SCSL-2003-08-PT
(3423-3864)

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

IN THE APPEALS CHAMBER

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

Registrar: Mr Robin Vincent

Date filed: 24/11/2003

THE PROSECUTOR against MORRIS KALLON
CASE NO. SCSL – 2003 – 07 – PT

THE PROSECUTOR against SAM HINGA NORMAN
CASE NO. SCSL – 2003 – 08 – PT

THE PROSECUTOR against BRIMA BAZZY KAMARA
CASE NO. SCSL – 2003 – 10 – PT

ADDITIONAL WRITTEN SUBMISSIONS OF THE PROSECUTION— LEGALITY OF THE ESTABLISHMENT OF THE COURT

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I. THE ALLEGED VIOLATION OF THE CONSTITUTION OF SIERRA LEONE

A. INTRODUCTION

1. Kallon's second preliminary motion, Norman's first preliminary motion and Kamara's "application" (which the Prosecution submits is to be characterised as a preliminary motion) all argue that the Special Court has been illegally established because of alleged violations of the Constitution of Sierra Leone.

2. In relation to this challenge, the Prosecution submits that it is necessary to establish **first** what is the legal status of the Special Court for Sierra Leone under general principles of public international law, leaving aside any issue of the Constitution of Sierra Leone. Then, **subsequently** consideration needs to be given to whether that legal status could be affected by the fact (if it were to be proved by the Defence) that the Parliament and Government of Sierra Leone acted in violation of the Constitution of Sierra Leone (which the Prosecution does not admit).

3. The Prosecution does not deny that the Special Court has the jurisdiction to determine the legality of its own creation, for the purpose of deciding its own jurisdiction.[1] The Prosecution submits that the Appeals Chamber should in the exercise of that jurisdiction pronounce that the Special Court has been lawfully established. For that purpose, the Appeals Chamber can determine the validity and effectiveness under international law of the Special Court Agreement which established the Special Court. However, unless any alleged violation of the Constitution of Sierra Leone could affect the validity and effectiveness of the Special Court Agreement under international law (which, for the reasons given below, is not the case), the Special Court has no jurisdiction to consider whether there has been any violation of the Constitution of Sierra Leone. As a general principle, international courts and tribunals cannot declare the internal invalidity of rules of internal law,[2] nor can they determine that a State has violated its own internal law.

4. The Prosecution argument is based on the following six propositions, which were set out during the oral hearings. The first five propositions concern the legal status of the Special Court, leaving aside any issue of the Constitution of Sierra Leone. The sixth Prosecution proposition deals with the issue whether the Constitution of Sierra Leone could affect that legal status.

B. FIRST PROSECUTION PROPOSITION: THE SPECIAL COURT WAS CREATED BY THE SPECIAL COURT AGREEMENT, AND NOT BY THE SIERRA LEONE IMPLEMENTING LEGISLATION

5. It is evident from the terms of the Special Court Agreement that the Special Court Agreement itself establishes the Special Court. Article 1(1) of the Special Court Agreement provides that "There is ***hereby*** established a Special Court for Sierra Leone" (emphasis added). Article 1(2) provides that "The Special Court shall

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1 *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995 (the "***Tadic Jurisdiction Appeal Decision***").

2 Brownlie, *Principles of Public International Law* (5th edn., 1998) ("**Brownlie**"), p. 40, referring to *Interpretation of the Statute of the Memel Territory*, PCIJ, Ser. A/B, no. 49, p. 336; *Barcelona Traction case, ICJ Reports 1970*, p. 234, *per* Judge Morelli.

function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof". The Special Court Agreement then provides for other machinery necessary for the establishment and functioning of the Special Court: Articles 2 to 4 deal with the appointment of Judges, the Prosecutor, Deputy Prosecutor and Registrar. Article 5 deals with premises. Article 6 deals with the expenses of the Special Court. Article 7 deals with the management committee. Article 10 deals with the seat of the Special Court. Article 18 deals with the working language. Article 19 deals with the practical arrangements. Article 23 provides for the termination of the Special Court Agreement, and therefore for the termination of the existence of the Special Court itself, "upon the completion of the judicial activities" of the Special Court.

6. It is similarly evident from the terms of the Special Court Agreement 2002 (Ratification) Act 2002 (the "**Implementing Legislation**") that the Implementing Legislation does ***not*** establish the Special Court. The Implementing Legislation is a municipal law statute of Sierra Leone, enacted by the Parliament of Sierra Leone. The terms of the Implementing Legislation clearly presuppose that the Special Court has already been established by the Special Court Agreement, and that the Implementing Legislation merely "ratifies" and implements the Special Court Agreement. This is evident from the title of that statute alone, as well as from its preamble, and from the "Memorandum of Objects and Reasons" appearing at the end of the Implementing Legislation. No provision of the Implementing Legislation purports as such to establish the Special Court.

C. SECOND PROSECUTION PROPOSITION: THE SPECIAL COURT AGREEMENT IS AN INTERNATIONAL TREATY

7. Article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (the "**1986 Vienna Convention**") defines a "treaty" for the purposes of that Convention as follows:

Article 2
Use of terms

1. For the purposes of the present Convention:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

This wording reflects that of Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (which governs the law of treaties to which only States are a party),[3] and must be accepted as a definition of a treaty also for the purposes of customary international law.[4]

8. In terms of Article 2(1)(a) of the 1986 Vienna Convention, the Special Court Agreement is certainly an "international agreement" that is "concluded in written form". In terms of Article 2(1)(a)(i) of the 1986 Vienna Convention, it is certainly concluded between a State (Sierra Leone) and an international organisation (the United Nations). The Special Court Agreement must also necessarily be an agreement "governed by international law" for the purposes of Article 2(1)(a) of the 1986 Vienna Convention. The Special Court Agreement provides for the establishment of an international organisation (see the Prosecution's fourth proposition) and provides for the prosecution and punishment of individuals for crimes under international law, something that it could hardly do if it was an informal "understanding" rather than an agreement governed by law.[5]

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[3] Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties defines a treaty for the purposes of that Convention as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[4] See paragraph 34 below, and see Aust, *Modern Treaty Law and Practice* (2000) ("**Aust**"), p. 14 ("As with most of the Convention, although its definition is expressed to be for the purposes of Convention and is limited to treaties between states, its elements now represent customary law").

[5] Compare Aust, pp. 17-18.

9. Furthermore, the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "**Report of the Secretary-General**") indicates that the Special Court is "treaty-based".[6] Also, the Special Court Agreement bears the hallmarks of an international treaty, in particular Article 20 (dealing with the settlement of disputes arising under the Agreement), Article 21 (dealing with the entry into force of the Agreement), Article 22 (dealing with amendment to the Agreement) and Article 23 (dealing with termination of the Agreement). These are classic final provisions of a treaty.

D. THIRD PROSECUTION PROPOSITION: THE SPECIAL COURT AGREEMENT HAS ENTERED INTO FORCE, AND ITS ENTRY INTO FORCE WAS IN NO WAY DEPENDENT UPON THE ENACTMENT OF VALID IMPLEMENTING LEGISLATION BY SIERRA LEONE

10. Article 21 of the Special Court Agreement provides that "The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with".

11. Aust lists 11 different types of treaty provisions for determining the date of entry into force of a treaty,[7] the eighth of which is:

> "On notification by each signatory state to the other (or others) of the completion of its constitutional requirements. This formula can be used even if the other state (or some of the other states) does not have to satisfy any such requirements, in which case the notification would be a mere formality. The notification is usually by third-person diplomatic note. Again, this is more common for bilateral treaties or multilateral treaties which are between only a few states".

12. The notifications under Article 21 of the Special Court Agreement by Sierra Leone and by the United Nations were both dated 21 April 2002. Accordingly, pursuant to Article 21 of the Special Court Agreement, the Agreement entered into force the following day, 12 April 2002.

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[6] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the **"Report of the Secretary-General"**), para. 9.

[7] Aust, pp. 131-135.

13. Contrary to what has been argued by the Defence for Norman, Article 21 of the Special Court Agreement does not make its entry into force in any way dependent upon the enactment of Implementing Legislation by Sierra Leone. Rather, it is the ***notification*** by the parties to each other that the legal requirements for entry into force have been complied with, that is the crucial event. It may be that under the national law of Sierra Leone, as under the national law of various other States, domestic legislation is necessary in order to enable the State to give effect to its obligations under an international treaty. However, while failure to enact such legislation may put the State at risk of finding itself in breach of its international treaty obligations, it will not affect the validity or operation of the treaty, or the State's obligations under it.[8] If Sierra Leone had never enacted the Implementing Legislation (for instance, if its government had decided, even erroneously, that Implementing Legislation was not a requirement under its own constitution), or if the Implementing Legislation were void as a matter of domestic constitutional law, that might have the result of preventing the Government of Sierra Leone from fulfilling its obligations under the Special Court Agreement. Were that to occur, the result would be only that Sierra Leone would be in breach of its treaty obligations under the Special Court Agreement. The continuing operation of the treaty itself, and the continuing existence under international law of the court created by it, would be unaffected.

14. The method adopted by Article 21 for bringing the Special Court Agreement into force can be distinguished from the third to seventh methods referred to in Aust, at pp. 132-134, which involve the "ratification" of a treaty by the contracting States. Article 21 does not require any ratification of the Special Court Agreement in order for it to come into force. The Implementing Legislation "ratifies" the Special Court Agreement for the purposes of Article 40(4) of the Constitution of Sierra Leone, which requires, as a matter of municipal law, that certain treaties entered into by Sierra Leone be "ratified" by its Parliament. It is a ratification for municipal law purposes only, and has effect only in municipal law. It is not a ratification for

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8 *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997), p. 65.

international law purposes, since no ratification for international law purposes is required for the entry into force of the Special Court Agreement.

E. FOURTH PROSECUTION PROPOSITION: THE SPECIAL COURT IS AN INTERNATIONAL ORGANISATION, AND AN INTERNATIONAL COURT

15. The Prosecution understands that following the oral arguments, this proposition is not seriously in dispute. The mere fact that it was created by an international treaty must create a strong presumption that the Special Court is an international organisation. The Special Court Agreement bears all the hallmarks of creating an international organization. Articles 2-4 divide the responsibility for appointments of Judges, the Prosecutor, Deputy Prosecutor and Registrar between the two contracting parties. Article 7 provides for a management committee composed of States and the Secretary-General of the United Nations. Article 8-9 provide for the inviolability of the Special Court's premises and assets. Article 10 provides for the Special Court to sit outside Sierra Leone, subject to the conclusion of a "headquarters agreement" between the third State concerned and the Government of Sierra Leone and the Secretary-General of the United Nations. ("Headquarters Agreement" is a form of agreement very commonly concluded in relation to international organisations.) Article 11 provides that the Special Court shall have the necessary juridical capacity. Articles 12 to 16 deal with the privileges and immunities of various categories of people associated with the Special Court. Article 17 imposes a duty on the Government of Sierra Leone to cooperate with the Special Court.

16. During the oral hearings, the question arose whether it is possible to confer on an international court jurisdiction to try crimes under the municipal law of a State (which is what Article 5 of the Special Court's Statute does). The Prosecution submits that there is no reason why this should not be done, although the Prosecution can point to no instance in which it has occurred. As argued in paragraph 2 above, it is necessary to establish first what is the legal position of the Special Court under general principles of public international law, assuming there to be no issue relating to the

constitutional law of Sierra Leone. It can then subsequently be examined whether that legal position would be affected by any issue of municipal constitutional law.

17. Assuming that there is no issue of municipal constitutional law, the Prosecution submits that there is simply no principle which would prevent States by agreement from conferring on an international court jurisdiction to try crimes under the municipal law of one or more States. Suppose, for example, that the European Community established a European criminal court, with jurisdiction to try crimes involving violations of Community law, and provided that in the interests of efficiency, it could also try crimes under the national law of any Member State committed as part of the same course of conduct. Or, to give another example, suppose that two neighbouring States (such as the United States and Canada) decided to establish an international criminal court by bilateral treaty to try cases involving organised criminal enterprises straddling the two States, and conferred on the court the jurisdiction to try crimes committed by the organised criminal enterprises under the municipal law of both States. If all of the States concerned agreed, and if the arrangement was consistent with the constitutional law of each of the States concerned, and if the international court was established by law and conformed to international standards of justice, it is submitted that there is simply no basis at all why such an arrangement should be contrary to international law.

18. The Prosecution submits that this conclusion is supported by the judgement of the Permanent Court of International Justice in the *Serbian Loans* case.[9] That case established that the Permanent Court of International Justice could be given jurisdiction, by agreement between the States concerned, "in a case where the point at issue was a question which must be decided by application of a particular municipal law".[10] Although that was a case involving private law rather than criminal law, the Prosecution submits that there is no authority that suggests that the position should be any different in relation to criminal law.

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[9] See Brownlie, *Principles of Public International Law* (5th edn, 1998) ("**Brownlie**"), pp. 38-39, discussing *Serbian Loans* case (1929), PCIJ, Ser. A, no. 20.

[10] Brownlie, p. 39.

19. For this reason, the Prosecution submits that Article 5 of the Special Court Agreement is valid. The Prosecution's submissions in relation to the alleged violation of the Constitution of Sierra Leone are set out under the sixth Prosecution proposition below.

F. FIFTH PROSECUTION PROPOSITION: THE SPECIAL COURT EXISTS AND FUNCTIONS IN THE SPHERE OF INTERNATIONAL LAW, NOT MUNICIPAL LAW

20. As an international court established by an international treaty, the Special Court exists and functions in the sphere of international law. The treaty which established the Special Court derives its legal force from the international law rules concerning the validity and legal effect of treaties. Neither the Special Court nor the Special Court Agreement derive their legal existence or powers from the municipal law of Sierra Leone. They do not exist and function in the sphere of the municipal law of any State by virtue of the treaty which created them.

21. In the United Kingdom, for instance, it has been settled by the House of Lords that an international organisation has legal personality *in the sphere of international law*, and that it does not thereby automatically acquire legal personality within domestic legal systems: for that, national legislation is required.[11] Pursuant to Article 11 of the Special Court Agreement, Sierra Leone is required to recognise the Special Court as having the juridical capacity necessary to contract, acquire and dispose of movable and immovable property and to institute legal proceedings. This is a practical necessity to enable the Special Court to function, and is a common provision in the case of international organisations. The Implementing Legislation gives effect to this obligation of Sierra Leone under the Special Court Agreement. The Implementing Legislation may also have been necessary, as a matter of Sierra Leone municipal law, to enable Sierra Leone to give effect to other obligations under the Special Court Agreement. However, this does not mean that the Special Court as a whole becomes part of the architecture of the Sierra Leone municipal legal system.

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[11] Shaw, *International Law* (3rd edn., 1991), pp.116-117, discussing *Maclaine Watson v. Department of Trade and Industry* [1989] 3 All ER 523 (House of Lords).

22. The Prosecution has drawn an analogy between the Special Court and the International Criminal Court ("**ICC**"). The ICC was also created by an international treaty, and exists and functions in the sphere of international law. Various States have enacted legislation in their own municipal law to enable them to give effect to their obligations under the Statute of the ICC. However, this does not mean that the ICC itself derives its existence or powers from the municipal law of any State, or that it is subject to the municipal law of a State, any more than the Special Court would be. Similarly, various States have enacted legislation recognising the legal personality or capacity of the United Nations. However, this does not convert the United Nations into an organisation that exists by virtue of municipal law, or that functions under municipal law: from the point of view of the United Nations Charter, the international treaty which created the organisation, the United Nations exists and functions in the sphere of international law.

23. The terms of the Special Court Agreement, and the Implementing Legislation, indicate no intention to depart from these established principles. Section 11(2) of the Implementing Legislation provides that "The Special Court shall not form part of the judiciary of Sierra Leone". Section 13 of the Implementing Legislation provides that "Offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone". Part IV of the Implementing Legislation is entitled "Mutual Assistance between Sierra Leone and Special Court"—"mutual assistance" being a term of art that is applied to co-operation between different legal systems, thereby indicating that the Special Court is a different legal system to the Sierra Leone municipal legal system. Section 20 of the Implementing Legislation provides that "For the purposes of execution, an order of the Special Court shall have the same force or effect ***as if*** it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court" (emphasis added), thereby necessarily implying that the Special Court is not a Sierra Leone court but that its orders will be treated "as if" it was.

24. The Defence for Norman nonetheless argues that the Special Court "is a hybrid court with Jurisdiction to try crimes under both international and domestic law and as such

operates within the spheres of both International and the Municipal Law of Sierra Leone and is therefore not strictu sensu an International Court akin to the … ICTY … and … ICTR … as contended by the Prosecutor".[12] According to the Defence for Norman, the Special Court "functions and exists in the spheres of both international law and the domestic laws of Sierra Leone as a hybrid court, a unique phenomenon that can be clearly distinguished from all former ad hoc international tribunals since the Second World War".[13] The Defence argument appears to be that because the Special Court exists and operates within the sphere of the domestic law of Sierra Leone, its existence and functioning is subject to the Constitution of Sierra Leone.

25. The Prosecution submits that this Defence argument is mere assertion, with no supporting arguments or authority.

26. The nature of the Special Court was considered in the Report of the Secretary-General of the United Nations, which stated that:

> "… [the Special Court] is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements".[14]

27. Each of the elements in this quote, in context, is consistent with the Prosecution position.

(1) This quote reaffirms that the Special Court is a "treaty-based court", as argued by the Prosecution.

(2) The reference to the Special Court as a "sui generis" court is merely a reference to the fact that the Special Court is so far the only international criminal court to have been created by a treaty between the United Nations

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12 "Defence Reply—Preliminary Motion Based on Lack of Jurisdiction: Lawfulness of the Court's Establishment", filed on behalf of Sam Hinga Norman on 14 July 2003 (Registry page nos. 1531-1542 in Case No. SCSL-2003-08) (the "**Norman Reply**"), Part II, para. 2.

13 *Ibid.*, Part II, para. 3.

14 Report of the Secretary-General, para. 9.

and a State. In this respect, it contrasts with the ICTY and ICTR, which are subsidiary organs of the United Nations, whose personnel are staff of the United Nations Secretariat subject to United Nations regulations and rules. The "sui generis" nature of the Special Court is expanded upon in the same paragraph of the Secretary-General's Report, which states immediately after the passage quoted above that:

> "As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., as the need arose."[15]

The Secretary-General's Report thus states expressly that the Special Court is not "anchored in … the national law of the State of the seat".

(3) The reference in paragraph 9 of the Report of the Secretary-General to the Special Court as a court of "mixed … composition" is, as is apparent from the subsequent text in paragraph 9 of the Secretary-General's Report, a reference to the fact that the Special Court "is composed of both international and Sierra Leonean judges, prosecutors and administrative support staff".[16] It is evident that the mere fact that the Special Court is composed in part of Sierra Leonean judges, prosecutors and administrative support staff does not mean that the Special Court was established in part under Sierra Leonean law or that it functions in part in the sphere of the domestic law of Sierra Leone.

(4) The reference in paragraph 9 of the Report of the Secretary-General to the Special Court as a court of "mixed jurisdiction" is, as is apparent from the subsequent text in paragraph 9 of the Secretary-General's Report, a reference to the fact that the Special Court's "applicable law includes

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15 Secretary-General's Report, para. 9.

16 Secretary-General's Report, para. 9 (footnote omitted).

> international as well as Sierra Leonean law".[17] However, the fact that a court that exists and functions on the international plane is given jurisdiction to determine whether crimes have been committed under the national law of a State does not mean that the court thereby also exists and functions in the sphere of the national law of that State.[18] Various States have enacted legislation giving their national courts jurisdiction to try genocide, war crimes and crimes against humanity. The fact that these national courts have jurisdiction over crimes under international law does not mean that these courts also exist and function in the sphere of international law. The converse is equally true. The legal existence of a court and the sphere in which it functions is not determined by the nature of the crimes over which it is given jurisdiction.

28. The Defence argues that the Special Court is a "hybrid" court.[19] However, the Secretary-General's Report nowhere uses the word "hybrid". Nor, as far as the Prosecution is aware, was the word "hybrid" ever used in any of the official documents relating to the establishment of the Special Court (in particular, the various letters between the President of the Security Council and the Secretary-General of the United Nations). Although the word "hybrid" appears to have often been used to describe the Special Court in various other contexts, this can of course have no effect on the legal nature of the Special Court. The Prosecution submits that most references to the Special Court as a "hybrid" institution have tended to be somewhat imprecise about what that word is intended to mean.

29. For instance, speaking before the Security Council on 18 July 2002, the Foreign Minister of Sierra Leone, Mr Koroma, said:

> "Sierra Leone has over the years tested the capacity of the United Nations to operate large and complex peace operations, ranging from the disarmament and demobilization of ex-combatants, the facilitation of an electoral process and the establishment of a unique hybrid judicial

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17 Secretary-General's Report, para. 9.
18 See paragraphs 16-19 above.
19 Norman Reply, Part II, para. 3.

> process in addressing the question of impunity, which comprises the Special Court and the Truth and Reconciliation Commission (TRC), each with its own specific mandate. The Truth and Reconciliation Commission, for example, is a quasi-judicial non-punitive institution, whereas the Special Court operates under a dual judicial system that will indict and judge those persons who bear the greatest responsibility for war crimes, genocide and crimes against humanity."[20]

30. The Prosecution submits that other references to the Special Court as a "hybrid" body are similarly imprecise,[21] and are capable of being construed as references to the factors referred to in paragraph 27(1) to (4) above, that is, that the Special Court is a *sui generis* treaty-based temporary body, which is not part of any permanent international organization, which is of mixed jurisdiction and mixed composition (certain Judges and the Prosecutor being appointed by the Secretary-General of the United Nations and certain Judges and the Deputy Prosecutor being appointed by Sierra Leone). The expression can also be understood as referring to the fact that the Special Court is not a court created by the United Nations (like the ICTY and ICTR) nor a court created by States (like the ICC), but a "hybrid" of the two (i.e., a court established by the United Nations and a State acting jointly). The Prosecution is not aware of any authority which states expressly that the Special Court is a body which

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20 4577th meeting of the Security-Council, 18 July 2002, U.N. Doc. S/PV.4577, p. 5, column 1.

21 Examples include "Administration of justice, rule of law and democracy: Report of the sessional working group on the administration of justice", United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th session, 12 August 2003 (U.N. Doc. E/CN.4/Sub.2/2003/6), para. 38 ("Ms. Motoc … also discussed the meaning of transition and of justice after massive violations of human rights. There were various mechanisms of transitional justice to deal with human rights violations. Firstly, there were ad hoc international criminal tribunals such as ICTY and ICTR. Secondly, there were hybrid tribunals such as the ones established for Sierra Leone and Cambodia. Thirdly, there were the examples of Kosovo and Timor-Lese which had organized their domestic justice systems with international assistance."); "Integration of the Human Rights of Women and the Gender Perspective—Violence Against Women", United Nations Economic and Social Council, Commission on Human Rights, 57th session, 23 January 2001 (U.N. Doc. E/CN.4/2001/73), footnote 133 ("The report [of the Secretary-General on the establishment of the Special Court] proposes that the Court be a hybrid, using both international and Sierra Leonean law, judges and prosecutors"); Corriero, "The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone", (2002) 18 NYLSJHR 337, 353 ("The Special Court for Sierra Leone will be created by a treaty between the United Nations and the Sierra Leone government. It will be under joint UN-Sierra Leone jurisdiction. The Special Court will neither be a UN body along the lines of the International Criminal Tribunals established for the former Yugoslavia and Rwanda, nor a Domestic Tribunal. Rather, it will be a hybrid court jointly administered by the United Nations and the Sierra Leone government. Significantly, it will apply local and international justice. As such, it represents an entirely new model for bringing war criminals to justice.")

exists and operates both in the sphere of Sierra Leone municipal law and in the sphere of international law.

