government (who has status in international law) breaches the Agreement.

I can see no supportable reason why clearly recognizable entities who have been involved in a dispute which was a matter of concern to the Security Council, cannot enter into binding agreements in which they have obligations not only to the opposite party in the conflict, but also towards the international community as such, if that international community has formally approved such an agreement or even co-signed it. By their very nature such commitments are commitments under international law. It would be completely artificial and it would serve no purpose whatsoever to deny such commitments that character for the simple reason that the entity has no legal personality in the traditional sense.

The next conclusion must be that, if such obligations are considered to be obligations under international law, the non-state entity which has entered into the agreement embodying them has some form of international legal personality. In my opinion it is not necessary - and again it would indeed be artificial - to try to equate this personality with concepts which have already in the past found their way into international law, such as belligerent parties or *de facto* regimes. The function of their international legal personality is not that of being party to an internal armed conflict or being a *de facto* regime, although both factors were and in the case of UNITA - regrettably - still are the case in actual reality. But the basis of according them such personality is the fact that they are party to an internationalized peace settlement, and the personality should be confined to this quality. We can learn, however, from the traditional concept of recognition as

belligerent party, how international law adapted itself to the interests and needs of states. That concept developed at a time when states felt the need to create the possibility for themselves to obtain a position of neutrality with regard to the warring parties in a civil war. This need hardly exists anymore and it would be foolish to resuscitate it in order to provide entities like UNITA and the Khmer Rouge a place in international law. Twenty-five years ago Wilhelm Wengler took the position that modern international law should be a *'ius inter potestates'* and therefore should encompass every political organization that acts as an effective factor in international relations[20]. I agree with what Wengler said but am inclined to add: if this is in the interest of an orderly international community. Rosalyn Higgins correctly states that "we have all been held captive by a doctrine that stipulates that all international law is to be divided into 'subjects' - that is, those elements bearing, without the need for municipal intervention, rights and responsibilities; and 'objects'"[21]. Malcolm Shaw points at the 'range of interactions upon the international scene by entities of all types and the pressures upon international law to come to terms with the contemporary structure of international relations'[22].

If this approach is taken there seems to be nothing against acknowledging that entities like UNITA and the Khmer Rouge can acquire international legal personality by becoming parties to internationalized peace-agreements. This has only partly to do with the fact that they were an insurrectionist movement or a *de facto*-regime, because what qualifies their legal personality is that they formally and in a binding way have renounced such status. Their legal personality, therefore, is a peculiar one: it is by its very essence a temporary and transitional one. Once the peace-arrangement has been implemented they acquire, at best, the status of a political party and thereby lose their international personality. During the implementation phase, however, they have rights and obligations under international law and can be held accountable under international law in instances of non-compliance.

The legal basis for the enforcement-measures taken against UNITA by the Security Council is the quasi-judicial finding that it had violated its obligations under international law, and that this resulted in a situation which constituted a threat to international peace and security. But that is far from saying that it must have some sort of legal personality *because* it is the target of enforcement measures.

In carrying out its primary responsibility for the maintenance of international peace and security the Security Council is free to take measures against any entity which it considers to be an obstructive factor in the restoration of peace. Such measures do not in themselves have the effect of giving international personality to the target. It may be illustrative to again draw a comparison between the cases of Rhodesia and the Republika Srpska. These entities were considered by the Security Council to exist factually - it can be said *that* their mere existence was a constitutive element of a threat to peace and security which caused the Council to act under Chapter VII. Although the Council strongly condemned the violations of international humanitarian law committed in areas under the control of Bosnian Serb forces, it immediately added that those who committed or who ordered the commission of such acts would be held *individually* responsible for such acts (emphasis added)[23]. Not once did the Council say that Rhodesia or the

Republika Srpska as such, had refused to comply with their legal obligations as it said with regard to the Khmer Rouge and UNITA[4]. In this respect it also deserves to be mentioned that the Council never referred to Rhodesia or the Republika Srpska by the 'official name' they chose for themselves, while in the case of UNITA or the Party of Democratic Kampuchea it did. The fact that it did so is logical because these were the names under which they had become a direct or an indirect party to the internationalized peace-agreement. Whereas during an internal armed conflict the Council usually refrains from addressing the parties by name and appeals to 'all parties to the conflict' or uses similar terms, it refers to such parties by name once a peace-agreement has been concluded[5].

Therefore the conclusion may be that it is not the taking of enforcement measures by the Security Council against a non-state entity that triggers off international legal personality but that a prior fact, which is *in casu* the conclusion of an *internationalized* peace-agreement[6], may lead to a restricted, temporary international legal personality for non-state parties to an internal armed conflict. It is the non-compliance with such an agreement by that entity that the Security Council uses to reach the quasi-judicial finding that the entity has failed to implement its obligations under international law and that consequently enforcement measures must be applied against such entity.

ANNEX

RESOLUTION 1127 (1997)

Adopted by the Security Council at its 3814th meeting, on 28 August 1997

The Security Council

Reaffirming its resolution 696 (1991) of 30 May 1991 and all subsequent resolutions,

Recalling the statement of its President of 23 July 1997 (S/PRST/1997/39) which expressed its readiness to consider the imposition of measures on the União Nacional para a Independencia Total de Angola (UNITA), inter alia, those specifically mentioned in paragraph 26 of resolution 864 (1993),

Emphasizing the urgent need for the Government of **Angola** and in particular UNITA to complete without further delay the implementation of their obligations under the "Acordos de Paz" (S/22609, annex), the Lusaka Protocol (S/1994/1441, annex) and the relevant Security Council resolutions,

Expressing its grave concern at the serious difficulties in the peace process, which are mainly the result of delays by UNITA in the implementation of its obligations under the Lusaka Protocol,

Expressing its firm commitment to preserve the unity, sovereignty and territorial integrity of **Angola**,

Having considered the report of the Secretary-General of 13 August 1997 (S/1997/640[7]),

Strongly deploring the failure by UNITA to comply with its obligations under the "Acordos de Paz" (S/22609, annex), the Lusaka Protocol and with relevant Security Council resolutions, in particular resolution 1118 (1997),

A

1. Demands that the Government of **Angola** and in particular UNITA complete fully and without further delay the remaining aspects of the peace process and refrain from any action which might lead to renewed hostilities;
2. Demands also that UNITA implement immediately its obligations under the Lusaka Protocol, including demilitarization of all its forces, transformation of its radio station Vorgan into a non-partisan broadcasting facility and full cooperation in the process of the normalization of State administration throughout **Angola**;
3. Demands further that UNITA provide immediately to the Joint Commission, as established under the Lusaka Protocol, accurate and complete information with regard to the strength of all armed personnel under its control, including the security detachment of the Leader of UNITA, the so-called "mining police", armed UNITA personnel returning from outside the national boundaries, and any other armed UNITA personnel, not previously reported to the United Nations, in order for them to be verified, disarmed and demobilized in accordance with the Lusaka Protocol and agreements between the parties in the context of the Joint Commission, and condemns any attempts by UNITA to restore its military capabilities;

B

Determining that the resulting situation in **Angola** constitutes a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

4. Decides that all States shall take the necessary measures:

(a) To prevent the entry into or transit through their territories of all senior officials of UNITA and of adult members of their immediate families as designated in accordance with paragraph 11 (a) below, except those officials necessary for the full functioning of the Government of Unity and National