31. In any event, and most importantly, it is the Prosecution's submission that the Appeals Chamber must decide what the legal position *is*, and not what others may have considered or assumed the legal position to be. The Special Court is established by an international treaty. As such, it exists and operates in the sphere of international law. As is expressly stated in the Report of the Secretary-General, "The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument".[22] Under basic principles of international law, courts and other legal entities created by treaties do not exist and operate simultaneously in the sphere of municipal law, in the sense contended for by the Defence (that is, in the sense that their existence and operation are dependent upon constitutionally valid national legislation).

32. A treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[23] It is submitted that there is nothing in the Special Court Agreement that indicates that any departure from established principles of international law were intended. There is nothing in the Special Court Agreement or Statute which suggests that the Special Court is established in any way by the national law of Sierra Leone or that it functions under Sierra Leone national law. Indeed, the Secretary-General's Report expressly referred to an alternative possibility of a Special Court "based on a concept of a 'national jurisdiction'", the legal basis of which would be "national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra-Leonean common-law system)".[24] This alternative solution was not recommended by the Secretary-General, and was not adopted by the parties to the Special Court Agreement.

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22 Report of the Secretary-General, para. 9.

23 1969 Vienna Convention on the Law of Treaties, Article 31(1); 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Article 31(1).

24 Secretary-General's Report, para. 72.

G. SIXTH PROSECUTION PROPOSITION: THE VALIDITY OF THE SPECIAL COURT AGREEMENT, AND THE EXISTENCE, OPERATION AND FUNCTIONING OF THE SPECIAL COURT IN THE SPHERE OF INTERNATIONAL LAW, ARE NOT AFFECTED BY PROVISIONS OF THE CONSTITUTION OF SIERRA LEONE

33. The first to fifth Prosecution propositions above establish that the Special Court is an international court existing and operating on the international plane pursuant to an international treaty. The question addressed by the sixth Prosecution proposition is whether that existence or functioning could be affected by the fact (if it were proved) that the Sierra Leone Government or Parliament acted contrary to the Constitution of Sierra Leone in becoming a party to the Special Court Agreement or in enacting the Implementing Legislation.

34. The Prosecution submits that this question must be answered by reference to the relevant provisions of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (the "**1986 Vienna Convention**"). These provisions reflect the language of the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties (dealing with treaties between States only), and the relevant provisions should be regarded as reflecting customary international law.[25]

35. Article 27(1) of the Vienna Convention provides that "A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform

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[25] See Aust, *Modern Treaty Law and Practice* (2000), p. 10-11 ("When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the [Vienna] Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it … In its 1997 *Gabcikovo* judgment … the [International] Court [of Justice] … applied Articles 60-62 as reflecting customary law, even though they had been considered rather controversial. … [I]t is reasonable to assume that the Court will take the same approach in respect of virtually all of the substantive provisions of the Convention. There has been as yet no case where the Court has found that the Convention does not reflect customary law"). See also Brownlie, *Principles of Public International Law* (5th edn, 1998), p. 608 (noting that while the 1969 Vienna Convention is not as a whole declaratory of general international law, "a good number of articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law") and p. 618 (noting the International Law Commission's view that "the decisions of international tribunals and State practice, if they are not conclusive, appear to support" the solution adopted in Article 46 of the 1969 Vienna Convention).

the treaty". The reference to "internal law" in this provision includes the constitutional law of a State. Thus, if it is established that a treaty is *valid* (as to which, see below), the treaty will operate in international law in accordance with its terms, even if it conflicts with the municipal constitutional law of a State that is a party to it.

36. In the context of the Special Court Agreement, this means, amongst other things, that it cannot be a defence to a crime under Articles 2 to 5 of the Statute to assert that the conduct in question was permitted by the municipal law of Sierra Leone, or even the Constitution of Sierra Leone. As a matter of international law, a State cannot enact a statutory right, or a constitutional right, to commit war crimes, crimes against humanity, or other serious violations of international humanitarian law. (See paragraph 54 below.) For instance, section 16(2) of the Constitution of Sierra Leone provides that a person shall not be regarded as having been deprived of his life if he dies as a result of the use of force to such extent as is reasonably justifiable in the circumstances of the case, "for the purpose of suppressing a riot, insurrection or mutiny". Such a provision could never amount to a justification under international law for the commission of serious violations of international humanitarian law for the purpose of suppressing a riot, insurrection or mutiny.

37. As to the validity of the Special Court Agreement, Article 27 of the 1986 Vienna Convention relevantly provides as follows:

> **Article 27**
> **Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties**
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> ...
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

38. Thus, even if it could be established that there has been a contravention of the Constitution of Sierra Leone, this would not affect the validity of the Special Court Agreement, unless it is established that such contravention of the Constitution is ***manifest***. Thus, unless it is established that there has been a ***manifest*** violation of the Constitution of Sierra Leone, there is no need to consider the matter any further. The burden of establishing a ***manifest*** violation is on the Defence which is challenging the validity of the Special Court Agreement, and that burden is a heavy one. According to one author, the subject of the invalidity of treaties:

> "is not of the slightest importance in the day-to-day work of a foreign ministry. The author does not recall during more than 30 years of practice a single serious suggestion that an existing treaty might be invalid. The International Law Commission was well aware that invalidity was a rarity, there being a natural presumption that a treaty is valid and its continuance in force being the normal State of things".[26]

39. In terms of Article 27(3) of the Vienna Convention, the relevant question is whether a breach of the Constitution of Sierra Leone was, at the time that the Special Court Agreement was concluded, "objectively evident" to the United Nations conducting itself in the matter in accordance with the normal practice of international organizations and in good faith. The Prosecution submits that it would not have been.

40. First, it is the normal practice of States and international organisations when concluding treaties to leave it to the other parties to determine what are those other parties' internal legal requirements. The United Nations was entitled to presume that the Government and Parliament of Sierra Leone were aware of their own constitutional law. The very fact that Sierra Leone negotiated the Special Court Agreement, and enacted the national Implementing Legislation, suggested that both the Government of Sierra Leone and its Parliament were satisfied that the constitutional requirements of Sierra Leone were met. Article 21 of the Special Court Agreement gave the Government of Sierra Leone time to reflect before notifying the United Nations that its internal legal requirements had been satisfied, thereby bringing the Agreement into force. According to Aust:

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[26] Aust, p. 252.

> "There are a number of procedures in treaty-making, such as ratification, which have been specifically designed to enable a state to reflect fully before deciding whether or not to become a party, and to comply with any constitutional requirements. States are entitled to regard other States as having acted in good faith when its representatives express their consent to be bound".[27]

41. Secondly, Sierra Leone has become a party to the ICC Statute. (Sierra Leone signed the ICC Statute on 17 October 1998 and ratified it on 15 September 2000). As a party to the ICC Statute, Sierra Leone has obligations under international law arising under that treaty, including, for instance, the obligation to arrest persons on its territory pursuant to arrest warrants issued by the ICC.[28] The ICC in turn has jurisdiction under international law to try persons for crimes within its jurisdiction committed in the territory of Sierra Leone (Article 12(2)(a)),[29] and Sierra Leone is obliged to accept that jurisdiction of the ICC (Article 12(1)).[30] Moreover, the ICC is entitled as a matter of international law to exercise its functions and powers on the territory of Sierra Leone (Article 4(2)).[31] Thus, if the Defence argument in this case were correct, it would mean that the ratification by Sierra Leone of the ICC Statute also violated the Constitution of Sierra Leone. The fact that Sierra Leone did ratify the ICC Statute further suggests that the Government of Sierra Leone was satisfied that it was consistent with the Sierra Leone Constitution to do so (and by extension, that it was consistent with its Constitution to enter into the Special Court Agreement). If it were ***manifest*** that the conclusion of the Special Court Agreement violated the Constitution of Sierra Leone, then by extension it must be equally ***manifest*** that the ratification of the ICC Statute by Sierra Leone violated the Constitution of Sierra

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27 Aust, p. 253.

28 See ICC Statute, Articles 59(1) and 89(1). Although these provisions provide that the State shall execute such arrest warrants "in accordance with its laws", the Prosecution submits that a State cannot avoid its obligation to arrest a person altogether simply by failing to enact national legislation to empower such arrests by their national authorities. The only thing that a State is entitled to regulate by its national law is the *modalities* of such arrests.

29 ICC Statute, Article 12(2)(a). It also has jurisdiction to try persons for crimes committed on vessels or aircraft registered in Sierra Leone (*ibid*), and to try Sierra Leonean nationals for crimes committed anywhere in the world (Article 12(2)(b)).

30 ICC Statute, Article 12(1).

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

Leone. The consequence would be, if the Defence argument were correct, that Sierra Leone has not in fact become a party to the ICC Statute.

42. Thirdly, if it were ***manifest*** that the conclusion of the Special Court Agreement violated the Constitution of Sierra Leone, it would have to be concluded that the ratification of the ICC Statute was in ***manifest*** violation of the constitutions of various other States in which the same constitutional argument as that raised by the Defence in this case would also arise. If the Defence argument were correct, the result would be not only that Sierra Leone has not become a party to the ICC Statute. It would mean that other States that have ratified the ICC Statute and that have materially similar constitutional provisions are also not parties to the ICC Statute because of "manifest" constitutional violations. If the Defence argument were correct, the number of States parties to the ICC Statute could be considerably lower than generally believed. Indeed, if the Defence argument were correct, the ICC Statute might not yet have come into force, and the ICC may not yet legally exist, because the number of States that have ratified it lawfully in accordance with their municipal constitutional requirements might be lower than the number of ratifications required to bring the ICC Statute into force. Such an argument cannot be accepted.

43. The Prosecution Responses to the various Defence preliminary motions referred in particular to the example of Australia,[32] which ratified the ICC Statute, and enacted legislation to implement the ICC Statute into municipal law, notwithstanding that under Chapter III of the Australian Constitution, federal judicial power cannot be conferred on a body other than a court established under Chapter III of the Australian Constitution. This occurred after a Parliamentary Committee in Australia expressly concluded, consistently with advice from the Australian Government Solicitor and the Attorney-General of Australia, that there would be no violation of the Australian Constitution because "the ICC will not exercise the judicial power of the Commonwealth [of Australia], even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be

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[32] See, for example, "Prosecution Response to the Second Defence Preliminary Motion (Constitution of Sierra Leone)", filed on behalf of the Prosecution in the *Kallon* case on 24 June 2003 (Registry page nos. 890-976 in Case No. SCSL-2003-07) (the "**Prosecution Response in *Kallon***"), para. 13.

exercised by the ICC will be that of the international community, not of the Commonwealth of Australia."[33]

44. It cannot be said conclusively that the ratification of the ICC Statute was consistent with the Constitution of Australia—that is a matter that ultimately could only be decided definitively by the High Court of Australia. However, in view of the conclusions of the Australian Parliamentary Committee, the Australian Government Solicitor and the Attorney-General of Australia, it cannot be said that there was a ***manifest*** violation of the Constitution of Australia.

45. The report of the Australian Parliamentary Committee contains a reference to a book by Louis Henkin, which concludes that ratification of the ICC Statute by the United States of America would be consistent with the United States Constitution.[34] Louis Henkin is an emeritus professor at the University of Columbia, with expertise in the areas of constitutional law, international law, law of American foreign relations and the law of human rights. The Kallon Reply quotes two members of Congress in the United States who argue that ratification of the ICC Statute by the United States *would* be unconstitutional.[35] However, there is no indication that these two members of the United States Congress are lawyers, let alone constitutional or international lawyers, nor that their constitutional concerns were the same as those raised by the Defence in this case. In any event, they are only two members of the Congress, out of hundreds. Ultimately, the consistency of the ICC Statute with the Constitution of Sierra Leone is a matter that could only be decided definitively by the United States Supreme Court. However, given the opinion of a professor as eminent as Louis Henkin, it cannot be said that it is ***manifest*** that ratification of the ICC Statute by the United States of America would violate the United States Constitution.

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33 See Prosecution Response in *Kallon*, para. 13.

34 See Prosecution Response in *Kallon*, footnote 12. The reference is to Professor Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn, 1996), p. 269.

35 "Reply to Prosecution Response to Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates Constitution of Sierra Leone", filed on behalf of Morris Kallon on 30 June 2003 (Registry page nos. 1016-1027 in Case No. SCSL-2003-07) (the "**Kallon Reply**"), para. 20.

46. The Prosecution Responses also gives the example of South Africa, which ratified the ICC Statute and enacted implementing legislation without changing its Constitution, even though the South African Constitution provides that the judicial authority of South Africa is vested in certain courts specifically identified in the Constitution, of which the ICC is not one. Again, the consistency of the ICC Statute with the Constitution of South Africa is a matter that ultimately could only be decided definitively by the Constitutional Court of South Africa. However, in view of the fact that South Africa did ratify the ICC Statute without amending its Constitution, it must be concluded that there was no ***manifest*** violation of the Constitution of South Africa.

47. The Kallon Reply refers to eight other States which are said to have experienced "constitutional concerns" in relation to the ratification of the ICC Statute.[36] The evidence filed in support of this submission consists of "progress reports" on the implementation of the ICC Statute transmitted by those States to the Council of Europe.[37] However, it appears that 29 States have now provided such "progress reports" to the Council of Europe,[38] which are available on the internet.[39] Not all of the States providing such reports are member States of the Council of Europe (for instance, Canada and Japan). In the interests of saving paper and time, the Prosecution has not annexed copies of all 29 reports. However, on the Prosecution's reading of these "progress reports", some 11 States either did not refer to any constitutional problems, or expressly stated that a constitutional amendment was not required for ratification of the ICC Statute.[40] Some 14 other States indicated that there were constitutional issues, but these were constitutional issues of a completely different type to the issue raised by the Defence in these proceedings.[41] The concerns

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36 Kallon Reply, para. 24.

37 See "Defence Authorities for Preliminary Motion Based on Lack of Jurisdiction (Lawfulness of the Court's Establishment)", filed on behalf of Morris Kallon on 29 October 2003 (Registry page nos. 2124-2227 in Case No. SCSL-2003-07) (the "***Kallon Authorities***"), items 4 to 10.

38 See Annex 15.

39 http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Transnational_criminal_justice/International_Criminal_Court/Documents/2Country_Information.asp.

40 See Annex 15.

41 Ibid.

related primarily to constitutional provisions dealing with executive powers of pardon, extradition, or immunities of certain State officials.

48. Indeed, the progress report of the Netherlands (one of the States relied upon by the Kallon Reply) expressly indicates that while there were constitutional issues in relation to pardons and immunities of certain State officials, it was considered that issues of the type raised by the Defence in this case did ***not*** present a constitutional impediment in the Netherlands. This progress report states that amongst the issues at stake were:

> "a) whether the establishment of a court not belonging to the Dutch judiciary would be in conflict with the Constitution; ***this was considered not to be the case*** for article 92 of the Constitution allows for the judiciary power to be transferred to an international organization;
>
> b) whether the articles 15 of the Constitution and 5(4) of the ECHR would require that the *habeas corpus* court be a national, i.e. a Dutch court; ***this was considered not to be the case***, and since article 59 and 60 of the the ICC Statute introduce a procedure which is in substance in conformity with *habeas corpus* norms, the ICC could be acceptable as a *habeas corpus* court as well;
>
> c) whether the *ius de non evocando* (the right to be judged by the court provided by law) as laid down in article 17 of the Constitution would require that, on Dutch soil, there be a Dutch court available; in the light of the above, ***this was considered not to be the case*** either".[42]

49. It appears that only two or three of the 29 States voiced constitutional concerns similar to those raised by the Defence in this case: Ireland, Moldova, and possibly Ukraine.[43] The Prosecution submits that in view of the fact that only two or three of 29 States voiced any such concerns, and in view of the fact that other States with constitutional traditions closer to that of Sierra Leone ratified the ICC Statute without amending their Constitutions (Australia, South Africa, Canada), it cannot be ***manifest*** that it violated the Constitution of Sierra Leone for Sierra Leone to become a party to

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42 Kallon Authorities, item 5, at Registry page no. 2143, paragraph 2(a) (emphasis added).

43 See Annex 15.

the ICC Statute or the Special Court Agreement. There is no reason why the conclusion reached in the case of the Australia (see paragraph 43 above) and the Netherlands (see paragraph 48 above) should not equally be applicable in the case of Sierra Leone.

50. Once again, the consistency of the ICC Statute with the Constitution of Sierra Leone is a matter that ultimately could only be decided definitively by the Supreme Court of Sierra Leone. However, in the absence of a ***manifest*** violation of the Constitution of Sierra Leone, the Special Court Agreement is valid, binding and effective in international law, and the Special Court has no need or jurisdiction to examine the Constitution of Sierra Leone any further.

51. It is for the Government of Sierra Leone, as it is for the Government of every other State, to determine for itself whether its own municipal law requirements have been complied with when entering into treaties. If the Government is satisfied that its internal constitutional requirements have been met, and if it enters into a treaty on that basis, the treaty is valid, binding and effective under international law. Should it subsequently emerge that the Government was wrong in its assessment of its own municipal constitutional requirements, this will not affect the validity of the treaty in the absence of a "manifest" violation within the meaning of Article 46 of the Vienna Conventions. If the Government is prevented by the breach from giving effect to its obligations under the treaty, the treaty will still be effective in international law, and the State concerned will be in violation of its obligations under international law.

52. The Prosecution does not suggest that national constitutions do not matter. However, it is States who must be the guardians of their own constitutions. Even if it could be established that entry into the Special Court Agreement and the enactment of the Implementing Legislation was not consistent with the Constitution of Sierra Leone, no fundamental right of the Accused under international law has been violated. The rights of an accused under international law are embodied in Article 17 of the Statute of the Special Court, and are respected in proceedings before the Special Court. There is no international law right not to be transferred to an international criminal.

Many States have ratified the ICC Statute without seeing any need to amend their national constitutions. Even if there were some peculiarity about the Constitution of Sierra Leone that had the effect of requiring a constitutional amendment before the Special Court Agreement was concluded (and the Prosecution in no way concedes this), this would be a purely internal municipal law matter for Sierra Leone. Any failure to amend the Constitution would not bring into play any international law right which the Special Court would be required to enforce.

II. THE ALLEGED VIOLATION OF THE CONSTITUTION OF SIERRA LEONE

53. The Defence in the *Norman* case argues that the Special Court Agreement is somehow invalid because at the time of concluding this treaty, the Government of Sierra Leone was not in control of over two thirds of the territory of Sierra Leone. The Prosecution submits that this argument is fully answered by paragraph 13 of the Prosecution Response to the First Preliminary Motion in that case, and by the Prosecution's oral arguments. The Defence does not argue that Sierra Leone was not a State under international law at the time of conclusion of the Special Court Agreement.[44] The Defence argument that the government of a State has no capacity to conclude treaties if it does not at the relevant time enjoy the obedience of the majority of the people of the country, is contrary to basic principles of international law, and must be rejected. The Defence cites no authority other than the Montevideo Convention of 1933 which, as stated in the Prosecution Response, is concerned with determining the *existence* of a State, and not with determining who is the *legitimate government* of a State or with determining whether the government of a State has the capacity to conclude treaties. It is not disputed that Sierra Leone was a State at all material times, and that the Government which concluded the Special Court Agreement was the Government recognised by the international community.

III. THE ALLEGED VIOLATION OF THE PRINCIPLE AGAINST RETROSPECTIVE CRIMINAL LEGISLATION

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44 Norman Reply, para. 13.

54. The Kamara Motion argues that because the crimes in Articles 2 to 4 of the Statute were not crimes under Sierra Leonean law until the enactment of the Implementing Legislation, the creation of liability for acts committed prior to that offends a constitutional prohibition against retrospective legislation.[45] However, for the reasons given above, because the Special Court functions in the sphere of international law and not municipal law, the Constitution of Sierra Leone is inapplicable. As a matter of international law, the principle against retrospective criminal legislation requires only that the conduct in question was criminal at the time under international law, and not that it was criminal under the municipal law of the State concerned.

55. Principle II of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[46] states that "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

56. This principle is further reflected in Article 15(2) of the International Covenant on Civil and Political Rights, which provides that "Nothing in this article [dealing with retrospective criminal legislation] shall prejudice the trial and punishment of any person for any act or omission which, at the time that it was committed, was criminal according to the general principles of law recognised by the community of nations".

57. Similar provision to this effect is found in Article 7(2) of the European Convention on Human Rights.

IV. CONCLUSION

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45 "Application by Brima Bazzy Kamara in respect of Jurisdiction and Defects in Indictment", filed on behalf of Brima Bazzy Kamara on 22 September 2003 (Registry page nos. 325-331 in Case No. SCSL-2003-10-PT), paras. 2.1 to 2.4.

46 Adopted by the International Law Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.

58. For the reasons given in above, the Appeals Chamber should therefore dismiss these preliminary motions in their entirety.

Freetown, 24/11/ 2003.

For the Prosecution,

Desmond de Silva, QC

Walter Marcus-Jones

Christopher Staker

Abdul Tejan-Cole

INDEX OF AUTHORITIES

1. *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995.

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

3. 1969 Vienna Convention on the Law of Treaties.

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

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

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

7. Shaw, *International Law* (3rd edn., 1991) [Extract].

8. 4577th meeting of the Security-Council, 18 July 2002, U.N. Doc. S/PV.4577.

9. "Administration of justice, rule of law and democracy: Report of the sessional working group on the administration of justice", United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th session, 12 August 2003 (U.N. Doc. E/CN.4/Sub.2/2003/6.

10. "Integration of the Human Rights of Women and the Gender Perspective— Violence Against Women", United Nations Economic and Social Council, Commission on Human Rights, 57th session, 23 January 2001 (U.N. Doc. E/CN.4/2001/73).

11. Corriero, "The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone", (2002) 18 NYLSJHR 337.

12. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

13. Rome Statute of the International Criminal Court.

14. Progress Reports submitted by States to the Council of Europe on ratification and implementation of the Rome Statute of the International Criminal Court.

ANNEX 1:

Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, App. Ch., 2 October 1995.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-94-1-AR72

IN THE APPEALS CHAMBER

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

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 October 1995

PROSECUTOR

v.

DU[KO TADI] a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:
Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis
Mr. William Fenrick

Counsel for the Accused:
Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simi}

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

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

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

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

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

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

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

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

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

B. Jurisdiction Of The Appeals Chamber

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

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

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

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

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

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

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

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

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

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.
The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

> "There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae* and *materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is

visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the Termes de la ley provide the following definition:

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (STROUD'S JUDICIAL DICTIONARY, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." BLACK'S LAW DICTIONARY, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others.
In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
>
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (*id.* at 12-14).

The Trial Chamber approved this line of argument.
This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

> "[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (Decision at Trial, at para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (*see* United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal,* the International Court of Justice declared:

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

> "In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (*Id.* at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (*see*, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

> "[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.
As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber that:

> "[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim.*)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator." It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Articles 1 to 5 of its Statute.

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position in some dicta of the International Court of Justice or its individual Judges, (*see* Decision at Trial, at paras. 10 - 13), to the effect that:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).)

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

> "[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (*Id.* at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia*, in its advisory opinion on the *Effect of Awards Case*:

> "[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (*See* Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations*:

> "[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).)

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (*See* Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an *ad hoc* criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of

individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of *ad hoc* tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?

2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?

3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

"In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (*Id.*, Art. 24(2).)

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the determination that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes recommendations (*i.e.*, opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering *measures* to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can

thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (*see* para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are coercive *vis-à-vis* the culprit State or entity. But they are also mandatory *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;

b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;

c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of

Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can *a fortiori* undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux*, or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards*, the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) **Was The Establishment Of The International Tribunal An Appropriate Measure?**

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter *ECHR*))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter *ACHR*).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (*See* Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (*See* G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (*See* General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See, e.g.*, Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the

Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

> "Concurrent jurisdiction
>
> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> 2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: " [The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadi}, that the said Du{ko Tadi} is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadi}, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

> "What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

> "From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para. 5.)

Appellant added that:

> "As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karad'i} et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in I*srael v. Eichmann*:

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 International Law Reports 5, 62 (1961), affirmed by Supreme Court of Israel, 36 International Law Reports 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega*:

> "As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));

b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);

c) Letter from Vasvija Vidovi}, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

> "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.
As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

> "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> [. . .]
>
> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.
>
> [. . .]
>
> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in Rivista Penale 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).[1]

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

"[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]

Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.

[. . .]

[T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 International Law Reports 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2.(7), 24, & 37). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

"[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. (*Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie*, 78 International Law Reports 125, 130 (Cass. crim.1983).)[2]

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

"Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

C. *Jus De Non Evocando*

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried — and having an equally fair trial (*see* Statute of the International Tribunal, art. 21) — before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

"Art. 13: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact — and of law — the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of jus de non evocando was considered by the Trial Chamber which disposed of it in the following terms:

> "Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict — either internal or international — at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "*[i]n the territory of Parties to the conflict*, the application of the present Convention shall cease on the general close of military operations."
> (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions — particularly Conventions III and IV — dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter *Protocol II*). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(*Id.* at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

> "[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are

widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (*See* Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovi} (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karad`i} (President of the Serbian Democratic Party), and Mr. Miljenko Brki} (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter *Agreement No. 1*).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. *See, e.g.*, S.C. Res. 752 (15 May 1992); S.C.Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

> "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (*See* statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;
>
> (c) wilfully causing great suffering or serious injury to body or health;
>
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
>
> (h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (*see*, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadi}*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

> "[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."
>
> [. . .]
>
> [T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.
>
> [. . .]
>
> [T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation

on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (*see* paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above*, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (*see* id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

> "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (*Id.*, at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

> "[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

> "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:
>
> Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (*Id.*, at p. 15.)

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

"the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law (on this point *see below*, para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "serious violations" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

"In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts

a. General

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions

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when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (League of Nations, O.J. Spec. Supp. 183, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army*, in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army*, in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [*sic*]. It also expects the rebels — and makes an urgent appeal to them to that effect — to act in the same manner.

> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [*sic*] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in American Journal of International Law (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (*See* A.H.M. Kirk-Greene, 1 CRISIS AND CONFLICT IN NIGERIA, A DOCUMENTARY SOURCEBOOK 1966-1969, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (*see* New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (*See* Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha*, Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)[3]

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously[4] adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was

"declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (*See* 67 American Journal of International Law (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously[5] adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
>
> 2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
>
> 3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
>
> 4. Civilian populations as such should not be the object of military operations.
>
> 5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
>
> 6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
>
> 7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
>
> 8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

> "In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, *see* Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the

large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

> "It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.
This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (*see*, e.g., 43 Annuaire Suisse de Droit International, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"[6] (*See Informe de la Fuerza Armata de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987*, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (*Humanitarian Law Conference, Remarks of Michael J. Matheson*, 2 American University Journal of International Law and Policy (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN - HANDBUCH, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)[7]

119. So far we have pointed to the formation of general rules or principles designed to protect civilians or civilian objects from the hostilities or, more generally, to protect those who do not (or no longer) take active part in hostilities. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards means and methods of warfare. As the Appeals Chamber has pointed out above (*see* para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including

> the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (*See* U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect *inter alia* that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects]*, 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 British Yearbook of International Law (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"[8] . (50 Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> "Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz*, 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year, Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (*See* Department of State Bulletin (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (*See* State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (*See* New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals — a matter on which this Chamber obviously cannot and does not express any opinion — there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 International Law Reports, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become

applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 Annuaire Suisse de Droit International (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) Individual Criminal Responsibility In Internal Armed Conflict

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (*See* THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (*id.*, at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (*see* paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"[9] . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. *See* KRIEGSVÖLKERRECHT - ALLGEMEINE BESTIMMUNGEN DES KRIEGFÜHRUNGSRECHTS UND LANDKRIEGSRECHT, ZDv 15-10, March 1961, para. 12; KRIEGSVÖLKERRECHT - ALLGEMEINE BESTIMMUNGEN DES HUMANITÄTSRECHTS, ZDv 15/5, August 1959, paras. 15-16, 30-2). Furthermore, the "INTERIM LAW OF ARMED CONFLICT MANUAL" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, INTERIM LAW OF ARMED CONFLICT MANUAL, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", *i.e.*, "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (*infractions graves*) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (*[c]onstituent des crimes de droit international*)

within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*, Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (*See* S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force."
> (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) Conclusion

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege*. Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*.

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal 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 derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: Judge Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber.

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]

* French translation to follow

Notes

[1] "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale...
Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno

combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).

[2] ."..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

[3] "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el artículo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayoría de la población y estén orientados a defender sus libertades fundamentales."

[4] The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

[5] The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

[6] "Dentro de esta línea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que aún no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, común a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."

[7] "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."

[8] "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."

[9] "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere;
-Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtingung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."

ANNEX 2:

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

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PRINCIPLES OF PUBLIC INTERNATIONAL LAW

BY

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effect. Another principle connected with these rules is to the effect that a change of government is not as such a ground for non-compliance with obligations.[24]

4. *The Position of the Individual*

International law imposes duties of certain kinds on individuals as such, and thus national and international tribunals may try persons charged with crimes against international law, including war crimes and genocide.[25] The International Military Tribunal at Nuremberg and many national tribunals did not admit pleas by accused persons charged with war crimes that they had acted in accordance with their national law.[26] Conversely, in a great number of situations an individual or corporation may plead that a treaty has legal consequences affecting interests of the claimant which must be recognized by a municipal court.[27] And again, on a charge of crime, such as homicide, under municipal law, a plea of justification may be based on rules of international law, for example, that an act of killing was a lawful act of war.

5. *Issues of Municipal Law before International Tribunals*

(*a*) Cases in which a tribunal dealing with issues of international law has to examine the municipal law of one or more states are by no means exceptional.[28] As a matter of evidence, the spheres of competence *claimed* by states, represented by state territory and the territorial sea, jurisdiction, and nationality of individuals and legal persons, are delimited by means of legislation and judicial and administrative decisions.[29] The substantive law of nations brings the same matters in

[24] On continuity of states: *infra*, pp. 80–3.

[25] See ch. XXV, s. 5.

[26] See Morgenstern, 27 *BY* (1950), 47–8. For duties arising under a commercial treaty: *Institute National* v. *Mettes*, ILR 24 (1957), 584.

[27] See: *Restraint at Lobith* case, ILR 19 (1952), no. 34; *Pokorny* v. *Republic of Austria*, ibid., no. 98; *Soviet Requisition* case, ibid., no. 143; *People of the Philippines* v. *Acierto*, ibid. 20 (1953), 148; *Falcon Dam Constructors* v. *United States*, ibid. 23 (1956), 360; *Public Trustee* v. *Chartered Bank of India, Australia and China*, ibid. 687; *Revici* v. *Conference of Jewish Material Claims, Inc.*, ibid. 26 (1958, II), 362; *Indochina Railway* case, ibid. 28, p. 269; *Richuk* v. *State of Israel*, ibid. 442. See also *infra*, pp. 44 ff. on incorporation.

[28] See generally Jenks, *The Prospects of International Adjudication* (1964), 547–603; Marek, *Droit international et droit interne*, pp. 267 ff.; id., 66 *RGDIP* (1962), 260–98; Stoll, *L'application et l'interprétation du droit interne par les juridictions internationales* (1962); Strebel, 31 *Z.a.ö.R.u.V.* (1971), 855–84.

[29] See the United Nations Legis. Series. On municipal law as evidence of the intention of a government see the *Anglo-Iranian Oil Co.* case, ICJ Reports (1952), 93.

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issue by setting limits of competence, represented especially by the concept of domestic jurisdiction[30] against which the municipal law on a given topic has to be measured. Thus a tribunal may have to examine municipal law relating to expropriation,[31] fishing limits,[32] nationality,[33] or the guardianship and welfare of infants[34] in order to decide whether particular acts are in breach of obligations under treaties or customary law. Issues relating to obligations to protect human rights,[35] the treatment of civilians during belligerent occupation, and the exhaustion of local remedies (as a question of the admissibility of claims)[36] concern internal law in nearly every case.

(*b*) A considerable number of treaties contain provisions referring directly to internal law or employing concepts which by implication are to be understood in the context of a particular national law. Many treaties refer to 'nationals' of the contracting parties, and the presumption is that the term connotes persons having that status under the internal law of one of the parties. Similarly, claims settlements involve references to legal interests of individuals and corporations existing within the cadre of a given national law.

(*c*) In the *Guardianship of Infants* case several of the individual judges rested their conclusions on the issues in the case on a principle of treaty law according to which the interpretation of treaties concerned with matters of private international law should take into account the nature of the subject-matter, in particular by the recognition of the principle of *ordre public* as applied locally.[37] In his separate opinion Judge Spender criticized this view of treaty interpretation, pointing to the variable content of *ordre public* and the importance of the principle *pacta sunt servanda*.[38]

(*d*) Treaties having as their object the creation and maintenance of certain standards of treatment of minority groups or resident aliens may refer to a national law as a method of describing the status to be created and protected. The protection of rights may be stipulated for

[30] *Infra*, pp. 293 ff.

[31] *German Interests in Polish Upper Silesia* (1926), PCIJ., Ser. A, no. 7. See further ch. XXIV, s. 9.

[32] *Fisheries* case, ICJ Reports (1951), 116. See further *infra*, pp. 180 ff.

[33] *Nottebohm* case, ICJ Reports (1955), 4. See further *infra*, ch. XIX.

[34] *Guardianship of Infants* case, ICJ Reports (1958), 55.

[35] Ch. XXV and esp. s. 7 on the European Commission of Human Rights and the European Court of Human Rights.

[36] Ch. XXII, s. 6.

[37] ICJ Reports (1958), 72–3 (Spiropoulos); 74–8 (Badawi); 91 ff. (Lauterpacht); 102–9 (Moreno Quintana). See Fitzmaurice, 35 *BY* (1959), 190–1. The Court, at p. 70, left the point open.

[38] pp. 120–31. See also Judge Córdova, sep. op., pp. 140–1, for a similar view.

'without discrimination' or as 'national treatment' for the categories concerned.[39]

(*e*) On occasion an international tribunal may be faced with the task of deciding issues solely on the basis of the municipal law of a particular state. Such a case was the *Serbian Loans* case[40] before the Permanent Court. This arose from a dispute between the French bondholders of certain Serbian loans and the Serb-Croat-Slovene Government, the former demanding loan-service on a gold basis from 1924 or 1925 onwards, the latter holding that payment in French paper currency was in conformity with the terms of the contracts. This was not a dispute involving international law. The French Government, by virtue of the right of diplomatic protection,[41] took up the case of the French bondholders, and by a special agreement the dispute was submitted to the Permanent Court. The Court considered whether it had jurisdiction under its Statute in a case where the point at issue was a question which must be decided by application of a particular municipal law. The conclusion was that jurisdiction existed, the basis for this important finding being the wide terms of Article 36(I) of the Statute, which refers especially to cases brought by special agreement, and the duty of the Court to exercise jurisdiction when two states have agreed to have recourse to the Court, in the absence of a clause on the subject in the Statute. Applying itself to the issues arising from the loans the Court had to decide an issue of conflict of laws: did Serbian or French law govern the obligations at the time they were entered into? Public international law (as the law of the forum) provided no ready-made rules of conflict of laws, and the Court prescribed certain principles:[42]

> The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intentions of the Parties. Moreover, this

[39] See *Memel Statute* case (1932) (PCJ) Ser. A/B, no. 49; *Jurisdiction of the Danzig Courts*, Ser. B, no. 15; *German Settlers in Poland* (1923), Ser. B, no. 6; *Minority Schools in Albania* (1935), Ser. A/B, no. 64. The Permanent Court did not regard a formal equality in law as the only criterion of equality. See further Fitzmaurice, 35 *BY* (1959), 191–2.

[40] (1929), PCIJ, Ser. A, no. 20. See also the *Brazilian Loans* case (1929), PCIJ, Ser. A, no. 21; Jenks, 19 *BY* (1938), 95–7; and Schwarzenberger, *International Law*, i (3rd edn.), 72–8. Cf. the *Norwegian Shipowners* claims (1922), *RIAA* i. 309; the *Diverted Cargoes* arbitration (1955), ILR 22 (1955), 820; and *Case No. 1*, Arbitration Tribunal for the Agreement on German External Debts, 34 *BY* (1958), 363.

[41] States may present, and negotiate concerning, claims which do not relate to international law. Sympathetic consideration may be given to such claims as a matter of general relations between the states concerned.

[42] PCIJ, Ser. A, no. 20, p. 41.

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would seem to be in accord with the principles of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law.

In the event the Court held that the substance of the debt and the validity of the clause defining the obligation of the debtor state was governed by Serbian law, but, with respect to the method of payment, the money of payment was the local currency of the place in which the debtor state was bound to discharge the debt. The money of payment was thus paper francs and the amount due in this currency was to be calculated, in accordance with the intention of the parties, by reference to gold francs, the money of account. The rate of conversion from the money of account to the money of payment was that prevailing at the time of the payment of the debt.

6. *Municipal Laws as 'Facts' before International Tribunals*

In the case of *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed:[43]

> It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

This statement is to the effect that municipal law may be simply evidence of conduct attributable to the state concerned which creates international responsibility. Thus a decision of a court or a legislative measure may constitute evidence of a breach of a treaty or a rule of customary international law.[44] In its context the principle stated is clear. However, the general proposition that international tribunals take account of municipal laws only as facts 'is, at most, a debatable proposition the validity and wisdom of which are subject to, and call

[43] PCIJ, Ser. A, no. 7, p. 19.

[44] See *Anglo-Iranian Oil Co.* case (Jurisdiction), ICJ Reports (1952), 106–7; Judge Badawi, sep. op., *Norwegian Loans* case, ibid. (1957), 31–2; Judge Lauterpacht, sep. op., ibid. 36–8, 40; Judge Morelli, *Barcelona Traction* case (Second Phase), ibid. (1970), 234; Judge Gros, sep. op., ibid. 272.

for, further discussion and review'.[45] In the practice of the International Court and other international tribunals the concept 'municipal law as mere facts' has six distinct aspects, as follows.

(*a*) Municipal law may be evidence of conduct in violation of a rule of treaty or customary law, as stated already.

(*b*) Judicial notice does not apply to matters of municipal law. The tribunal will require proof of municipal law and will hear evidence on it, and, if necessary, may undertake its own researches.[46]

(*c*) Interpretation of their own laws by national courts is binding on an international tribunal.[47] This principle rests in part on the concept of the reserved domain of domestic jurisdiction[48] and in part on the practical need of avoiding contradictory versions of the law of a state from different sources.

(*d*) The *dicta* of international tribunals (already cited) rest to some extent on the assumption that, for any domestic issue of which a tribunal is seized, there must always be some applicable rule of municipal law, which will be ascertainable in the same way as other 'facts' in the case. This assumption is not uncommonly unsafe since municipal law may be far from clear.[49]

(*e*) International tribunals cannot declare the internal invalidity of rules of national law since the international legal order must respect the reserved domain of domestic jurisdiction.[50]

(*f*) Certain judges of the International Court have stated as a corollary of the proposition that 'municipal laws are merely facts' that an international tribunal 'does not interpret national law as such'.[51] This view is open to question. When it is appropriate to apply rules of municipal law, an international tribunal will apply domestic rules as such.[52] The special agreement may require the application of rules of

[45] Jenks, *Prospects of International Adjudication*, p. 552; and see, in that work, pp. 548–53, 569–70; and Jenks, 19 *BY* (1938), 89–92. See further Marek, *Répertoire des décisions et des documents de la cour permanente de justice internationale et la cour internationale de justice*, i (1961).

[46] The *Mavrommatis Jerusalem Concessions* case, PCIJ, Ser. A. no. 5, pp. 29, 30; *Brazilian Loans*, ibid., nos. 20/1, p. 124; Judge Klaestad, diss, op., *Nottebohm* case (Second Phase), ICJ Reports (1955), 28–9; Judge Read, diss. op., ibid. 35–6; Judge Guggenheim, dis. op., ibid. 51–2; *Flegenheimer* claim, ILR 25 (1958, I), at 98. But see Judge Fitzmaurice, diss. op., Adv. Op., *Presence of South Africa in Namibia*, ICJ Reports (1971), 222.

[47] *Serbian Loans*, PCIJ, Ser. A. nos. 20–1, p. 46; *Brazilian Loans*, ibid. 124; Judge McNair, sep. op., *Fisheries* case, ICJ Reports (1951), 181; Judge Klaestad, diss. op., *Nottebohm* case (Second Phase), ibid. (1955), 28–9. See also the *Lighthouses* case, PCIJ, Ser. A/B, no. 62, p. 22; and the *Panevezys–Saldutiskis Railway* case, ibid., no. 76, p. 19.

[48] *Infra*, p. 293.

[49] See *R.* v. *Keyn*, *infra*, p. 46; *Burmah Oil* case [1965] AC 75.

[50] *Interpretation of the Statute of the Memel Territory*, PCIJ Ser. A/B, no. 49, p. 336; Judge Morelli, sep. op., *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 234.

[51] See Judge Lauterpacht, *Guardianship* case, ICJ Reports (1958), sep. op., p. 91.

[52] The dictum of the PCIJ in the *Upper Silesia* case (quoted earlier) is not unequivocal in its remark that the Court was 'not called upon to interpret the Polish law as such'. See Judge

municipal law to the subject matter of the dispute.[53] International law may designate a system of domestic law as the applicable law.[54] Moreover, in cases in which vital issues (whether classified as 'facts' or otherwise) turn on investigation of municipal law, the International Court has duly examined such matters, including the application of nationality laws,[55] the availability of local remedies,[56] and the law concerning guardianship of infants.[57] It is also necessary to make the point that in the particular state national courts may have a power to overrule local legislation on the ground that it is contrary to international law, for example, as laid down by the International Court.[58]

7. *Issues of International Law before Municipal Courts*

In general. English courts take judicial notice of international law: once a court has ascertained that there are no bars within the internal system of law to applying the rules of international law or provisions of a treaty,[59] the rules are accepted as rules of law and are not required to be established by formal proof, as in the case of matters of fact and foreign law. However, in the case of international law and treaties, the taking of judicial notice has a special character. In the first place, there is in fact a serious problem involved in finding reliable evidence on points of international law in the absence of formal proof and resort to the expert witness.[60] Secondly, issues of public policy and difficulties of obtaining evidence on the larger issues of state relations combine to produce the procedure whereby the executive is consulted on questions of mixed law and fact, for example, the existence of a state of war or the status of an entity claiming sovereign immunities.[61] The special considerations involved in this procedure do not affect the general character of rules of international law before the courts. Where, in a conflict of laws case, an expert gives evidence as to matters of foreign

Read, diss. op., *Nottebohm* case (Second Phase), ICJ Reports (1955), 36; Judge Guggenheim, ibid. 52. See also Judge Córdova, diss. op., *Administrative Tribunal of the I.L.O.*, ibid. (1956), 165; Judge Moreno Quintana, sep. op., *Guardianship* case, ibid. (1958), 108.

53 *Lighthouses* case, PCIJ, Ser. A/B, no. 62, pp. 19–23. See also the *Lighthouses* Arbitration (1956), PCA, ILR, 23 (1956), 659.

54 *Serbian and Brazilian Loans*, *supra*.

55 *Nottebohm* case (Second Phase), ICJ Reports (1955), 4. See also the *Flegenheimer* claim, ILR, 25 (1958, I), at 108–10.

56 *Panevezys-Saldutiskis Railway* case, PCIJ, Ser. A/B, no. 76, pp. 18–22.

57 *Guardianship* case, *supra*.

58 See Judge Lauterpacht, sep. op., *Norwegian Loans* case, ICJ Reports (1957), 40–1.

59 See *infra*, p. 42, on incorporation.

60 See *infra*, pp. 45–8, on the decisions in *R.* v. *Keyn* and *West Rand Central Gold Mining Co.* *R.* See also *infra* on the sources employed by English courts.

61 On the Foreign Office Certificate see *infra*, p. 52.

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PART X

INTERNATIONAL TRANSACTIONS

CHAPTER XXVI

THE LAW OF TREATIES

1. *Introductory*[1]

A GREAT many international disputes are concerned with the validity and interpretation of international agreements, and the practical content of state relations is embodied in agreements. The great international organizations, including the United Nations, have their legal basis in multilateral agreements. Since it began its work the International Law Commission has concerned itself with the law of treaties, and in 1966 it adopted a set of seventy-five draft articles.[2]

These draft articles formed the basis for the Vienna Conference which in two sessions (1968 and 1969) completed work on the Vienna

[1] The principal items are: the Vienna Conv. on the Law of Treaties (see n. 3); the commentary of the International Law Commission on the Final Draft Articles, *Yrbk. ILC* (1966), ii. 172 at 187–274; Whiteman, xiv. 1–510; Rousseau, i. 61–305; Guggenheim, i. 113–273; McNair, *Law of Treaties* (1961); Harvard Research, 29 *AJ* (1935), Suppl.; O'Connell, i. 195–280; Sørensen, pp. 175–246; Jennings, 121 Hague *Recueil* (1967, II), 527–81; *Répertoire suisse*, i. 5–209; Nguyen Quoc Dinh, Daillier, and Pellet, *Droit international public* 117–309; Reuter, *Introduction au droit des traités* (2nd edn. 1985); id., *Introduction to the Law of Treaties* (1989). See further: Rousseau, *Principes généraux du droit international public*, i (1944); Basdevant, 15 Hague *Recueil* (1926, V), 539–642; Detter, *Essays on the Law of Treaties* (1967); Gotlieb, *Canadian Treaty-Making* (1968); various authors, 27 *Z.a.ö.R.u.V.* (1967), 408–561; ibid. 29 (1969), 1–70, 536–42, 654–710; Verzijl, *International Law in Historical Perspective*, vi (1973), 112–612; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984); Thirlway, 62 *BY* (1991), 2–75; id., 63 *BY* (1992), 1–96; Oppenheim, i. 1197–1333.

[2] The principal items are as follows: International Law Commission, Reports by Brierly, *Yrbk.* (1950), ii; (1951), ii; (1952), ii; Reports by Lauterpacht, *Yrbk.* (1953), ii; (1954), ii; Reports by Fitzmaurice, *Yrbk.* (1956), ii; (1957), ii; (1958), ii; (1960), ii; Reports by Waldock, *Yrbk.* (1962), ii; (1963), ii; (1964), ii; (1965), ii; (1966), ii; Draft articles adopted by the Commission, I, Conclusion, Entry into Force and Registration of Treaties, *Yrbk.* (1962), ii. 159; 57 *AJ* (1963), 190; *Yrbk.* (1965), ii. 159; 60 *AJ* (1966), 164; Draft Articles, II, Invalidity and Termination of Treaties, *Yrbk.* (1963), ii. 189; 58 *AJ* (1964), 241; Draft Articles, III, Application, Effects, Modification and Interpretation of Treaties, *Yrbk.* (1964), ii; 59 *AJ* (1965), 203, 434; Final Report and Draft, *Yrbk.* (1966), ii. 172; 61 *AJ* (1967), 263.

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

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

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

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

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

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

[4] Art. 84.

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

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

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

[8] *Infra*, p. 678.

[9] *Infra*, p. 661.

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

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

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

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

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

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

[13] See ch. III on legal personality.

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

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

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

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

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

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ulations governing the article provides for *ex officio* registration. This involves initiatives by the Secretariat and extends to agreements to which the United Nations is a party, trusteeship agreements, and multilateral agreements of which the United Nations is a depositary. It is not yet clear in every respect how wide the phrase 'every international engagement' is, but it seems to have a very wide scope. Technical intergovernmental agreements, declarations accepting the optional clause in the Statute of the International Court, agreements between organizations and states, agreements between organizations, and unilateral engagements of an international character[50] are included.[51] Paragraph 2 is a sanction for the obligation in paragraph 1, and registration is not a condition precedent for the validity of instruments to which the article applies, although these may not be relied upon in proceedings before United Nations organs.[52] In relation to the similar provision in the Covenant of the League the view has been expressed that an agreement may be invoked, though not registered, if other appropriate means of publicity have been employed.[53]

5. *Invalidity of Treaties*[54]

(*a*) *Provisions of internal law.*[55] The extent to which constitutional limitations on the treaty-making power can be invoked on the international plane is a matter of controversy, and no single view can claim to be definitive. Three main views have received support from writers. According to the first, constitutional limitations determine validity on the international plane.[56] Criticism of this view emphasizes the insecurity in treaty-making that it would entail. The second view varies

[50] McNair, *Law of Treaties*, p. 186, and see *infra*, p. 642.

[51] If an agreement is between international legal persons it is registrable even if it be governed by a particular municipal law; but cf. Higgins, *Development*, p. 329. It is not clear whether special agreements (*compromis*) referring disputes to the International Court are required to be registered.

[52] If the instrument is a part of the *jus cogens* (*supra*, p. 514), should non-registration have this effect?

[53] *South West Africa* cases (Prelim. Objections), ICJ Reports (1962), 319 at 359–60 (sep. op. of Judge Bustamante) and 420–2 (sep. op. of Judge Jessup). But cf. joint diss. op. of Judges Spender and Fitzmaurice, ibid. 503.

[54] See also *infra*, p. 630, on conflict with prior treaties. As to capacity of parties, *supra*, p. 608. See generally: Elias, 134 Hague *Recueil* (1971, III), 335–416.

[55] See *Yrbk. ILC* (1963), ii. 190–3; Waldock, ibid. 41–6; *ILC*, Final Report, *Yrbk. ILC* (1966), ii. 240–2; McNair, *Law of Treaties*, ch. III; Blix, *Treaty-Making Power* (1960); Lauterpacht, *Yrbk. ILC* (1953), ii. 141–6; P. de Visscher, *De la conclusion des traités internationaux* (1943), 219–87; id., 136 Hague *Recueil* (1972, II), 94–8; Geck, 27 *Z.a.ö.R.u.V.* (1967), 429–50; *Digest of US Practice* (1974), 195–8; Meron, 49 *BY* (1978), 175–99.

[56] This was the position of the International Law Commission in 1951; *Yrbk.* (1951), ii. 73.

from the first in that only 'notorious' constitutional limitations are effective on the international plane. The third view is that a state is bound irrespective of internal limitations by consent given by an agent properly authorized according to international law. Some advocates of this view qualify the rule in cases where the other state is aware of the failure to comply with internal law or where the irregularity is manifest. This position, which involves a presumption of competence and excepts manifest irregularity, was approved by the International Law Commission, in its draft Article 43, in 1966. The Commission stated that 'the decisions of international tribunals and State practice, if they are not conclusive, appear to support' this type of solution.[57]

At the Vienna Conference the draft provision was strengthened and the result appears in the Convention, Article 46:

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

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

(*b*) *Representative's lack of authority.*[58] The Vienna Convention provides that if the authority of a representative to express the consent of his state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe the restriction may not be invoked as a ground of invalidity unless the restriction was previously notified to the other negotiating states.

(*c*) *Corruption of a state representative.* The International Law Commission decided that corruption of representatives was not adequately dealt with as a case of fraud[59] and an appropriate provision appears in the Vienna Convention, Article 50.

(*d*) *Error.*[60] The Vienna Convention, Article 48,[61] contains two principal provisions which probably reproduce the existing law and are as follows:

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was

[57] *Yrbk. ILC* (1966), ii. 240–2.

[58] ILC draft, Art. 32; *Yrbk. ILC* (1963), ii. 193; Waldock, ibid. 46–7; Final Draft, Art. 44; *Yrbk. ILC* (1966), ii. 242; Vienna Conv., Art. 47.

[59] *Yrbk. ILC* (1966), ii. 245.

[60] See Lauterpacht, *Yrbk. ILC* (1953), ii. 153; Fitzmaurice, 2 *ILCQ* (1953), 25, 35–7; Waldock, *Yrbk. ILC* (1963), ii. 48–50; Oraison, *L'Erreur dans les traités* (1972); Thirlway, 63 *BY* (1992), 22–8.

[61] See also *Yrbk. ILC* (1966), ii. 243–4.

assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.[62]

(*e*) *Fraud.*[63] There are few helpful precedents on the effect of fraud. The Vienna Convention provides[64] that a state which has been induced to enter into a treaty by the fraud of another negotiating state may invoke the fraud as invalidating its consent to be bound by the treaty. Fraudulent misrepresentation of a material fact inducing an essential error is dealt with by the provision relating to error.

(*f*) *Coercion of state representatives.*[65] The Vienna Convention, Article 51, provides that 'the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without legal effect'. The concept of coercion extends to blackmailing threats and threats against the representative's family.

(*g*) *Coercion of a state.*[66] The International Law Commission in its draft of 1963 considered that Article 2, paragraph 4, of the Charter of the United Nations, together with other developments, justified the conclusion that a treaty procured by the threat or use of force in violation of the Charter of the United Nations shall be void. Article 52 of the Vienna Convention so provides.[67] An amendment with the object of defining force to include any 'economic or political pressure' was withdrawn. A Declaration condemning such pressure appears in the Final Act of the Conference.

(*h*) *Conflict with a peremptory norm of general international law* (jus cogens). See Chapter XXIII, section 5.

(*i*) *Unequal treaties.* The doctrine of international law in Communist states, invoked by their representatives in organs of the

[62] See the *Temple* case, ICJ Reports (1962), 26. See also the sep. op. of Judge Fitzmaurice, ibid. p. 57.

[63] See Lauterpacht, ibid. (1953), ii. 152; Fitzmaurice, ibid. (1958), ii. 25, 37; Waldock, ibid. (1963), ii. 47–8; Oraison, 75 *RGDIP* (1971), 617–73.

[64] Art. 49. See also the Final Draft, *Yrbk. ILC* (1966). ii. 244–5.

[65] Fitzmaurice, ICJ Reports (1958), ii. 26, 38; Waldock, ibid. (1963), ii. 50; Final Draft, Art. 48; *Yrbk. ILC* (1966), ii. 245–6.

[66] ILC draft, Art. 36; *Yrbk. ILC* (1963), ii. 197; Waldock, ibid. 51–2; Lauterpacht, ICJ Reports (1953), ii. 147–52; McNair, *Law of Treaties*, pp. 206–11; Brownlie, *International Law and the Use of Force by States* (1963), 404–6; Fitzmaurice, *Yrbk ILC* (1957), ii. 32, 56–7; ibid. (1958), ii. 26, 38–9; Bothe, 27 *Z.a.ö.R.u.V.* (1967), 507–19; Jennings, 121 Hague *Recueil*, pp. 561–3; Ténékidès, *Ann. français* (1974), 79–102; De Jong, 15 *Neths. Yrbk.* (1984), 209–47. See also *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*), ICJ Reports, (1973) 3 at 14; Briggs, 68 *AJ* (1974), 51 at 62–3; Thirlway, 63 *BY* (1992), 28–31.

[67] See also the Final Draft, Art. 49; *Yrbk. ILC* (1966), ii. 246–7; Whiteman, xiv. 268–70; Kearney and Dalton, 64 *AJ* (1970), 532–5.

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United Nations, held that treaties not concluded on the basis of the sovereign equality of the parties to be invalid.[68] An example of such a treaty is an arrangement between a powerful state and a state still virtually under its protectorate, whereby the latter grants extensive economic privileges and or military facilities. The general view is that the principle does not form a part of positive law[69] but it is attractive to some jurists of the 'Third World'.[70] Apart from the presence or absence of general agreement on the content of the principle, a proportion of its dominion may be exercised through the rules concerning capacity of parties, duress (*supra*), fundamental change of circumstances (*infra*, section 6(*h*)), and the effect of peremptory norms of general international law, including the principle of self-determination (*supra*, pp. 593–6 and *infra*, section 6(*i*)).

6. *Withdrawal, Termination and Suspension of Treaties*[71]

(*a*) *Pacta sunt servanda*. The Vienna Convention prescribes a certain presumption as to the validity and continuance in force of a treaty,[72] and such a presumption may be based upon *pacta sunt servanda* as a general principle of international law: a treaty in force is binding upon the parties and must be performed by them in good faith.[73]

(*b*) *State succession*.[74] Treaties may be affected when one state succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive depend on many factors, including the precise form and origin of the 'succession' and the type of treaty concerned. Changes of this kind may of course terminate treaties apart from categories of state succession (section (*h*), *infra*).

[68] See Kozhevnikov (ed.), *International Law* (n.d.), 248, 280–1; Lester, II, *ICLQ* (1962), 847–55; Detter, 15 *ICLQ* (1966), 1069–89. The principle has been advanced both as affecting essential validity and as a ground for termination.

[69] See Caflisch, 35 *German Yrbk.* (1992), 52–80.

[70] See Sinha, 14 *ICLQ* (1965), 121 at 123–4.

[71] See generally *Annuaire de l'Institut*, 49, i (1961); 52, i. ii (1967); Fitzmaurice, *Yrbk. ILC* (1957), ii. 16–70; McNair, *Law of Treaties*, chs. XXX–XXXV; Tobin, *Termination of Multipartite Treaties* (1933); Detter, *Essays*, pp. 83–99; Whiteman, xiv. 410–510; Capotorti, 134 Hague *Recueil* (1971, III), 419–587; Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), 229–425; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 59–85; Thirlway, 63 *BY* (1992), 63–96; Oppenheim, i. 1296–1311.

[72] Art. 42. See also ILC draft, Art. 30; *Yrbk. ILC* (1963), ii. 189; Final Draft, Art. 39; ibid. (1966), ii. 236–7.

[73] See the Vienna Conv. Art. 26; the ILC Final Draft, Art. 23; *Yrbk. ILC* (1966), ii. 210–11; and McNair, *Law of Treaties*, ch. XXX.

[74] See ch. XXVIII, pp. 665–9. In its work on the law of treaties the International Law Commission put this question aside: Final Draft, Art. 69; *Yrbk.* (1966), ii. 267; and see the Vienna Conv., Art. 73.

ANNEX 3:

1969 Vienna Convention on the Law of Treaties.

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International Law Commission

Vienna Convention on the Law of Treaties*

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I
INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Article 2
Use of terms

1. For the purposes of the present Convention:

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

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

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

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

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

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

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

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

(i) "'international organization'" means an intergovernmental organization.

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

Article 3
International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II
CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6
Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11
Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12
Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13
Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Article 14
Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15
Consent to be bound by a treaty expressed by accession

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

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

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

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

Article 16
Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;

(b) their deposit with the depositary; or

(c) their notification to the contracting States or to the depositary, if so agreed.

Article 17
Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification,

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acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19
Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20
Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22
Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23
Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

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4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III
OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

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

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to

determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36
Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the

parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38
Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV
AMENDMENT AND MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V
INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

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5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45
Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46
Provisions of internal law regarding competence to conclude treaties

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

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

Article 47
Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48
Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49
Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50
Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51
Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53
Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or

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withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 58
Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59
Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60
Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
Emergence of a new peremptory norm of general international law (*jus cogens*)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65
Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66
Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67
Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65 paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68
Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69
Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in

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accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
Consequences of the invalidity of a treaty which conflict with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

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

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

PART VI
MISCELLANEOUS PROVISIONS

Article 73
Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74
Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75
Case of an aggressor State

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

PART VII
DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

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

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

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

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

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(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

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

Article 78
Notifications and communications

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

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

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

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79
Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

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

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

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

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procés-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

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

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

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

Article 80
Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII
FINAL PROVISIONS

Article 81
Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83
Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85
Authentic texts

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The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Abstract:-
* (back)

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

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

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

ANNEX 4:

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

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MODERN TREATY LAW AND PRACTICE

ANTHONY AUST



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International organisations

Since the constituent instrument (i.e., the constitution) of an international organisation and a treaty adopted *within* the organisation are made by states, the Convention applies to such instruments, but this is without prejudice to any relevant rules of the organisation (Article 5). Those rules may, for example, govern the procedure by which treaties are adopted within the organisation, how they are to be amended and the making of reservations.[11]

State succession, state responsibility and the outbreak of hostilities

For the avoidance of doubt, Article 73 confirms that the Convention does not prejudge any question that may arise in regard to a treaty from a succession of states,[12] from the international responsibility of a state (for breach of a treaty),[13] or from the outbreak of hostilities.[14] The Convention does not deal with these matters, which are largely governed by customary international law, and are discussed here in later chapters.

Bilateral and multilateral treaties

The term 'bilateral' describes a treaty between two states, and 'multilateral' a treaty between three or more states. There are, however, bilateral treaties where two or more states form one party, and another state or states the other party.[15] For the most part the Convention does not distinguish between bilateral and multilateral treaties. Article 60(1) is the only provision limited to bilateral treaties. Articles 40, 41, 58 and 60 refer expressly to multilateral treaties, and the provisions on reservations and the depositary are relevant only to such treaties.

The Convention and customary international law

The various provisions mentioned above, and the preamble to the Convention, confirm that the rules of customary international law continue

[11] See, for example, p. 109 below on the rules for reservations to ILO Conventions.
[12] See pp. 305–31 below.
[13] See pp. 300–4 below, and the *Gabcikovo* judgment, para. 47 (ILM (1998), p. 162).
[14] See pp. 243 below. [15] See p. 19 below.

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

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

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

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

[16] See M. Shaw, *International Law* (4th edn, 1998), pp. 54–77.
[17] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1990), p. 87.
[18] See T. Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer', *Hague Recueil* (1990), IV, vol. 223, pp. 25–60; and H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal', AJIL (1985), pp. 871–90.
[19] See Thirlway, 'Law and Procedure', at p. 86. [20] See Sinclair, pp. 10–24.
[21] See p. 127 below about the time limit for notifying objections to reservations.

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

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

Effect of emerging customary law on prior treaty rights and obligations

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

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

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

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

application. But, since 1945 so-called 'law-making' treaties have become so numerous that a sizeable number of topics have come to be regulated by both customary law and treaty law. Whether the emergence of a new rule of customary law can supplant a prior treaty rule seems to have been studied in depth only quite recently.[25] The view has been expressed that international law has no hierarchy of sources of law, custom and treaty being autonomous; and that, even when custom has been codified, it retains its separate existence. This is a controversial theory,[26] and does not reflect the approach to legal problems taken by foreign ministry legal advisers, who, when dealing with an actual problem, naturally give more weight to an applicable treaty rule than a different customary rule. Nevertheless, new customary rules which emerge from economic changes or dissatisfaction with a treaty rule can result in a modification in the operation of a treaty rule. In the *Fisheries Jurisdiction* cases (*United Kingdom* v. *Iceland*; *Federal Republic of Germany* v. *Iceland*) in 1974, the International Court of Justice decided that, since the adoption in 1958 of the High Seas Convention, the right of states to establish twelve-mile fishing zones had crystallised as customary law, despite the provisions in that Convention regarding freedom of fishing on the high seas.[27]

Nor does international law contain any *acte contraire* principle by which a rule can be altered only by a rule of the same legal nature. Article 68(c) in the International Law Commission's 1964 draft of the Convention provided that the operation of a treaty may be modified by the 'subsequent emergence of a new rule of customary international law relating to matters dealt with in the treaty and binding upon all the parties'.[28] Although the article was not included in the final text of the Convention, this was only because the International Law Commission did not see its mandate as extending to the general relationship between customary law and treaty law.

Reference material on the Convention

The single most valuable source of material on the meaning and effect of the articles of the Convention remains the Commentary of the

[25] See M. Villiger, *Customary International Law and Treaties* (2nd edn, 1997); K. Wolfe, 'Treaties and Custom: Aspects of Interrelation', in Klabbers and Lefeber (eds.), *Essays on the Law of Treaties* (1998), pp. 31–9; and *Oppenheim*, pp. 31–6.

[26] See *Nicaragua* (*Merits*), *ICJ Reports* (1986), p. 92, paras. 172–82; and H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1989), pp. 143–4.

[27] *ICJ Reports* (1974), p. 3 at pp. 13 and 37. [28] YBILC (1964), II, p. 198.

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International Law Commission on its draft articles and contained in its final report on the topic.[29] The history of the drafting of the articles is in the Yearbooks of the Commission beginning in 1950. However, since the Vienna Conference naturally made changes to the draft articles, one needs to refer also to the summary records of the Conference.[30] A comprehensive guide to the negotiating history (*travaux*) has been produced by Rosenne.[31] This should be used in conjunction with Wetzel's book, which has the text, in English, of all the most important *travaux*.[32] There are useful accounts of the negotiations in Sinclair and by Kearney and Dalton,[33] who took part in the Vienna Conference.

[29] YBILC (1966), II, pp. 173–274. See now A. Watts, *The International Law Commission, 1949–1998* (1999), vol. II, Chapter 8.

[30] UN Doc. A/Conf. 39/11 and Add. 1. The *documents* produced at the Conference are in A/Conf. 39/11/Add. 2.

[31] S. Rosenne, *The Law of Treaties* (1970).

[32] Wetzel and Rausching, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978).

[33] AJIL (1970), pp. 495–561.

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2

What is a treaty?

> the intolerable wrestle with words and meanings.[1]

Like the Vienna Convention, this book is primarily concerned with treaties between *states*. Article 2(1)(a) defines a 'treaty' as:

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

As with most of the Convention, although the definition is expressed to be for the purposes of the Convention and is limited to treaties between states, its elements now represent customary law. As we shall see, the difficult question is not with the definition itself, but whether a particular instrument or transaction falls within the definition.[2] An examination of the elements of the definition will go some way to answer that question, as well as illustrating some of the key principles underlying the law of treaties.

Definition of 'treaty'

'an international agreement'

To be a treaty an agreement has to have an international character. When we examine the other elements of the definition we will see what that means. The Convention uses 'treaty' as a generic term. The constitution, law or practice of some states divide treaties variously into categories such as inter-state, inter-governmental, inter-ministerial or administrative.[3]

[1] T. S. Eliot, *East Coker*, Part 2.
[2] H. Thirlway, 'The Law and Procedure of the International Court of Justice', *BYIL* (1991), pp. 4–5.
[3] See Chapter 10 on treaties and domestic law.

The Convention does not recognise such distinctions. Treaties can also be described as 'universal' or 'regional', but this has no legal significance.[4] The term 'plurilateral' is, however, relevant in relation to reservations to treaties.[5]

The International Law Commission's Commentary makes it clear that the definition of treaty includes those international agreements which by the 1960s were increasingly being drafted in a less formal manner.[6] For example, there is no difference in legal effect between a treaty contained in a single instrument and one constituted by an exchange of notes, provided it satisfies the other elements of the definition (see the examples in Appendices B and E). In 1945 there was still some uncertainty whether international agreements drafted in a less formal way could properly be called treaties, and this was reflected in Article 102 of the United Nations Charter which requires the registration of 'every treaty and every international agreement'. By the 1960s there was no longer any doubt on the matter.

'concluded between states'

A treaty can be concluded between a state and another subject of international law, in particular an international organisation, or between international organisations, but this is outside the scope of the Convention, and of this book. An agreement between international or multinational companies, or even between a state and such a company, is not a treaty. The International Court of Justice has held that an oil concession granted by a state to a foreign company was not a treaty because the state of nationality of the company was not party to the concession.[7] Even when, as sometimes happens, an agreement between a state and a company provides that it shall be interpreted in whole or in part by reference to rules of international law, that does not make it a treaty.[8] There are, however, a small number of agreements between states to which non-state entities are also parties, but this does not affect their status as treaties.[9]

[4] But see McNair, pp. 739–54, on the differing legal character of treaties.
[5] See p. 112–13 below. [6] YBILC (1966), II, p. 173 at pp. 188–9.
[7] *Anglo-Iranian Oil Company (United Kingdom* v. *Iran) (Preliminary Objections) ICJ Reports* (1952), p. 93 at p. 112.
[8] See C. Greenwood, 'The Libyan Oil Arbitrations', BYIL (1982), pp. 27–81. See pp. 24–5 below about agreements between states which are governed by domestic law. [9] See p. 53 below.

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In the nineteenth century agreements between imperial powers and the representatives of indigenous peoples, such as the Treaty of Waitangi 1840 by which Maori chiefs ceded New Zealand to the British Crown,[10] were often drawn in the same form as a treaty and described as such.[11] But, since the land occupied by such peoples was not considered at the time to be a state, such agreements are not treaties, even if they had, and continue to have, effects in domestic law.[12]

But a treaty does not have to be expressed to be between states as such. Since a state is a legal concept, not a natural person, its head of state, its government or some other agency of the state has to act on behalf of the state. A treaty may therefore be expressed to be concluded by heads of state, governments, ministries or other state agencies.[13]

'in written form'

The Vienna Convention does not apply to oral agreements.[14] But, even though the modern practice is for the original text of a treaty to be typed or printed, there is no reason why a treaty should not be contained in a telegram, telex, fax message or even e-mail, or, rather, constituted by an exchange of such communications. Provided the text can be reduced to a permanent, readable form (even if this is done by down-loading and printing-out from a computer), it can be regarded as in written form. The absence of original signed copies is not a problem, provided there is a means of authenticating the 'signature'.[15] In September 1998 a Communiqué on Electronic Commerce was issued by US President Clinton and Irish Prime Minister Ahern by electronic means. They did so by each operating a separate computer terminal and, using an electronic signature, that is a signature in digital form which is in, attached to or associated with the data (in this case the Communiqué) and used to indicate the approval by the 'signatory' of the content of the data. The 'signature' must therefore be uniquely linked to the signatory, identify him, be created by means under his sole control and connected to the data in a way

[10] 6 Hertslet 579; 29 BFSP 1111.
[11] See the 1815 Treaty between the United States and the Sioux and other Indian tribes (65 CTS 81).
[12] See McNair, pp. 52–4; *Oppenheim*, para. 595, note 2; D. O'Connell, *International Law* (2nd edn), vol. 1, p. 440. [13] See also pp. 47–8 below. [14] See p. 7 above.
[15] Cf. section 5 of the (UK) Arbitration Act 1996 (ILM (1997), p. 165); and see p. 24 below.

which would reveal if it were to be subsequently altered unilaterally. This can be done with a 'smart card'.[16] Although the Communiqué was not a treaty, it may not be too fanciful to envisage full powers, instruments of ratification or even treaties being signed and deposited electronically. One should not, however, get too excited with such developments. Given the mistakes made now in treaties and treaty procedures, there is no reason to suppose that information technology will necessarily improve matters.[17]

'governed by international law'

According to the International Law Commission's Commentary, the phrase 'governed by international law' embraces the element of an *intention to create obligations under international law.* If there is no such intention the instrument will not be a treaty. In the *Aegean Sea Continental Shelf* case, the International Court of Justice considered the terms of a joint communiqué issued by the Greek and Turkish Prime Ministers, and the particular circumstances in which it was drawn up, in order to determine its nature. The Court found that there had been no intention to conclude an agreement to submit to the jurisdiction of the Court.[18] Thus intention must be gathered from the terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention.[19]

Although the law of treaties does not require a treaty to be in any particular form or to use special wording,[20] lawyers practising in foreign or other ministries deliberately utilise instruments which employ carefully chosen terminology to indicate that, rather than creating international legal rights and obligations, the intention of the participants is to record no more than mutual *understandings* as to how they will conduct themselves (see Appendices C and D). The existence of such instruments, and the extent to which they are a significant vehicle for the conduct of business between

[16] Unfortunately the President and the Prime Minister were in the same room: see *Financial Times*, 7 October 1998, IT review, p. xv, which, uncharacteristically for that paper, described the 'document' as a treaty. The European Community is drafting a directive on a common framework for electronic signatures, from which these technical details have been taken.

[17] See pp. 270–3 below on the problem of errors.

[18] *ICJ Reports* (1978), p. 3 at pp. 39–44. See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1991), pp. 13–15.

[19] *Qatar* v. *Bahrain*, *ICJ Reports* (1994), p. 112 at paras. 26–7.

[20] See the *Temple of Preah Vihear* (*Preliminary Objections*) *ICJ Reports* (1961), pp. 31–2.

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states, is not well known outside government circles. In fact, a large number of such instruments, bilateral and multilateral, are concluded every year covering a wide range of subjects. Most are never published. A recent (published) example of such a multilateral instrument is the Memorandum of Understanding on Port State Control in the Caribbean Region 1996.[21]

Such instruments have been variously described as 'gentlemen's agreements', 'non-binding agreements', '*de facto* agreements' and 'non-legal agreements'. These non-legally binding instruments are most commonly referred to by the initials 'MOU'. This is short for 'Memorandum of Understanding', since this is the name most often given to them. However, as will be explained shortly, calling an instrument a 'Memorandum of Understanding' does not, in itself, determine its status, since – and most confusingly – some treaties are also given that name.[22]

How to distinguish between a treaty and an MOU, how and why MOUs are used, and their possible legal consequences, is discussed in detail in the next chapter.

'whether embodied in a single instrument or in two or more related instruments'

This phrase recognises that the classic form for a treaty – a single instrument (Appendix B) – has for a long time been joined by treaties drawn in less formal ways, such as exchanges of notes. These play an increasingly important role. An exchange of notes usually consists of an initiating note and a reply note (Appendix E). But in 1994, in *Qatar* v. *Bahrain*, the International Court of Justice had to consider the legal effect of a *double* exchange of letters between (1) Qatar and Saudi Arabia and (2) Bahrain and Saudi Arabia.[23] Saudi Arabia, having agreed to use its good offices to help solve certain territorial disputes between the other two states sent each of them letters in identical terms proposing certain settlement procedures. Each wrote to Saudi Arabia accepting the proposal. Saudi Arabia then announced that the two states had agreed to go to arbitration. This complicated scheme was necessary because of political sensitivities, but the text of each letter and of the announcement were agreed in advance;

[21] ILM (1997), p. 237. See also the list of MOUs at p. xxx above
[22] See pp. 20–1 below.
[23] *ICJ Reports* (1994), p. 112; ILM (1994), p. 1461 (see para. 17).

and although three states were involved there were only two parties, Qatar and Bahrain. Although the form of a double exchange was unusual, there are several examples of treaties being constituted by three or more principal instruments (important treaties may have several subsidiary instruments).[24] The arrangements for dealing with claims between Iran and the United States, including the establishment of the Iran–US Claims Tribunal, were established in 1981 by (1) a Declaration by the Algerian Government setting out the formal commitments which had been made to it by Iran and the United States (a similar arrangement to that used later by Saudi Arabia); (2) an Iran–US Agreement which entered into force on receipt by Algeria of a 'notification of adherence' by each party; and (3) an Escrow Agreement between the United States, the Federal Reserve Bank of New York, Bank Markazi, Iran and the Central Bank of Algeria, as escrow agent.[25]

A treaty which is part bilateral and part multilateral can be constituted by a series of parallel exchanges of notes, all identical in substance, between one state and a number of states (A–B; A–C; A–D etc.).[26] In such a case it is important to make clear in the notes who are the parties. In an exchange between, say, four states there could be four parties (A, B, C and D), or two (A and B+C+D).[27] In such a case, when there are only two parties it may also be necessary to make clear whether the treaty can be terminated only by one of the parties, or whether one of the states constituting a party can, by denouncing the treaty, bring about its termination.

The drafting of normal exchanges of notes is discussed in the final chapter.[28]

'whatever its particular designation'

One of the most mystifying aspects of treaty practice is the unsystematic way in which treaties are designated (named). Writers have sought to explain, sometimes at great length and not very convincingly, why certain

[24] For an example of a triple exchange, and other multiple exchanges, see *Satow*, para. 29.38.

[25] ILM (1981), p. 230; 62 ILR 599; AJIL (1981), p. 418.

[26] See the six parallel Exchanges of Notes between Germany and Belgium, Canada, France, Netherlands, United Kingdom and United States (ILM (1991), pp. 415 and 417; and McNair, pp. 29–30).

[27] See the two Memoranda of Understanding on the Avoidance of Overlaps and Conflicts relating to Deep Seabed Areas of 1961 (UKTS (1991) 52 and UKTS (1995) 4).

[28] At pp. 355–6 below.

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names are given to particular categories of treaty.[29] That task has become even more difficult today, the names chosen being even more confusing, inconsistent and changeable than in the past. It is often more a matter of the practice of international organisations or groups of states, or political preference, which determines how a treaty is named. But, whatever the position may have been in the nineteenth or early twentieth centuries, the name does not, in itself, determine the status of the instrument; what is decisive is whether the negotiating states intended the instrument to be (or not to be) legally binding. Thus, just as one should never judge a book by its cover, one should not assume that the name given to an international instrument automatically indicates its status either as a treaty or an MOU. Although it is reasonable to assume that an instrument called a treaty, agreement or convention is a treaty, one should nevertheless examine the text to make quite sure. Most other names are problematic. Both the UN Charter and the Charter of the Commonwealth of Independent States 1993 (CIS)[30] are treaties, but the OSCE Charter of Paris 1990[31] and the Russia–United States Charter of Partnership and Friendship 1992[32] are MOUs.

Memorandum of understanding

One must be especially careful about the status of any instrument called 'Memorandum of Understanding'. This designation is most commonly used for MOUs in the sense described above, but occasionally one will find a treaty called a Memorandum of Understanding. Only by studying the terms of an instrument can one determine its status. Some have been misled into believing that because an instrument is called a Memorandum of Understanding it cannot be a treaty. Conversely, others have mistakenly assumed an instrument designated Memorandum of Understanding must be a treaty because several bearing that name have been registered as treaties.

The practice of designating a treaty a Memorandum of Understanding appears to have started in a small way after the Second World War, three being concluded in the 1950s in connection with the Treaty of Peace with

[29] See *Satow*, Paras. 29.9–29.33, 30 and 31.1–31.22. [30] ILM (1995), p. 1282.
[31] ILM (1991), p. 193; A. Bloed (ed.), *The Conference on Security and Co-operation in Europe* (1993), pp. 537–50. [32] ILM (1992), p. 782.

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Entry into force

> The treaty becomes international law after 40 countries have ratified it.[1]

This is a common misconception. When a treaty has entered into force, it is in force *only* for those states which have consented to be bound by it. A treaty is therefore not like national legislation which, once in force, is in force for all to whom it is directed. A treaty is much closer in character to a contract. For the position of third states, see Chapter 14.

Each of the states for which a treaty is in force is a 'party' (Article 2(1)(g)). Thereafter it should never be referred to by the – uninformative and misleading – term 'signatory'.[2] But it must also be remembered that when a state expresses its consent to be bound it does not necessarily mean that the treaty will enter into force for it at that time: that will depend on whether the treaty is already in force (for the states which have already consented to be bound) or whether further consents are needed to bring it into force. A state's consent may of course have the effect of bringing the treaty into force if it is the last one needed to do that.

However, this does not mean that a treaty will have no legal effects before it enters into force. Certain of its provisions have to apply from the moment it is adopted, such as those on authentication of the text, right to participate, entry into force and depositary functions (Article 24(4)).

Express provisions

A treaty enters into force in such manner and on such date as provided for in the treaty or as the negotiating states may agree (Article 24(1)). There are various ways:

(1) On a date specified in the treaty. The parties are free to specify a date later than that of signature, or even for the treaty to operate retrospectively. Because of

[1] *The Times*, 26 June 1998, on the Landmines Convention. [2] See p. 91 above.

the difficulties in getting multilateral treaties ratified, it is unusual for them to specify a date for entry into force. Inserting a specific date may serve a political purpose by encouraging states – or, perhaps more to the point, their parliaments – to meet the deadline. Such a provision is therefore usually subject to a proviso. Article 16 of the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 provided that it would enter into force on 1 January 1989, but only if by then it had been ratified by eleven states or regional economic integration organisations, and certain other conditions had been satisfied.[3]

(2) On signature *only* by all the negotiating states. This is common for bilateral treaties which do not have to be approved by parliaments (see Appendix B), and is sometimes found in treaties between a few states (plurilateral treaties) even when the subject is of major importance, such as the Dayton Agreement 1995[4] or the London Agreement 1945, which established the Nuremberg Tribunal.[5]

(3) On ratification by both (or all) signatory states. If a multilateral treaty requires ratification by all the negotiating states, entry into force may be expressed to be on, or at a specific time after, the deposit of the last instrument of ratification. Article 45(1) of the Europol Convention 1995 provides that:

> This Convention shall enter into force on the first day of the month following the expiry of a three-month period after the notification [that it has completed its constitutional requirements] by the Member State which, being a member of the European Union *on the date of adoption by the Council of the Act drawing up this Convention*, is the last to fulfill that formality.[6]

This apparently elaborate formula is essential. First, it ensures that the treaty cannot enter into force until all EU Member States have consented to be bound. Secondly, it has the effect of excluding from that calculation any *new* Member States. Since the treaty gives them the right to accede at any time, without the emphasised words the entry into force of the treaty could be delayed for many years if new states join the EU before all the Member States at the time of the adoption of the treaty have consented to be bound. Thirdly, without the special formula, the treaty might not enter into force at all if not all new Member States were to accede. Some non-EU treaties fall into this trap.[7] The alternative is for the treaty to prohibit accessions by new Member

[3] 1522 UNTS 3 (No. 26369); ILM (1987), p. 1550. See also the Maastricht Treaty 1992, Title VII, Article R (UKTS (1994) 12). [4] ILM (1996), p. 75. See p. 79 above.
[5] 82 UNTS 279. [6] (UK) European Communities Series No. 13 (1995), Cm 3050.
[7] Cf. Article 4 of Protocol No. 11 to the European Convention on Human Rights (ILM (1994), p. 960). Similar problems can occur with amendments: see p. 218 below.

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States until the treaty is in force, or not to count their accession for the purpose of entry into force. But the former may not be feasible politically.

(4) Conditional on the signature (or, more usually, ratification) of certain states specified by number, name or category. The Nuclear Non-Proliferation Treaty 1968 provided for entry into force after ratification by forty signatory states, including ratification by the three depositary states, the Soviet Union, the United Kingdom and the United States.[8] The entry into force of the 1984 Protocol to the Convention on Long-Range Transboundary Air Pollution (EMEP) required ratification by nineteen states and organisations within the geographical scope of the Protocol which, being Europe, meant that the instruments deposited by Canada and the United States before the entry into force of the Protocol did not count for that purpose.[9] The Comprehensive Nuclear-Test-Ban Treaty 1996 cannot enter into force until the forty-four states named in Annex 2 to the Treaty have ratified.[10]

(5) On signature (or, more usually, ratification) by a minimum number of the negotiating states (see, for example, Article 84(1) of the Vienna Convention itself). The minimum number for a multilateral treaty is two. The four Geneva Conventions of 1949, their Additional Protocols of 1977,[11] and other treaties on international humanitarian law, require only two ratifications to enter into force. In those cases, although the treaty will at first bind only the two states, this reflects the nature of such treaties, the purpose of which is to protect military personnel of the parties to a conflict and civilians. A humanitarian law treaty therefore creates, in effect, a network of 'bilateral treaties' between the parties. But for most multilateral treaties the number for entry into force is larger, often much more than the thirty-five needed to bring the Vienna Convention into force. The UN Convention on the Law of the Sea 1982 (UNCLOS) needed sixty ratifications, as does the Statute of the International Criminal Court 1998.[12] A large number is usually chosen to ensure that the treaty receives a broad measure of acceptance before it enters into force. This will be important if it requires parties to make significant financial contributions to a new international organisation. In the case of UNCLOS, this aim was not realised because the industrialised states did not ratify until after entry into force, and then only after UNCLOS had been effectively amended by the 1994 Implementation Agreement.[13] The 1984

[8] 729 UNTS 161 (No. 10485); ILM (1968), p. 809; UKTS (1970) 88; TIAS 6839. For the reason why there are three depositaries, see p. 263 below.

[9] ILM (1988), p. 701; UKTS (1988) 75: see Article 10(1)(a). See also Article 6 of the UNCLOS Implementation Agreement 1994 (ILM (1994), p. 1313; UKTS (1999) 82.

[10] ILM (1996), p. 1443. They include India, Pakistan and the United States.

[11] 75 UNTS 3 (No. 17512); ILM (1977), p. 1391; UKTS (1999) 29 and 30.

[12] ILM (1998), p. 1002.

[13] ILM (1994), p. 1313; UKTS (1999) 82. See pp. 90–1 above.

Protocol amending the Chicago Convention required 102 ratifications, and, not surprisingly, did not enter into force until 1998.[14] Certain treaties to which international organisations are parties, in particular regional economic integration organisations, such as the European Community, provide that, in addition to its Member States, the organisation can become a party in its own right, except that its instrument of ratification shall not be counted in addition to those deposited by its Member States.[15]

(6) As in 4 or 5 above, but the minimum number of states or organisations must also fulfil other conditions. These are often financial or economic, and designed to ensure that the treaty does not enter into force until the states which have a significant interest in the subject matter have ratified or, as in the case of commodity agreements, there is a balance between producing and consuming states. Article 10(1)(b) of the EMEP (see (4) above) imposed a further condition for entry into force: that the aggregate of the UN assessment rates for the European states which ratify had to exceed 40 per cent. The Montreal Protocol on Substances that Deplete the Ozone Layer 1987 had a similar provision, entry into force being dependent on eleven ratifications 'representing at least two-thirds of the 1986 estimated global consumption of the controlled substances [i.e., CFCs]'.[16] Since the Protocol did not define 'estimated global consumption', the UN Secretary-General, as depositary, notified the entry into force of the Protocol only after having obtained confirmation, in the form of data provided by the states concerned, that the necessary conditions for entry into force had been met.[17]

(7) On the exchange of instruments of ratification (bilateral treaty).

(8) On notification by each signatory state to the other (or others) of the completion of its constitutional requirements. This formula can be used even if the other state (or some of the other states) does not have to satisfy any such requirements, in which case the notification would be a mere formality. The notification is usually by third-person diplomatic note. Again, this is more common for bilateral treaties or multilateral treaties which are between only a few states.

(9) In the case of a treaty constituted by an exchange of notes, on the date of the reply note, though a further stage (such as in 8 above) is frequently added.

[14] ILM (1984), p. 705.

[15] See Article 305(1)(f) of, and Article 8 of Annex IX to, UNCLOS (ILM (1982), p. 1261; UKTS (1999) 81; and Article XI(2) of the FAO Compliance Agreement 1993 (ILM (1994), p. 968). Nor can the organisation and its member states usually have more votes in aggregate than the total votes of the member states (see p. 55, note 39, above).

[16] 1522 UNTS 3 (No. 26369); ILM (1987), p. 1550; UKTS (1990) 19. The deadline was met.

[17] See also Article 15 of the Bribery Convention 1997 (ILM (1998), p. 1). See further examples in *UN Depositary Practice*, paras. 226–32.

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(10) As in 9 above, but on a date earlier or later than that of the reply note.
(11) On a date to be agreed. The 1998 Netherlands–United Kingdom Agreement on a Scottish Trial in the Netherlands (for those accused of the Lockerbie bombing) provides that it shall enter force on a date to be agreed.[18]

No provision or agreement on entry into force

If the treaty has no express provision on entry into force, and there is no agreement about it between the negotiating states, the treaty will enter into force as soon as all those states have consented to be bound (Article 24(2)). The Iraq–United Nations Memorandum of Understanding 1998 (actually a treaty) had no provision for ratification or entry into force.[19] The agreement may be implicit. No provisions were needed in the 1995 treaty between Norway and the United Kingdom concerning the disposal of the 'Brent Spar' offshore installation since it contains only assurances by the United Kingdom about the eventual disposal of the installation.[20]

Date of entry into force

In the case of *multilateral* treaties it is usual to provide that the *date* of entry into force will be a specified number of days, weeks or months following the deposit of the last instrument of ratification which is needed to bring the treaty into force (see, for example, Article 84(1) of the Vienna Convention itself). The period may be of any length, but the normal range is from thirty days to twelve months. This breathing space gives the depositary time to notify the contracting states of the forthcoming entry into force. In addition, contracting states may need time to bring into effect implementing legislation which they have previously enacted (or even to enact it). It also allows time for other necessary preparations.

One must be careful in calculating the date of entry into force. If the period is thirty days following deposit of the last necessary instrument, the time runs from the day *after* the date of deposit. If that date is 14 January the treaty will enter into force on 13 February. If the period is one month, it will run from the date of deposit. If that is 14 January, the treaty will

[18] ILM (1999), p. 926; UKTS (1999)) 43; UN Doc. S/1995/795. It entered into force on 8 January 1999. See also p. 148 below. [19] ILM (1998), p. 501.
[20] UKTS (1995) 65. For the 1998 Brent Spar Treaty, see UKTS (1998) 46.

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Invalidity

> a matter upon which there exists abundant literary authority, a little diplomatic authority, and almost no judicial authority.[1]

Not much has changed since McNair made this dispiriting observation, except that the Convention has nine main articles on invalidity of treaties (Articles 46–53 and 64). It has to be said, however, that the subject is not of the slightest importance in the day-to-day work of a foreign ministry. The author does not recall during more than thirty years of practice a single serious suggestion that an existing treaty might be invalid. The International Law Commission was well aware that invalidity was a rarity, there being a natural presumption that a treaty is valid and its continuance in force being the normal state of things. Nevertheless, learned works continue to devote considerable space to the topic, which has a certain fascination for lawyers.[2] What follows is a short account, in which we can step back in time a little.

Violation of internal law on competence to conclude treaties

The overriding need for certainty in treaty relations is clearly reflected in the wording of Article 46, which provides that:

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

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

[1] McNair, p. 207, or duress. [2] Sinclair, pp. 159–81 and 203–26, contains a thorough account.

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The provision is expressed in negative form ('may not invoke . . . unless') to emphasise the exceptional character of the cases in which this ground might be invoked. There are a number of procedures in treaty-making, such as ratification, which have been specifically designed to enable a state to reflect fully before deciding whether or not to become a party, and to comply with any constitutional requirements. States are entitled to regard other states as having acted in good faith when its representatives express their consent to be bound.

Although not directly relevant, the judgment of the European Court of Justice in *France* v. *Commission*[3] is instructive. The Court held that the European Community (EC) had concluded a treaty with the United States in contravention of internal EC rules governing the competence of various EC organs to conclude treaties. However, the Court did not claim that the treaty was not binding on the EC in international law. Given the complexity of EC internal rules,[4] if the EC enters into a treaty in breach of those rules any internal irregularity is most unlikely to be manifest. It is therefore unlikely that the EC could invoke any rule of customary international law which might be reflected in Article 46, or rather the equivalent article in the 1986 Convention.[5]

If a state seeks to invoke constitutional defects after the treaty has entered into force and after the state has been carrying it out, it will be estopped[6] (i.e., prevented) from asserting the invalidity of its consent to be bound.

Article 46 must be distinguished from Article 27, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[7] That rule applies unless the treaty has been held to be invalid.

Violation of specific restrictions on authority to express consent

An omission by the representative of a state to observe a specific (internal) restriction on his authority to express the consent of his state to be bound may not be invoked as invalidating that consent unless the restriction was

[3] [1994] ECR V-3641. [4] See pp. 55–6 above.
[5] The EC is not party to the 1986 Convention, but the European Court of Justice has held that the rules in the 1969 Convention apply to the EC to the extent that they reflect rules of customary international law: *Racke* (Case C-162/96; ILM (1998), p. 1128) AJIL (1999) 205–9.
[6] See p. 45 above. [7] See p. 144 above.

ANNEX 5:

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

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United Nations S/2000/915

Security Council

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

I. Introduction

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

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

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

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

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

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

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

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specific ity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

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

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

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

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

II. Nature and specificity of the Special Court

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

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

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

III. Competence of the Special Court

A. Subject-matter jurisdiction

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

1. Crimes under international law

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

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

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

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

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

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

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

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

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

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

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

(c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

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

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

B. Temporal jurisdiction of the Special Court

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

1. The amnesty clause in the Lomé Peace Agreement

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

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

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

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

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal juris diction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

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

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

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

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

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

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

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

C. Personal jurisdiction

1. Persons "most responsible"

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

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

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

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

2. Individual criminal responsibility at 15 years of age

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

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

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

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

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

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

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

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

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

IV. Organizational structure of the Special Court

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

A. The Chambers

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

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

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

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

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

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

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

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

B. The Prosecutor

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

C. The Registrar

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

V. Enforcement of sentences

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

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

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

VI. An alternative host country

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

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

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

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

VII. Practical arrangements for the operation of the Special Court

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

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

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

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

1. Personnel and equipment

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

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

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

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

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

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

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

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

2. Premises

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

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

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

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

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

B. Expertise and advice from the two International Tribunals

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

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

C. Support and technical assistance from UNAMSIL

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

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

VIII. Financial mechanism of the Special Court

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

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

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

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

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

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

IX. Conclusion

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

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

Notes

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

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

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

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

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

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

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

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

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

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

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

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

Annex

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

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

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

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

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

Article 1
Establishment of the Special Court

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

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

Article 2
Composition of the Special Court and appointment of judges

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

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

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

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

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

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

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

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

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

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

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

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

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

Article 4
Appointment of a Registrar

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

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

Article 5
Premises

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

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

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

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

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

Article 8
Funds, assets and other property

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

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

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

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

Article 9
Seat of the Special Court

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

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

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

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

(c) Institute legal proceedings;

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

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

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

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

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

(c) Inviolability for all papers and documents;

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

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

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

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

Article 12
Privileges and immunities of international and Sierra Leonean personnel

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

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

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

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

(a) Immunity from immigration restriction;

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

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

Article 13
Counsel

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

2. In particular, the counsel shall be accorded:

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

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

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

Article 14
Witnesses and experts

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

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

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

Article 16
Cooperation with the Special Court

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

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

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

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

Article 18
Practical arrangements

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

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

Article 19
Settlement of disputes

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

Article 20
Entry into force

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

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

For the United Nations

For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

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

Article 1
Competence of the Special Court

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

Article 2
Crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

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

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

(i) Other inhumane acts.

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

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

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

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

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

(f) Pillage;

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

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

Article 4
Other serious violations of international humanitarian law

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

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

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

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

Article 5
Crimes under Sierra Leonean law

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

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

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

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

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

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

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

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

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

Article 6
Individual criminal responsibility

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

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

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

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

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

Article 7
Jurisdiction over persons of 15 years of age

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

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

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

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

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

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

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

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

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

Article 8
Concurrent jurisdiction

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

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

Article 9
Non bis in idem

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

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

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

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

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

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

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

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

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

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

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

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

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

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

Article 13
Qualification and appointment of judges

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

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

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

Article 14
Rules of Procedure and Evidence

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

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

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

Article 15
The Prosecutor

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

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

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

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

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

Article 16
The Registry

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

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

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

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

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

Article 17
Rights of the accused

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

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

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

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

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

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

(c) To be tried without undue delay;

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

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

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

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

Article 18
Judgement

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

Article 19
Penalties

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

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

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

Article 20
Appellate proceedings

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

(a) A procedural error;

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

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

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

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

Article 21
Review proceedings

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

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

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

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

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

Article 23
Pardon or commutation of sentences

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

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

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

ANNEX 6:

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

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AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Seventh revised edition

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The attitude of national legal systems to international law

The attitude of municipal law to international law is much less easy to summarize than the attitude of international law to municipal law. For one thing, the laws of different countries vary greatly in this respect. If one examines constitutional texts, especially those of developing countries which are usually keen on emphasizing their sovereignty, the finding is that most states do not give primacy to international law over their own municipal law.[10] However, this does not necessarily mean that most states would disregard international law altogether. Constitutional texts can form a starting point for analysis. What also matters is internal legislation, the attitude of the national courts and administrative practice, which is often ambiguous and inconsistent. The prevailing approach in practice appears to be dualist, regarding international law and internal law as different systems requiring the incorporation of international rules on the national level. Thus, the effectiveness of international law generally depends on the criteria adopted by national legal systems.

The most important questions of the attitude of national legal systems to international law concern the status of international treaties and of international customary law, including general principles of international law. The analysis of municipal law in relation to the European Community is a special area beyond the scope of the following.[11]

Treaties

The status of treaties in national legal systems varies considerably.[12] In the United Kingdom, for example, the power to make or ratify treaties belongs to the Queen on the advice of the Prime Minister, a Minister of the Crown, an Ambassador or other officials, though by the so-called Ponsonby Rule, as a matter of constitutional convention, the Executive will not normally ratify a treaty until twenty-one parliamentary days after the treaty has been laid before both Houses of Parliament. Consequently, a treaty does not automatically become part of English law; otherwise the Queen could alter English law without the consent of Parliament, which would be contrary to the basic principle of English constitutional law that Parliament has a monopoly of legislative power. There is an exception concerning treaties regulating the conduct of warfare[13] which is probably connected with the rule of English constitutional law which gives the Queen, acting on the advice of her ministers, the power to declare war without the consent of Parliament. If a treaty requires changes in English law, it is necessary to pass an Act of Parliament in order to bring English law into conformity with the treaty. If the Act is not passed, the treaty is still binding on the United Kingdom from the international point of view, and the United Kingdom will be responsible for not complying with the treaty.

An Act of Parliament giving effect to a treaty in English law can be repealed by a subsequent Act of Parliament; in these circumstances there is a conflict between international law and English law, since international law regards the United Kingdom as still bound by the treaty, but English courts cannot give effect to the treaty.[14] However, English courts usually

10 See A. Cassese, Modern Constitutions and International Law, *RdC* 192 (1985-III), 331 *et seq.*

11 See F. Caportorti, European Communities: Community Law and Municipal Law, *EPIL* II (1995), 165–70. See Chapter 6 below, 95–6.

12 See, for example, F.G. Jacobs/S. Roberts (eds), *The Effect of Treaties in Domestic Law* (UK National Committee of Comparative Law), 1987; M. Duffy, Practical Problems of Giving Effect to Treaty Obligations – The Cost of Consent, *AYIL* 12 (1988/9), 16–21; W.K. Hastings, New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi, *ICLQ* 38 (1989), 668 *et seq.*; R. Heuser, Der Abschluß völkerrechtlicher Verträge im chinesischen Recht, *ZaöRV* 51 (1991), 938–48; Zh. Li, Effect of Treaties in Domestic Law: Practice of the People's Republic of China, *Dalhouse LJ* 16 (1993), 62–97; Interim Report of the National Committee on International Law in Municipal Courts [Japan], *Jap. Ann. IL* 36 (1993), 100–62; T.H. Strom/P. Finkle, Treaty Implementation: The Canadian Game Needs Australian Rules, *Ottawa LR* 25 (1993), 39–60; G. Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen am Beispiel der Rechtsprechung der Gerichte Deutschlands, Österreichs, der Schweiz und der Vereinigten Staaten von Amerika*, 1993; K.S. Sik, *The Indonesian Law of Treaties 1945–1990*, 1994; C. Lysaght, The Status of International Agreements in Irish Domestic Law, *ILT* 12 (1994), 171–3; M. Leigh/M.R. Blakeslee (eds), *National Treaty Law and Practice*, 1995; P. Alston/M. Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty*, 1995.

13 See Lord McNair, *The Law of Treaties*, 1961, 89–91, and *Porter v. Freudenberg*, [1915] 1 KB 857, 874–80.

14 *Inland Revenue Commissioners v. Collco Dealings Ltd*, [1962] AC 1. Would English courts apply subsequent Acts of Parliament which conflicted with the European Communities Act 1972? See E.C.S. Wade/W. Bradley, *Constitutional and Administrative Law*, 10th edn 1985, 136–8.

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try to interpret Acts of Parliament so that they do not conflict with earlier treaties made by the United Kingdom.[15]

As far as the United Kingdom is concerned, there is a very clear difference between the effects of a treaty in international law and the effects of a treaty in municipal law; a treaty becomes effective in international law when it is ratified by the Queen, but it usually has no effect in municipal law until an Act of Parliament is passed to give effect to it. In other countries this distinction tends to be blurred. Most other common law countries, except the United States, as will be discussed below, follow the English tradition and strictly deny any direct internal effect of international treaties without legislative enactment. This is the case, for example, in Canada and India.[16] The House of Lords recently reaffirmed this rule in 1989 in the *International Tin* case, in which Lord Oliver of Aylmerton noted:

> as a matter of constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[17]

In the vast majority of democratic countries outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously. For instance, the Constitution of the United States provides that the President 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur' (Article II (2)). Treaties ratified in accordance with the Constitution automatically become part of the municipal law of the United States. However, this statement needs some qualification.[18] Under the US Constitution, treaties of the Federal Government (as distinct from the states) are the 'supreme Law of the Land', like the Constitution itself and federal law (Article VI). Cases arising under international treaties are within the judicial power of the United States and thus, subject to certain limitations, within the jurisdiction of the federal courts (Article III (2)). International agreements remain subject to the Bill of Rights and other requirements of the US Constitution and cannot be implemented internally in violation of them. If the United States fails to carry out a treaty obligation because of its unconstitutionality, it remains responsible for the violation of the treaty under international law.

A recent controversial decision of the US Supreme Court was given in the *Alvarez-Machain* case. A Mexican doctor accused of torturing an American narcotics agent was kidnapped in Mexico by US agents and brought to trial in the United States. The Court held that this action was not covered by the terms of the 1978 US–Mexico Extradition Treaty, because its language and history would 'not support the proposition that the Treaty prohibits abductions outside of its terms'.[19] This awkward

15 *Inland Revenue Commissioners v. Collco Dealings Ltd*, [1962] AC 1 (*obiter*). This rule is not limited to treaties which have been given effect in English law by previous Acts of Parliament. See *R. v. Secretary of State for Home Affairs, ex p. Bhajan Singh*, [1975] 2 All ER 1081; *R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi*, [1976] 3 All ER 843, 847; and *Pan-American World Airways Inc. v. Department of Trade* (1975), *ILR*, Vol. 60, 431, at 439. See also P.J. Duffy, English Law and the European Convention on Human Rights, *ICLQ* 29 (1980), 585–618; A.J. Cunningham, The European Convention on Human Rights, Customary International Law and the Constitution, *ICLQ* 43 (1994), 537–67.

16 See M.W. Janis, *An Introduction to International Law*, 2nd edn 1993, 96.

17 *Australia & New Zealand Banking Group Ltd et al. v. Australia et al.*, House of Lords, judgment of 26 October 1990, *ILM* 29 (1990), 671, at 694; see Chapter 6 below, 94. On the interpretation of treaties see R. Gardiner, Treaty Interpretation in the English Courts Since *Fothergill v. Monarch Airlines* (1980), *ICLQ* 44 (1995), 620–9.

18 For details, see *Restatement (Third)*, Vol. 1, part III, ch. 2, 40–69; Janis, *op. cit.*, 85–94; H.A. Blackmun, The Supreme Court and the Law of Nations, *Yale LJ* 104 (1994), 39–49; A.M. Weisburd, State Courts, Federal Courts and International Cases, *Yale JIL* 20 (1995), 1–64.

19 *U.S. v. Alvarez-Machain*, *ILM* 31 (1992), 902, 112 S. Ct. 2188, 119 L. edn 2d 441 (1992), at 453. See Janis, *op. cit.*, 91–2. In the end the case against the Mexican doctor was dismissed by the federal trial judge. See also B. Baker/V. Röbe, To Abduct or To Extradite: Does a Treaty Beg the Question? The Alvarez-Machain Decision in U.S. Domestic Law and International Law, *ZaöRV* 53 (1993), 657–88; D.C. Smith, Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in *U.S. v. Alvarez-Machain*, *EJIL* 6 (1995), 1–31; M.J. Glennon, State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain*, *AJIL* 86 (1992), 746–56; M. Halberstam, In Defense of the Supreme Court Decision in *Alvarez-Machain*, *ibid.*, 736–46; L. Henkin, Correspondence, *AJIL* 87 (1993), 100–2.

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interpretation of the treaty by the majority of the Supreme Court shows a remarkable disrespect for international law and understandably provoked a strong protest by the government of Mexico, which demanded that the treaty be renegotiated.

Another complicating aspect, particularly under United States law, is the distinction between 'self-executing' and 'non-self-executing agreements'.[20] In essence, the distinction concerns the issue whether an agreement, or certain provisions thereof, should be given legal effect without further implementing national legislation and is relevant when a party seeks to rely on the agreement in a case before an American court. Moreover, it is important to note that most United States treaties are not concluded under Article II of the Constitution with the consent of the Senate, but are 'statutory' or 'congressional-executive agreements' signed by the President under ordinary legislation adopted by a majority of both the House of Representatives and the Senate. There are also treaties called 'executive agreements' which the President concludes alone without the participation of Congress.[21]

In the United States and in those countries following the legal traditions of continental Europe, treaties enjoy the same status as national statutes. This means that they generally derogate pre-existing legislation (the principle of *lex posterior derogat legi priori*), but are overruled by statutes enacted later. It is difficult, however, to generalize in this area in view of considerable national modifications to this rule.

Some constitutions even make treaties superior to ordinary national legislation and subordinate law, but rarely superior to constitutional law as such. The operation of this rule in practice depends on who has the authority to give effect to it. This may be reserved to the legislature, a political body, excluding any review by the courts. In other cases, where constitutional courts exist or where courts have the power of judicial review of legislative action, the situation is often different. There are also countries in which the authoritative interpretation of the meaning of international treaties is a privilege of the executive branch, to secure the control of the government over foreign affairs. To a certain extent this is also the case in France with the result that the power of the French courts is in effect curtailed to reject the validity of a national statute because of a conflict with an international treaty. Thus, the view that numerous countries following the model of the French legal system have recognized the priority of treaties is at least open to doubt.[22]

In the Netherlands the situation is somewhat peculiar. The Dutch Constitution of 1953, as revised in 1956, clearly provided that all internal law, even constitutional law, must be disregarded if it is incompatible with provisions of treaties or decisions of international organizations that are binding on all persons.[23] Although there is no system of judicial review of legislative acts in the Netherlands,[24] which in this respect follows the tradition of the United Kingdom, Dutch courts thus obtained the authority to overrule acts of Parliament, not on grounds of unconstitutionality, but on the ground that they may conflict with certain treaties or resolutions of international organizations. However, there is a safeguard built into constitutional procedures. The Dutch Parliament has to consent to treaties

20 The case law started in 1829 with Chief Justice John Marshall's decision in *Foster & Elam v. Neilson*, 27 US (2 Pet.) 253 (1829). See T. Buergenthal, Self-Executing and Non-Self-Executing Treaties in National and International Law, *RdC* 235 (1992-IV), 303–400; C.M. Vázquez, The Four Doctrines of Self-Executing Treaties, *AJIL* 89 (1995), 695–723 and the comment by M. Dominik, *AJIL* 90 (1996), 441.

21 See Janis, *op. cit.*, 92; L. Wildhaber, Executive Agreements, *EPIL* II (1995), 312–18.

22 See Partsch, *op. cit.*, 1195.

23 Netherlands Constitution, Article 66, as amended in 1956. See H.H.M. Sondaal, Some Features of Dutch Treaty Practice, *NYIL* 19 (1988), 179–257; H. Schermers, Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law, *Mich. JIL* 10 (1989), 266 *et seq.*

24 Article 120 of the Dutch Constitution provides: 'The constitutionality of acts of Parliament and treaties shall not be reviewed by the courts.'

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which conflict with the Constitution by a majority necessary for constitutional amendments. The new text of the 1983 Constitution retained this power of the courts in Article 94, but has given rise to some dispute as to whether it departs from the previous text as far as the relationship between international treaties and the Constitution is concerned.[25] The unusual, 'monist' Dutch openness to the internal effect of international law, not only in the case of treaties, may find some explanation in the fact that, as a small country with considerable global trading and investment interests, the Netherlands places more emphasis on the rule of law in international relations.

The strictly 'dualist' tradition of the former socialist countries has been to require a specific national legislative act before treaty obligations could be implemented and had to be respected by national authorities.[26] Thus, their courts were not required to decide on conflicts between treaty norms and municipal law, and international law could generally not be invoked before them or administrative agencies, unless there was an express reference to it in domestic law.[27]

With the constitutional reforms in Eastern Europe there have been some important changes. The new Russian Constitution of 1993, for example, contains the following revolutionary clause (Article 15(4)):

> The generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply.[28]

Although this clause is comparatively broad, because it includes not only treaties but also 'generally recognized principles and norms of international law', it does not give priority to these sources over the Constitution itself. What this means in practice and what the role of the new Constitutional Court of the Russian Federation in this respect will be, remain to be seen.[29] On 16 June 1995, the State Duma of the Russian Federation adopted a Federal Law on International Treaties[30] which replaced the 1978 Law on the Procedure for the Conclusion, Execution, and Denunciation of International Treaties of the former Soviet Union.[31]

Moreover, in a recent study of fifteen constitutions or draft constitutions of Central-Eastern European States, Eric Stein concludes that

> most incorporate treaties as an integral part of the internal order, and although this is not clear in all instances, treaties have the status of ordinary legislation. In five (probably seven) instances treaties are made superior to both prior and subsequent national legislation, while in three documents this exalted rank is reserved for human rights treaties only.[32]

In the end, the actual implementation of such provisions by the courts and administration will matter more than lofty constitutional texts.

Custom and general principles

There are some significant differences in the rules for the application of customary international law and general principles in municipal law as

25 Cassese, *op. cit.*, at 411, views the new text as 'a step backwards'. Dutch authors do not agree, see M.C.B. Burkens, The Complete Revision of the Dutch Constitution, *NILR* (1982), 323 *et seq.*; E.A. Alkema, Foreign Relations in the 1983 Dutch Constitution, *NILR* (1984), 307, at 320 *et seq.*; see also the study by E.W. Vierdag, *Het nederlandse verdragenrecht*, 1995. On recent developments see J. Klabbers, The New Dutch Law on the Approval of Treaties, *ICLQ* 44 (1995), 629–42.

26 See, e.g., Article 24 of the 1978 USSR Law of the Procedure for the Conclusion, Execution and Denunciation of International Treaties, *ILM* 17 (1978), 1115.

27 On the general lack (with the exception of the former German Democratic Republic) of constitutional provisions or general legislation on the effect of international law in the internal laws of the Comecon states, see K. Skubizewski, Völkerrecht und Landesrecht: Regelungen und Erfahrungen in Mittel- und Osteuropa, in W. Fiedler/G. Ress (eds), *Verfassungsrecht und Völkerrecht: Gedächtnisschrift für Wilhelm Karl Geck*, 1988, 777 *et seq.*

28 G.M. Danilenko, The New Russian Constitution and International Law, *AJIL* 88 (1994), 451–70. See also A. Kolodkin, Russia and International Law: New Approaches, *RBDI* 26 (1993), 552–7.

29 M.F. Brzezinski, Toward 'Constitutionalism' in Russia: The Russian Constitutional Court, *ICLQ* 42 (1993), 673 *et seq.*

30 Text in *ILM* 34 (1995), 1370 with an Introductory Note by W.E. Butler. See T. Beknazar, Das neue Recht völkerrechtlicher Verträge in Russland, *ZaöRV* 56 (1995), 406–26.

31 1978 USSR Law, *op. cit.*

32 E. Stein, International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?, *AJIL* 88 (1994), 427–50, at 447. See also E. Stein, International Law and Internal Law in the New Constitutions of Central-Eastern Europe, in *FS Bernhardt*, 865–84; V.S. Vereshchetin, New Constitutions and the Old Problem of the Relationship between International Law and National Law, *EJIL* 7 (1996), 29–41.

ANNEX 7:

Shaw, *International Law* (3rd edn., 1991) [Extract].

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INTERNATIONAL LAW

by

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THIRD EDITION



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Preface by Prudence Lovell

states members of an international organisation with separate personality could be rendered liable for the latter's debts.

If such a rule did exist, the question would then arise as to how that would be accepted or manifested in the context of municipal law. This, of course, would depend upon the precise content of such a claimed international rule and, as Kerr LJ noted, no such rule did exist in international law permitting action against member-states "in any national court".[46] It was also not possible for an English court to remedy the gap in international law by itself creating such a rule.[47] Nourse LJ, however, took a different position on this point, stating that "where it is necessary for an English court to decide such a question [i.e. an uncertain question of international law], and whatever the doubts and difficulties, it can and must do so".[48] This, with respect, is not and cannot be the case, not least because it strikes at the heart of the community-based system of international law creation.

Lord Oliver in the House of Lords judgment[49] clearly and correctly emphasised that

> It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.[50]

(b) *Treaties* [51]

As far as treaties are concerned, different rules apply as to their application within the domestic jurisdiction for very good historical and political reasons. While customary law develops through the evolution of state practice, international conventions are in the form of contracts binding upon the signatories. For a custom to emerge it is usual, though not always necessary, for several states to act in a certain manner believing it to be in conformity with the law. Therefore, in normal circumstances the influence of one particular

[46] *Ibid.*, p.1095; 80 *ILR*, p.109.
[47] *Ibid.*
[48] *Ibid.*, p.1118; 80 *ILR*, p.135.
[49] [1989] 3 All ER 523; 81 *ILR*, p.671.
[50] *Ibid.*, at 554; 81 *ILR*, p.715.
[51] See generally McNair, *The Law of Treaties*, 1961, pp.81-97 and Mann, "The Enforcement of Treaties by English Courts", 44 *Transactions of the Grotius Society*, 1958-9, p.29.

state is not usually decisive. In the case of treaties, the states involved may create new law that would be binding upon them irrespective of previous practice or contemporary practice. In other words, the influence of the executive is generally of greater impact where treaty law is concerned than is the case with customary law.

It follows from this that were treaties to be rendered applicable directly within the state without any intermediate stage after signature and ratification and before domestic operation, the executive would be able to legislate without the legislature. Because of this, any incorporation theory approach to treaty law has been rejected. Indeed, as far as this topic is concerned, it seems to turn more upon the particular relationship between the executive and legislative branches of government than upon any pre-conceived notions of international law.

One of the principal cases in English law illustrating this situation is the case of the *Parlement Belge*.[52] This involved a collision between this ship and a British tug, and the claim for damages brought by the latter vessel before the Probate, Divorce and Admiralty division of the High Court. The *Parlement Belge* belonged to the King of the Belgians and was used as a cargo boat. During the case, the Attorney-General intervened to state that the Court had no jurisdiction over the vessel as it was the property of the Belgian monarch and that further by a political agreement of 1876 between Britain and Belgium, the same immunity from foreign legal process as applied to warships should apply also to this packet boat. In discussing the case, the Court concluded that only public ships of war were entitled to such immunity and that such immunity could not be extended to other categories by a treaty without parliamentary consent. Indeed, it was stated that this would be "a use of the treaty-making prerogative of the Crown . . . without precedent, and in principle contrary to the law of the constitution".[53]

Thus it is that treaties cannot operate of themselves within the state, but require the passing of an enabling statute. The Crown in Britain retains the right to sign and ratify international agreements, but is unable to legislate directly. Before a treaty can become part of English law, an Act of Parliament is essential. This fundamental

[52] (1879) 4 PD 129.
[53] *Ibid.*, p.154.

proposition was clearly spelt out by Lord Oliver in the House of Lords decision in *Maclaine Watson* v. *Department of Trade and Industry*.[54] He noted that:

> as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[55]

It therefore followed that as far as individuals were concerned such treaties were *res inter alia acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations.[56] Such sentiments were also expressed by Lord Templeman[57] and thus constitute a major restatement of the English law position.

However, this rule does not apply to all treaties. Those relating to the conduct of war or cession of territory do not need an intervening act of legislation before they can be made binding upon the citizens of the country.[58] A similar situation exists also with regard to relatively unimportant administrative agreements which do not require ratification, providing of course they do not purport to alter municipal law. Such exceptions occur because it is felt that, having in mind the historical compromises upon which the British constitutional structure is founded, no significant legislative powers are being lost by Parliament. In all other cases where the rights and duties of British subjects are affected, an Act of Parliament is

[54] [1989] 3 All ER 523, 531; 81 *ILR*, pp.671, 684.

[55] *Ibid.*, at pp.544-45; 81 *ILR*, p.701.

[56] *Ibid.*

[57] *Ibid.*, at p.526; 81 *ILR*, p.676.

[58] See e.g. Brownlie, *op. cit.*, p.48; de Smith and Brazier, *Constitutional and Administrative Law*, 6th ed., 1989, pp.140-42 and Wade and Phillips, *Constitutional and Administrative Law*, 9th ed., 1977, pp.303-6. See also *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] AC 326, 347; 8 *ILR*, p.41; *Walker* v. *Baird*, [1892] AC 491; *Republic of Italy* v. *Hambro's Bank*, [1950] 1 All ER 430; *Cheney* v. *Conn*, [1968] 1 WLR 242; 41 *ILR*, p.421; *Porter* v. *Freudenberg*, [1915] 1 KB 857, 874-80 and McNair, *op. cit.*, pp.89-91.

necessary to render the provisions of the particular treaty operative within Britain.[59]

There is in English law a presumption that legislation is to be so construed as to avoid a conflict with international law. This operates particularly where the Act of Parliament which is intended to bring the treaty into effect is itself ambiguous. Accordingly, where the provisions of a statute implementing a treaty are capable of more than one meaning, and one interpretation is compatible with the terms of the treaty while others are not, it is the former approach that will be adopted. For, as Lord Diplock pointed out:

> Parliament does not intend to act in breach of international law, including therein specific treaty obligations.[60]

However, where the words of a statute are unambiguous the courts have no choice but to apply them irrespective of any conflict with international agreements.[61] Attempts have been made to consider treaties in the context of domestic legislation not directly enacting them, or as indications of public policy, particularly with regard to human rights treaties,[62] and it seems that account may be taken of them in seeking to interpret ambiguous provisions.[63]

[59] By virtue of the "Ponsonby rule" Parliament is informed of the terms of treaties to be ratified 21 days before ratification, 171 HC Deb., col.2001, 1 April 1924. This is regarded not as a binding rule, but as a constitutional usage: see Wade and Phillips, *op. cit.*, p.304.

[60] *Salomon* v. *Commissioners of Customs and Excise*, [1967] 2 QB 116, 143; *Post Office* v. *Estuary Radio Ltd*, [1968] 2 QB 740 and *Brown* v. *Whimster*, [1976] QB 297. See also *National Smokeless Fuels Ltd* v. *IRC*, *The Times*, 23 April 1986, p.36 and Lord Oliver in *Maclaine Watson* v. *Department of Trade and Industry*, [1989] 3 All ER 523, 545; 81 *ILR*, pp.671, 702.

[61] *Ellerman Lines* v. *Murray*, [1931] AC 126 and *IRC* v. *Collco Dealings Ltd*, [1962] AC 1. See Sinclair, "The Principles of Treaty Interpretation and their Application by the English Courts", 12 *ICLQ*, 1963, p.508 and Schreuer, "The Interpretation of Treaties by Domestic Courts", 45 *BYIL*, 1971, p.255. See also Mann, *Foreign Affairs in English Courts*, 1986, pp.97-114.

[62] See e.g. *Blathwayt* v. *Baron Cawley*, [1976] AC 397.

[63] See e.g. in the context of the European Convention on Human Rights, *R* v. *Secretary of State for the Home Department, ex p. Bhajan Singh*, [1975] 2 All ER 1081; 61 *ILR*, p.260; *R* v. *Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi*, [1976] 3 All ER 843; 61 *ILR*, p.267; *R* v. *Secretary of State for the Home Department, ex p. Phansopkar*, [1976] QB 606; 61 *ILR*, p.390; *Waddington* v. *Miah*, [1974] 1 WLR 683; 57 *ILR*, p.175; *Cassell* v. *Broome*, [1972] AC 1027; *Malone* v. *MPC*, [1979] Ch.344; 74 *ILR*, p.304; *R* v. *Secretary of State for the Home Department, ex p. Anderson*, [1984] 1 All ER 920 and *Trawnik* v. *Ministry of Defence*, [1984] 2 All ER 791. In *R* v. *Secretary of State for the Home Department, ex p. Brind*, [1990] 1 All ER, it was held that subordinate legislation and executive discretion did not fall into this category.

However, ministers are under no obligation to do this in reaching decisions.[64]

In the interpretation of international treaties incorporated by statute, the English courts have adopted a broader approach than is customary in statutory interpretation. In particular, recourse to the relevant *travaux préparatoires* may be possible.[65]

Lord Oliver in *Maclaine Watson* v. *Department of Trade and Industry*[66] has also emphasised that the conclusion of an international treaty is a question of fact and that while a treaty may be referred to as part of the factual background against which a particular issue arises, the legal results that flow from such a treaty in international law are not such questions of fact and are thus not justiciable before the English courts.

There are many reasons why certain issues may be non-justiciable before the English courts,[67] ranging from judicial propriety to act of state and state immunity situations, but whether the doctrine can or should be expressed quite so baldly may be questioned. There may indeed be situations where legal consequences will be deemed to flow from the existence and nature of particular unincorporated treaties.[68]

Reference should also be made to the growing importance of entry into the European Communities in this context. The case-law of the Communities demonstrates that fundamental rights are an integral part of the general principles of law, the observance of which the European Court of Justice seeks to ensure. The system provides that Community law prevails over national law and that the decisions of the European Court are to be applied by the domestic courts of the member-states. The potential for change through this route is, therefore, significant.[69]

[64] See e.g. *R* v. *Secretary of State for the Home Department, ex p. Fernandes,* [1984] 2 All ER 390.

[65] See *Buchanan* v. *Babco,* [1978] AC 141 and *Fothergill* v. *Monarch Airlines,* [1981] AC 251; 74 *ILR,* p.648. Compare in the latter case the restrictive approach of Lord Wilberforce, *ibid.,* p.278; 74 *ILR,* p.656 with that of Lord Diplock, *ibid.,* p.283; 74 *ILR,* pp.661-62. See also *Goldman* v. *Thai Airways International Ltd,* [1983] 3 All ER 693.

[66] [1989] 3 All ER 523, 545; 81 *ILR,* pp.671, 702.

[67] See further *infra,* p.128.

[68] See Kerr LJ, *Maclaine Watson* v. *Department of Trade and Industry,* [1988] 3 WLR 1033, 1075-76; 80 *ILR,* pp.49, 86-88.

[69] See e.g. *Nold* v. *EC Commission,* [1974] ECR 491, 508 and *Rutili* v. *Ministry of Interior of French Republic,* [1975] ECR 1219.

ANNEX 8:

4577th meeting of the Security-Council, 18 July 2002, U.N. Doc. S/PV.4577.

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United Nations S/PV.4577

Security Council

Fifty-seventh year

Provisional

4577th meeting

Thursday, 18 July 2002, 10 a.m.

New York

President:	Baroness Valerie Amos	(United Kingdom of Great Britain and Northern Ireland)
Members:	Bulgaria	Mr. Tafrov
	Cameroon	Mr. Tadjani
	China	Mr. Wang Yingfan
	Colombia	Mr. Franco
	France	Mr. Doutriaux
	Guinea	Mr. Fall
	Ireland	Mr. Ryan
	Mauritius	Mr. Koonjul
	Mexico	Mr. Aguilar Zinser
	Norway	Mr. Kolby
	Russian Federation	Mr. Leplinsky
	Singapore	Mr. Mahbubani
	Syrian Arab Republic	Mr. Wehbe
	United States of America	Mr. Williamson

Agenda

The situation in Africa

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room C-178.

02-48424 (E)

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The meeting was called to order at 10.20 a.m.

Adoption of the agenda

The agenda was adopted.

The situation in Africa

The President: I should like to inform the Council that I have received letters from the representatives of Denmark, Japan, Morocco and Sierra Leone, in which they request to be invited to participate in the discussion of the item on the Council's agenda. In accordance with the usual practice, I propose, with the consent of the Council, to invite those representatives to participate in the discussion without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

On behalf of the Council, I extend a warm welcome to His Excellency Mr. Momodu Koroma, Foreign Minister of Sierra Leone.

At the invitation of the President, Mr. Koroma (Sierra Leone) took a seat at the Council table; Ms. Løj (Denmark), Mr. Motomura (Japan) and Mr. Bennouna (Morocco) took the seats reserved for them at the side of the Council Chamber.

The President: In accordance with the understanding reached in the Council's prior consultations, and in the absence of objection, I shall take it that the Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Mr. Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations.

It is so decided. I invite Mr. Guéhenno to take a seat at the Council table.

In accordance with the understanding reached in the Council's prior consultations, and in the absence of objection, I shall take it that the Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Ms. Carolyn McAskie, Deputy Emergency Relief Coordinator.

It is so decided. I invite Ms. McAskie to take a seat at the Council table.

In accordance with the understanding reached in the Council's prior consultations, and in the absence of objection, I shall take it that the Security Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Mr. Ivan Šimonović, President of the Economic and Social Council.

It is so decided. I invite Mr. Šimonović to take a seat at the Council table.

I should like to inform the Council that I have received a letter dated 15 July 2002 from the Permanent Representative of the United Kingdom to the United Nations that reads as follows:

> "I have the honour to request that the Security Council extend an invitation to Mr. Sylvian Ngung, Deputy Permanent Observer of the African Union to the United Nations, to address the Council under rule 39 of the provisional rules of procedure of the Security Council during its consideration of the Mano River Union on 18 July."

That letter will be published as a document of the Security Council under the symbol S/2002/761.

If I hear no objection, I shall take it that the Council agrees to extend an invitation under rule 39 to Mr. Sylvian Ngung.

It is so decided. I invite Mr. Ngung to take the seat reserved for him at the side of the Council Chamber.

The President: The Security Council will now begin its consideration of the item on its agenda. The Council is meeting in accordance with the understanding reached in its prior consultations.

That concludes the formal opening of this Security Council meeting. What I would like to do now is just to briefly explain the format of today's workshop.

The workshop is divided into three parts. First of all, I am honoured to welcome Secretary-General Kofi Annan, who will open the workshop. Then the Foreign Minister of Sierra Leone and the Foreign Minister of Guinea will speak. After this introductory session, we shall move on to the first topic of the workshop, which is "Lessons learned in Sierra Leone". Two keynote speakers will address us, after which members of the Council and invited speakers will take the floor according to the speakers' list before us. I will encourage everyone to keep their introductory remarks brief, because what I would really like to facilitate this

morning and this afternoon is plenty of time for real debate, discussion and exchange of views.

Today is about learning the lessons from Sierra Leone, but it is also about giving the Security Council an opportunity to look forward and to think about the ways in which we can use the lessons we have learned in Sierra Leone, to apply them in other parts of Africa, and also to reflect on what we need to do to encourage regional peace in the Mano River Union. I hope you will forgive me if today I am a more interactive and informal chair than is normal for Security Council meetings. I hope that a more informal style will facilitate the kind of debate and discussion that is more normal in a seminar format. On that basis, I hope you will also forgive me if, if any of you begin to run overtime, I respectfully ask you to keep your remarks brief. I will do my best to do that in as charming a way as possible.

The afternoon session will focus on the way forward for the Mano River Union and will have exactly the same format. I shall endeavour to end the workshop at 6 p.m. by summing up some of the main points that will have been made and by indicating, I hope, some kind of action plan that will take us forward. To facilitate the discussion, I would like to make a few introductory remarks, but I will keep them brief, to try to give some kind of lead for the rest of the day.

I think it is very important that we acknowledge that the international community has brought peace to Sierra Leone. Just two years ago it looked as if all the efforts that we were making in Sierra Leone were on the brink of collapse, and the Revolutionary United Front (RUF) controlled half of Sierra Leone, including the diamond fields. But now we have a Sierra Leone that is stable and democratic; peaceful elections were held in May; and the United Nations Mission in Sierra Leone (UNAMSIL) is carrying out its mandate confidently and effectively. What we want to see is that peaceful situation enshrined so that the fragile peace that we now have is not disrupted.

A lot remains to be done. There are enormous post-conflict challenges. We need to manage the transition from peacekeeping to peace-building. And we need to ensure that the international community's investment is not wasted. So the objectives that we have set ourselves today are to learn the lessons from the United Nations experience in Sierra Leone that might be relevant to other conflict situations, to consider how the United Nations can focus more on peace-building in Sierra Leone, and to examine what more the United Nations can do to help reduce subregional instability and end fighting in Liberia.

Others will talk in more detail about the lessons we have learned from Sierra Leone, but I think the key issues are that conflict is complex and that there are no easy solutions. In learning the lessons from Sierra Leone, I hope that we will be honest and as open as possible about where we think we did the right thing, as well as where we think we made mistakes.

With respect to the situation in the Mano River Union, it is a region that is inherently unstable and where there has been a cycle of conflict, with significant refugee flows between countries. What we need to do today is to look at ways in which we can work with the countries in the Mano River Union to support a regional approach, but also to think about how the United Nations can raise its profile, particularly in the context of the crisis in Liberia, and facilitate and coordinate a peace process. As I said, I will say more as the day progresses. But I would like to stop there.

I have great pleasure in asking the Secretary-General to make some opening remarks.

The Secretary-General: Madam President, let me begin by welcoming you to United Nations Headquarters. I am very glad that you are with us today as we review the situation in Africa and in the Mano River subregion, and the lessons to be learned from our experiences in Sierra Leone. Indeed, if the prospects for Sierra Leone look so much more promising today than they did two years ago, that is in large measure due to the timely intervention by your own country, which helped to stabilize the situation. I too will be very brief, because I see that the head of the Department of Peacekeeping Operations is joining the Council in this seminar, and if I say too much, he either will have to repeat what I have said or will have nothing to say.

I think, Madam, that your initiative today in organizing a workshop on lessons learned in Sierra Leone and on how to develop a coordinated approach to the situation in that part of Africa is no less timely, and is extremely welcome. It comes at a critical juncture, when the United Nations Mission in Sierra Leone (UNAMSIL) is about to begin a new phase of its

operations there but when, at the same time, the escalating conflict in Liberia threatens to destabilize the whole area.

The United Nations peacekeeping experience in Sierra Leone offers invaluable lessons, not only because of the success achieved so far but also, particularly, because of the trials encountered in the early stages of the Mission and how they were dealt with. The combination of early command-and-control challenges experienced by the Mission, mistakes made in taking over from a subregional peacekeeping operation, lack of adequate preparation and an attempt to implement an ambitious mandate without adequate resources resulted in a costly crisis in May 2000. Lessons were learned the hard way from that tragic experience. But, thank goodness, the international community did not give up.

The Security Council, the Secretariat and the troop contributors, as well as regional partners and individual Member States — in particular, the United Kingdom — took swift concerted action to correct the situation. I think that one of the other main lessons we learned from this is that when we get into these operations — in these fluid and ambiguous situations — we have to be prepared for the unpredictable. Indeed, we should go in prepared for developments on the ground and have the stamina and the will to stay the course. I think that in Sierra Leone we did this. It holds lessons for us in other areas, too. Therefore, it is a question of effective preparation, adequate resources, enough analysis and information to anticipate how the crisis is likely to develop, and the resources and political will to stay the course until we have achieved our objectives.

The President: I thank you, Mr. Secretary-General, for not only setting out so briefly some of the challenges that faced us in Sierra Leone but also for doing it with such style.

The next speaker on my list is the Foreign Minister of Sierra Leone, on whom I now call.

Mr. Koroma (Sierra Leone): I would like to thank the United Kingdom Government for its initiative in convening this meeting in the form of a workshop. We are grateful that it will provide an opportunity for an interactive discussion and an exchange of views on the situation in the Mano River Union subregion.

Madam President, if you will allow me, may I take this opportunity to recognize the presence of the Secretary-General. I bring you greetings, Sir, from His Excellency President Alhaji Ahmad Tejan Kabbah, and I thank you for your statement during our inaugural state opening of Parliament.

This meeting is very timely. It comes at the end of a historic and successful phase in the search for peace and stability not only in the Mano River Union countries but also in the West African subregion as a whole. I refer to the situation in my country, Sierra Leone, where we have witnessed the end of a brutal war, the successful disarmament and demobilization of ex-combatants under the auspices of the leadership of the United Nations Mission in Sierra Leone (UNAMSIL) and the holding of a violence-free and transparent election. Secondly, this meeting is timely because we can see patches of dark clouds floating around the radiance of the success we are celebrating in Sierra Leone. This is why we are delighted that the subject of the second session of this workshop is "The way forward: a coordinated Mano River Union action plan".

The United Nations peace mission in Sierra Leone is the largest, but certainly not the first, undertaken by the Organization. It emerged and developed from more than four decades of experience by the United Nations in the deployment of troops and observers wearing the blue helmets of the United Nations to help maintain international peace and security. It benefited from the mistakes and successes of other peace operations.

However, the United Nations peace mission in Sierra Leone was, in many ways, unique. It had its own specific characteristics. And here I believe lies the first lesson learned in UNAMSIL. The Mission in Sierra Leone has taught us that, in deciding to deploy a peace operation, the United Nations should take into account the particular circumstances of the conflict it is about to help manage or contain; the political climate of the area surrounding the theatre of operation; and the capacity or capability of regional and subregional organizations to perform peacekeeping activities — the role of the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) and its relations with the Security Council come into focus here. The United Nations should also take into consideration certain unique circumstances, such as the humanitarian dimension of the conflict, the role of

natural resources in fuelling the conflict, the interaction between the Secretariat and troop-contributing countries and, of course, the special role of certain countries. By this, I mean, in our case, the role of the United Kingdom Government in assisting the United Nations deployment in Sierra Leone.

Sierra Leone has over the years tested the capacity of the United Nations to operate large and complex peace operations, ranging from the disarmament and demobilization of ex-combatants, the facilitation of an electoral process and the establishment of a unique hybrid judicial process in addressing the question of impunity, which comprises the Special Court and the Truth and Reconciliation Commission (TRC), each with its own specific mandate. The Truth and Reconciliation Commission, for example, is a quasi-judicial non-punitive institution, whereas the Special Court operates under a dual judicial system that will indict and judge those persons who bear the greatest responsibility for war crimes, genocide and crimes against humanity.

The United Nations Mission in Sierra Leone, for all intents and purposes, has lived up to expectation in the discharge of its mandate. Suffice it to say that UNAMSIL's success did not come easy. There were many challenges. The uniqueness of the peace operations in Sierra Leone reflects the links among peacekeeping, peace-building, good governance, security and post-conflict concerns; the scope of United Nations offices in Sierra Leone also clearly reflects these concerns. The Mission further recognizes the cooperation between the United Nations and other regional and bilateral partners that are providing support. Examples of such bilateral and United Nations cooperation are the training of Sierra Leone's military by the United Kingdom Government and the training of our police force. The success of UNAMSIL in achieving its objectives in Sierra Leone is due in large part to its acting in concert with those partners, and this could augur well for future United Nations peace operations in similar situations in countries of conflict elsewhere.

Having spoken about the lessons that the United Nations has learned, we should remind ourselves that it is important that these lessons be applied properly in the subregion because the subregion itself is still a region of conflict. The gains achieved in Sierra Leone will be temporary without security and stability in the subregion. The current situation in the subregion is indeed cause for concern, as the escalating violence in Liberia overshadows the recent success in Sierra Leone.

Neither should we forget that before the conflict in Liberia escalated there was conflict and much fighting in Guinea. The arms, the ammunition and those who were fighting in Guinea cannot be easily wished away. They are lurking somewhere, in some corner of the subregion, and they have not been located yet.

The droves of refugees now swarming into our border regions, escaping the violence and its attendant consequences in Liberia, no doubt give rise to speculation among members of the international community that conflict will re-emerge in Sierra Leone. But the mobilization of vast amounts of financial, material, technological and human resources to secure peace for our country must be seen by members of the international community as an act of faith in our nation's survival. They must not lose hope in us as we strive to consolidate those gains. Our President, Alhaji Ahmad Tejan Kabbah, has not lost sight of the need to hold continuous consultations with other heads of State of the subregion, namely those of Guinea and Liberia, concerning the peaceful resolution of the crisis in the region, because the fact of the matter is that crisis and conflict in one of the countries indirectly affect every other country.

One would therefore be tempted to ask at this point whether the vast amount of resources that have been committed to Sierra Leone would be wasted simply because we ignored the conflict in the subregion. One would also be tempted to ask whether the subregion itself is not a candidate for the testing of the lessons that the United Nations has learned in Sierra Leone.

The pacts and protocols initially signed among the member States of the Mano River Union to enhance the Union's capability in promoting social, economic and political integration became inoperative during the periods of conflict in Liberia and in Sierra Leone. The ideal would be to revive the defunct institutions of the Union and effectively and efficiently to implement the existing protocols, especially those relating to security and defence. The deterioration of the security situation led to another meeting of heads of State of the Mano River Union subregion, held in February 2002 at Rabat, Morocco. The conclusions adopted in the communiqué

have not been effectively implemented. Nor have we been able to revive the institutions of the Union effectively, simply because we lack the resources to do so.

Indeed it is now widely accepted that peace and stability in the Mano River Union area is a key factor for peace, stability and development in the West African subregion. Modalities have being worked out by countries members of the Mano River Union with a view to revitalizing the Union and to expanding its scope to include cooperation in the areas of politics, security, foreign affairs and defence. The signing on 9 May 2000 of the Fifteenth Protocol to the Mano River Union Declaration on Defence and Security has engendered a greater degree of confidence-building and security within the Union. Further initiatives structured to forge dialogue and cooperation among the States members of the Mano River Union have also been recommended by both the African Union and the subregional organization, the Economic Community of West African States. Sierra Leone supports these measures in principle, but what is lacking, of course, is the resources to fully implement the measures that can put the Union back in place.

I would like to conclude by saying that it must be noted that the countries of the subregion are faced with enormous financial constraints. Those constraints prevent the countries of the subregion from easily reviving the Union. My appeal is that this workshop consider ways in which the Mano River Union situation can be studied carefully with a view to securing cooperation among the United Nations, regional organizations and the countries of the Mano River Union subregion in order to ensure that there is support and assistance from the international community to help build a Union, which, of course, would take over the role of whatever organization is currently operating in the subregion when that organization leaves.

The President: Mr. Minister, thank you for your very thoughtful analysis of the issues. Could I ask you two questions? First, could you say where you think mistakes on Sierra Leone were made by the international community in the years running up to the crisis and also in the last couple of years? As well, in your statement, you mentioned the particular situation of refugees and the ways in which you feel that this can continue to fuel instability. Could you say something about what you think the international community should be doing to support Sierra Leone and the other countries in the region with respect to the situation of refugees?

Mr. Koroma (Sierra Leone): I believe the situation in Sierra Leone is not one in which you can easily single out mistakes, because it was a very fluid situation, a situation that was evolving as time went on. We are all aware of the teething problems that the United Nations encountered. One would say that this was probably one of the mistakes: it underestimated the extent of the combatants, their ability to cause havoc and their disregard for international protocols and regulations, except if they were forced to comply. One would say that if there was a mistake, that was the first. But we consider that to be a teething problem for the United Nations.

Afterwards, I think that the United Nations evolved a very comprehensive framework. It looked at the issue not only as an isolated security issue but also as a governance issue. There is the fact that diamonds were extensively considered by the United Nations; the fact that the travel ban was imposed on many people who were involved in the conflict in Sierra Leone; and the fact that the arms situation in the subregion was looked at: perhaps that is another area that needs careful consideration. Sierra Leone should not be treated as an island in these circumstances. We should look a little beyond Sierra Leone and try to see what we can do, using the lessons we have learned in Sierra Leone, to ensure that there is stability in the region. We all know that the boundaries that separate African countries are to a large extent artificial. So, apart from the boundaries being porous, the people are virtually the same in most of those countries. Therefore, containing conflict in one country alone might not be the answer.

That leads me to the second question: what can we do to ameliorate the refugee situation? First of all, Sierra Leone lost all its infrastructure. It does not have the money to contain the situation right now. Apart from the fact that we did not bring all our refugees back to Sierra Leone after the conflict, the fact remains that our infrastructure is completely down. The flow of Liberians into Sierra Leone is putting a heavy burden on the little that we have left and will compound the situation even further. There remains a need for a continued United Nations humanitarian presence in Sierra Leone to ensure that the refugee situation can be handled. But the refugee situation is not only a

humanitarian situation; it is a security situation. It is a fact that there is conflict in Liberia and that there was conflict in Guinea at one point. That is why the situation exists. Therefore, the more we look at it in a very comprehensive manner, the better it is for the Council and for the United Nations system in general.

The President: The next speaker is the Minister for Foreign Affairs of Guinea. I welcome Minister Fall and give him the floor.

Mr. Fall (Guinea) (*spoke in French*): Madam President, I am very happy to be here this morning to attend this meeting. The holding of this workshop is the fulfilment of a promise made in this very Chamber last January during the public debate on the situation in Africa, and attests to your country's continuing commitment to the quest for peace in the Mano River Union Basin. I am therefore extremely pleased to see you presiding over this important meeting.

I also welcome the Secretary-General's presence here at the opening of the meeting, and I welcome also the guests who have been invited to make their valuable contributions to the success of our work.

As is well known, the peacekeeping operation in Sierra Leone is rightly regarded as a unqualified success for the United Nations. The gradual restoration of peace in Sierra Leone was possible only because of the resolve of the international community and because of the considerable resources that were made available.

Our first conclusion, therefore, is that this United Nations Mission was given a clear and precise mandate and the appropriate resources were provided. My delegation believes that these are the factors that contributed to the success of the operation.

We believe that what was done in Sierra Leone can be done also elsewhere in Africa — for example, in the Democratic Republic of the Congo — if we base ourselves on the success of that first operation. We welcome the important achievements that have been registered, but my delegation continues to believe that the situation in Sierra Leone remains fragile. Stability and the prospects for development in Sierra Leone depend on the resolution of several problems that still face that country.

I believe also that it must be stressed that our Organization must continue to promote peace-building in Sierra Leone. Some of the measures that might be considered include the following.

The first measure could be the establishment of a civic and political information programme for the army, including those RUF elements that have rejoined the army, so as to create a genuine spirit of support for the country within the Sierra Leonean army. We believe that this is very important.

Secondly, a restructuring of the army and of the police could be considered, in order to ensure that they are of a multi-ethnic character.

When the United Nations Mission in Sierra Leone (UNAMSIL) gradually withdraws, it must do so in a manner that is in keeping with the capacity of the Sierra Leonean army and police to take over and to guarantee security in the country. A hasty withdrawal of UNAMSIL today on the basis of what has been achieved to date is not something that we would advise.

State authority must also be extended through decentralization, with a primary role for women in all sectors. We have seen the role that women have played in the resolution of the conflict in Sierra Leone and also in the Mano River Union Basin.

The promotion of good governance is also important. This involves a restructuring of the judiciary — its human resources and premises — and the promotion of human rights is also essential, because the country has witnessed serious human rights violations, including mutilations.

An international conference of donors for recovery and reconstruction in Sierra Leone should be convened. Self-sustaining projects should be identified — projects that should be quick-impact or at least effective in the medium term. For instance, a better policy is needed for operating and managing the diamond sector, so that resources from that sector can be used in agriculture to ensure food self-sufficiency.

There must also be a programme to combat poverty. We cannot say this often enough: poverty is one of the basic reasons for conflicts in Africa. Indeed, the war has plunged the Mano River Union countries and Sierra Leone into what can only be described as utter poverty.

While everybody seems to agree that encouraging results have been achieved in Sierra Leone, despite the problems I have just mentioned, it is a fact that the situation in neighbouring Liberia is still extremely worrisome. This is because, unlike what happened in

Sierra Leone, the end of the war in Liberia was not accompanied by a real exit strategy. The absence of a policy for national reconciliation, of a programme for the disarmament, demobilization and reintegration of armed factions, and of an economic recovery programme following 10 years of fighting negated the immense sacrifices made by the Economic Community of West African States (ECOWAS) to restore peace in Liberia.

It is true that today armed factions continue to fight inside the territory. These actions were condemned by ECOWAS and by the African Union, which, during the most recent meeting in Durban, called on the Liberian Government to begin negotiations with all of the factions and forces in order to begin a constructive dialogue to ensure a better future for the country.

Following the collapse of the Abuja and Ouagadougou meetings, in which all actors did not participate, the upcoming meeting to be held at Dakar, which will be held under the auspices of President Obasanjo of Nigeria and of President Abdoulaye Wade of Senegal, has given rise to great expectations. We hope that all parties will participate in this dialogue in order that peace may be restored to Liberia.

We believe that the following additional measures should be taken: a ceasefire throughout Liberian territory; continued inter-Liberian dialogue, with effective participation by all forces, including high-level Government authorities; adoption and implementation of a genuine disarmament, demobilization and reintegration programme in Liberia; and adoption of a programme for economic recovery using primarily income from the lumber industry and from the maritime registry. External assistance could supplement the financing of this economic recovery programme. The authority of the Liberian Government must be extended to the entire territory, particularly in areas currently under rebel control, and along the borders.

Naturally, the international community must remain vigilant in monitoring political normalization and reconciliation in Liberia and the stability of the subregion. Accordingly, we believe that maintenance of the sanctions imposed by the Security Council is justified. These sanctions should be lifted only once the Liberian Government has discharged all of its commitments under the relevant resolutions of the Security Council. We believe that both of these aspects are important.

I should like to say a few words about the Rabat peace process and what has been done to follow it up.

The meeting was held on 27 February 2002 and chaired by His Majesty King Mohammed VI, with the participation of the Presidents of Sierra Leone, Liberia and Guinea. Since then, several meetings were held simultaneously in Monrovia, Freetown, Conakry and Agadir to monitor recent developments. The recommendations emanating from those meetings include the need to respect the protocol on relations between the three countries — my brother from Sierra Leone spoke of this earlier — and the rapid deployment of joint border security and peace-building units. I am pleased to inform the Council that arrangements have already been made in this connection. A few weeks ago a Liberian delegation was in Conakry to witness the establishment of joint border patrols, which have already begun to play a role on the border between the two countries. There are, of course, the thorny issues of small arms and of dissidents in all three countries. Unfortunately, we see that as one of the key problems.

With regard to creating a favourable environment to encourage the return of refugees, I can inform the Council that significant progress has been made on the return of Sierra Leonean refugees but, unfortunately, given the fighting in some parts of Liberia, there has been a new influx of refugees into Guinea and into Sierra Leone. That has aggravated the situation in Liberia. The organization of a "caravan" to restore confidence among the three countries remains on the agenda. We also advocate the official reopening of borders and the free circulation of persons and goods among the three countries.

We believe that these sound initiatives should be encouraged and supported by the Council to promote the definitive return of peace and security to the Mano river basin. Contacts are now under way, at the initiative of Moroccan diplomacy, to hold a second Mano River Union summit to assess progress made since the Rabat meeting. The Economic Community of West African States is also working hard to follow up these matters.

I cannot conclude this short statement without noting our regret at the delay in opening the United Nations Office for West Africa at Dakar. All the States

of the subregion are eagerly awaiting the opening of that Office, which we believe could speed up the peace process now under way in the subregion.

In conclusion, my delegation would like to thank you once again, Madam President, for having taken this very important initiative of organizing this workshop. I am sure that the recommendations will help mark the path to peace and harmony in the Mano River Union region.

The President: I thank the representative of Guinea for his comments, particularly as they relate to the regional situation, and for the suggestions he made as to the way forward.

Mr. Minister, could I ask you two questions? Just because I asked the Foreign Minister of Sierra Leone two questions does not mean that I am going to have two questions for everybody. But there are two things that came out in your comments.

We have talked about the situation, particularly as it relates to refugees, but it would be helpful to have a sense of other areas where you think the situation in Sierra Leone has had a direct impact on Guinea. For example, what were the political reactions to the crisis in Sierra Leone? What kind of affect has there been on the economy in Sierra Leone?

The other issue that I would like to touch on is the role that Guinea has played and perhaps could have played. Do you have any thoughts, looking back on the situation, on whether Guinea could have been more proactive in terms of getting international help for the region, and if so, at what point in the crisis?

Mr. Fall (Guinea) (*spoke in French*): As a country neighbouring Sierra Leone, Guinea is certainly the first country to have suffered as a result of the crisis in Sierra Leone. We had asked the international community for a long time to do its best to stabilize the situation in Guinea, primarily because we are in an area that has been a conflict zone for 10 years: first, there was the protracted war in Liberia, which had an impact on Guinea. When we saw that the conflict was shifting towards Sierra Leone, we began sounding the alarm to warn that Guinea had to be helped to bear the burden of refugees and to stabilize its own situation.

Specifically on Sierra Leone, I would say that everything that happens in Sierra Leone is immediately felt in Guinea. At various times three former Presidents of Sierra Leone have found themselves in our capital, not because we wanted them, but just because we are close by. There are hundreds of thousands of refugees who cross the border because of our proximity and particularly because of the similarity between our two populations. We believe that the artificial border with Sierra Leone has not worked and Guinea has immediately found itself a major host country.

So we have felt the impact in terms of the economy, public expenditures, the environment, deforestation and health problems. We have had no shortage of security problems, because some of the refugees have settled along the border, contrary to international regulations, which has enabled rebels often to conduct raids in Guinea to seek supplies and even recruits among the refugees. Finally, what we had always said would happen did happen: the rebels attacked the country. Even now, despite the departure of a significant number of refugees, Guinea is still suffering the consequences of that situation.

Turning to Guinea's role, we have always worked to restore peace in Sierra Leone and Liberia. Guinea worked with Nigeria and Ghana to stop the massacres in Liberia. Even before the United Nations Mission in Sierra Leone (UNAMSIL) arrived, those three countries intervened on a massive scale in Sierra Leone to restore peace. That was done through the ECOWAS Monitoring Group (ECOMOG). We represent a significant part of ECOMOG in Sierra Leone and we played a stabilizing role in Sierra Leone. We call on the international community to help stabilize the situation in Sierra Leone, because we know that whenever things go bad in Sierra Leone, Guinea is the first to suffer. We continue to play this role regarding Sierra Leone and Liberia.

The President: That concludes the introductory remarks to our meeting. We now begin the first session of our workshop, which deals more specifically with the lessons learned in Sierra Leone. I would like to ask the Under-Secretary-General for Peacekeeping Operations to take the floor.

Mr. Guéhenno: I am very pleased indeed to participate in this workshop and I should like to commend the President of the Council for this important initiative. But before turning to the lessons learned from the United Nations Mission in Sierra Leone (UNAMSIL), let me first say in the presence of the Foreign Minister of Sierra Leone that Sierra Leone is today moving away from war and towards peace

because the largest share of the achievement belongs to the Sierra Leone Government and people, whose efforts are the foundation of any success that the United Nations may claim there.

The Secretary-General has already given a broad overview of the recent experience in Sierra Leone. I hope to provide some further detail in this meeting, particularly regarding the United Nations response to the grave challenge that UNAMSIL faced in May 2000. While all the lessons of such a complex operation cannot be captured in my short briefing today, I believe that the key ones can be found if one looks closely at three aspects of the experience: the adjustment of the UNAMSIL mandate; the provision of the means to achieve the new mandate; and the management of the Mission to implement the mandate and consolidate the gains made.

(*Spoke in French*)

When the Revolutionary United Front (RUF) precipitated the crisis of May 2000, many observers thought at that time that UNAMSIL had suffered grave setbacks from which it could not recover. It is all the more remarkable, therefore, that today, the fundamental lesson we can draw from that experience is that, with the necessary resolve, the Council, the troop-contributing countries, the Economic Community of West African States (ECOWAS) and the United Nations were able to work together to turn the situation around. The Council recognized that the credibility of the United Nations was at stake and that UNAMSIL could not be allowed to fail, or Sierra Leone be abandoned to the crisis. Of course, the challenges we have still to meet are formidable, but Sierra Leone is now on the path towards peace and stability.

How did this turnaround of the situation occur? The resolve of the Security Council to strengthen UNAMSIL's mandate, to build up troop levels and the Mission's structures, was a central factor. The new mandate provided the basis necessary for a robust peacekeeping force. The necessary resources were then put in place to carry out the mandate, and we are grateful to those Member States which heeded the United Nations call. This allowed the Mission to follow a two-track strategy: political engagement of the RUF, on one hand, while denying any military option, on the other.

It should be noted that that strategy was possible because the Council, the United Nations Secretariat and the troop-contributing countries demonstrated their unity and thus established absolute clarity concerning the implications of the new mandate and rules of engagement. If I may be frank, I believe in the previous period there had been some hesitation about the meaning and interpretation of UNAMSIL's mandate and rules of engagement, some hesitation among actors in the field, in New York, and even among States concerned. But sustained efforts were made at that time to ensure that all key players had the same understanding of the mandate. I believe that this bore fruit and that there is here a basic lesson for peacekeeping operations. Unity among the key actors is a sine qua non for the success of any complex operation. This in fact translates into clarity of objectives, and clarity of objectives means also the clarity and efficiency in the operational activity of a mission.

As a final note on the question of the mandate, I believe that we should learn from the UNAMSIL experience that peacekeeping operations should always take into account the possibility of the worst-case scenario happening. Certainly, peacekeeping often requires that we take calculated risks, but planning and adequate resources take into account these risks.

(*Spoke in English*)

The early gaps in UNAMSIL's strength and capacity deserve close attention. Initially, UNASMIL was particularly short on troops with significant capacity for self-sustainment and had to rely on troops with some relative limitations in training and equipment. For example, at one point, the Mission was joined by four battalions having only one truck and four jeeps per 800 soldiers. Also, UNASMIL faced command and control difficulties, which stemmed in part from the "re-hatting" of forces originally deployed through regional arrangements. Lines of command from UNASMIL headquarters to the field were not always strong enough, and some UNASMIL contingents continued to rely primarily on instructions from their national headquarters. However, the experience of "re-hatting" the troops demonstrated the importance of early and close coordination between the United Nations and the regional organization engaged in the areas of crisis.

The operational and logistic capabilities of various contingents were enhanced through innovative measures. Their equipment was supplemented directly

from United Nations resources, as well as arrangements made with third parties. The United Kingdom played a decisive role in that respect; its valuable assistance must be acknowledged. Training provided under various bilateral arrangements also contributed to building a truly capable and credible force, and this will continue to be needed through the final phases of the Mission. This experience underlines the fact that we must think of the means available to a mission as more than simply the numbers of personnel. Their training, the support provided to them and the political guidance behind the mission will all determine whether a mission has the means to implement the mandate.

The May 2000 crisis was also characterized by the willingness, at all levels, to painstakingly review UNAMSIL's performance and its structure and operations. The Council, the troop-contributing countries, the Secretariat and UNAMSIL each played a role in reassessing the Mission in light of the changed circumstances on the ground. An assessment mission, led by General Eisele, a former senior official of the Department of Peacekeeping Operations, was dispatched at the end of May 2000 and made broad recommendations to the Secretary-General on strengthening the Mission. In addition, a review of the force command structure led to a more integrated field command. The Special Representative of the Secretary-General ensured that the Mission's leadership understood and adhered to its two-track strategy of peace and strength. Deploying the limited number of troops thinly, or waging war on the RUF without the requisite mandates or equipment, might have had disastrous consequences.

UNAMSIL implemented a well-conceived strategy of negotiation and the progressive demonstration of deterrence, gradually deploying throughout the country, including in the economically vital diamond areas. UNAMSIL deployed in strength, and by so doing it gave concrete meaning to the concept of robust peacekeeping. The peacekeeping force was not deployed to wage war, but to close the option of war. A clear message was thus sent that the use of force was no longer a viable strategy for those tempted to destabilize the process. And thus, deterrence was achieved.

Non-military elements of the Mission were also restructured. A key element was the integration of various United Nations elements operating in the country through one Deputy Special Representative, who at the same time served as the United Nations Resident Coordinator. Another Deputy Special Representative focused on operational and management issues. Integration of all United Nations elements with a peace effort is now a general aim sought in all complex missions. UNAMSIL also took steps to strengthen its public information capacity. The use of the Trust Fund for quick impact projects also underlined the importance of confidence-building measures for the population.

More broadly, I would like to emphasize that the success that has so far been achieved is, in large part, the result of the integrated nature of the Mission. Peacekeepers could not have been successful if they had not been working side by side with human rights specialists, with development experts and with the humanitarian community. And we are proud to be part of that joint and integrated effort.

In this regard, I should like to emphasize another crucial point. The role played by your country, Madam President, must be seen as a key element of the international community's response to May 2000. The rapid assistance of your country's troops in critical locations on the ground, and later, the "Over the Horizon" presence, reinforced the message sent by UNAMSIL's strengthened, robust force in a decisive way.

There are important lessons to be drawn from this experience. Undoubtedly, in specific circumstances, the need for a lead nation, with the capacity to project forces quickly and convincingly, will arise again. However, I would also submit to the Council that the approach taken for UNAMSIL will not necessarily be applicable in all future situations. It is equally important to recognize that, while the United Kingdom so ably and so generously filled an urgent need for credible force projection, that need might not have arisen if UNAMSIL itself had had the requisite resources from the outset.

While the handover of peacekeeping duties from ECOMOG to UNAMSIL forces was done quickly, continuity of ECOWAS's political engagement also proved absolutely vital. This subregional organization worked closely with UNAMSIL and brought critical influence to bear on the RUF in support of UNAMSIL goals.

There are important lessons to be learned about how peacekeeping missions must often be supported by

a regional strategy. The pressure applied by the Council through sanctions and the ban on illegal diamond exports was also precedent-setting and contributed to the progress made in Sierra Leone. However, with a measure of self-criticism, I think it would be fair to say that greater and earlier attention could have been paid to developing a coherent international strategy to address the regional aspects. The conflict in Liberia, which the previous speakers have discussed, remains a serious threat to the Sierra Leone and the region, and will require a comprehensive strategy to avert regional destabilization.

I believe the Council is well aware of the advances that UNAMSIL was able to make in the disarmament, demobilization and reintegration (DDR) process, which was formally completed last January. Forty-seven thousand combatants were disarmed and demobilized, and some 22,000 are now engaged in programmes to reintegrate into civilian life. But this leaves some 25,000 who need to be reintegrated if they are to make a living without a gun, in a normal economy. However, the reintegration programme currently faces a funding shortfall of $13.5 million. This weakness in the DDR process may in turn weaken the other gains made in Sierra Leone. The lesson here is that longer-term commitment, beyond the life of a peacekeeping mission, is necessary to consolidate the fragile peace gained and build upon it.

In the next stages of the Mission, a strategy must be developed to allow the Government and other partners to progressively take on UNAMSIL's responsibilities in a sustainable manner, while consolidating the gains we have made. A progressive, staged drawdown of United Nations forces must be accompanied by a build-up of Sierra Leonean capacity. Here, also, the major contribution of the United Kingdom in building capacities in Sierra Leone must be acknowledged. While the United Kingdom-led International Military Assistance Training Team (IMATT) project has made considerable advances in training the national army, it is, however, not yet ready to fully take over from UNAMSIL. Therefore, a security-sector strategy must be developed with benchmarks linking UNAMSIL's drawdown to the capacity of the national army and the police.

UNAMSIL is discussing options for developing the police with the Government, the police command and the Commonwealth. If the police are to be brought to a level capable of ensuring internal security, assistance will be needed to recruit an additional 2,500 personnel and train, equip and pay the force in a programme that the Government can sustain. UNAMSIL is discussing two options with the Government. One would have United Nations Civilian Police lead the project, and the other would involve a bilateral, IMATT-type arrangement, with a lead country pulling together the training team and resources. Further details on these proposals will be submitted in the report of the Secretary-General in September.

The question of how salaries are to be paid is also critical. Even the best-trained police cannot be expected to perform without pay. Also, we have learned from other operations that, ultimately, the police cannot provide for internal security unless their efforts are linked to judicial and penal institutions that can ensure that the rule of law is upheld.

In conclusion, let me say that with the national elections and the installation of President Kabbah, Sierra Leone has entered a new phase. It is only right that the Government now take on a progressively bigger share of the responsibility for peace, stability and development in Sierra Leone. Clearly, an extraordinary, unified effort has created a solid foundation where once the peacekeeping mission was in crisis. The exit strategy for UNAMSIL lies in ensuring that the Government can carry out the functions that peacekeepers and the international community have fulfilled.

We must now turn our attention towards supporting the Government's efforts to achieve goals such as long-term development and the creation of a viable economy, effective and transparent control and administration of national resources, capacity-building, national reconciliation, security-sector development and the full reintegration of ex-combatants. Close coordination between the Government, international agencies and bilateral assistance will be vital.

Much, indeed, remains to be done. But the strength of resolve and spirit of partnership that the international community brought to bear on the crisis of May 2000 must be maintained. It will now have to be turned towards consolidating the gains made and securing regional stability. I am confident that if this is done, a peaceful Sierra Leone can finally fully emerge.

The President: I thank Mr. Guéhenno for his very kind comments about the role that the United Kingdom played. I thank him for the honesty and

frankness of the assessment that he made and his very constructive comments in terms of solutions.

Mr. Guéhenno, I was struck by the importance you gave to the clarity of the mandate and to coordination and the implications of that for the management of the operation overall. In that context, I would like to ask you about the relationship between the United Nations political, military and humanitarian wings, because it has been different in Sierra Leone, the Democratic Republic of the Congo and Afghanistan. It is now a live issue in Angola. Should we be looking for a single model, or should we be developing and learning from each of the countries and adapting to each context?

My other question relates to the point you made very early on, which was about the urgency which was introduced into the process after the recognition that the credibility of the United Nations was at stake. Collectively, as the Security Council, what can we do to get that sense of urgency into the situation at an earlier stage in the process, without getting to the point where we think the credibility of the United Nations is at stake?

Mr. Guéhenno: Your first question was whether there a single model for the integration of the various efforts of the international community. I think there are degrees of integration; it will vary from one mission to the other. However, I do believe that in any peacekeeping or peace-building operation — and we see more and more that the two have to be closely linked — there has to be a unity of effort on the part of the international community. I think that the international community weakens its hand when it goes into a crisis situation in a scattered way, so to speak. I think part of the success achieved by the Afghanistan mission is very much linked to its integrated nature. It is often thought that it could be even more integrated.

In the case of Angola that is now being considered, there will also be a need for a major effort of the international community to support the reconstruction of a country that has been torn by many years of war. There, again, I would think that an integrated model is in order. The way in which one of the two number twos in the Mission federated the efforts of the development community and the humanitarian community has proved to be very effective in Sierra Leone. The various agencies, funds, and programmes provide the substantive backstopping with their expertise, but there is an operational integration that is of the essence and we see, for areas such as disarmament, demobilization and reintegration (DDR), that the links among the political, military, humanitarian and economic are very close. How can you disarm combatants if you do not have an economic and reintegration strategy? So my answer to the question is that there are degrees of integration, but that certainly integration is the right answer.

The second question was how we can give the Council a greater sense of urgency. I think there we all share responsibility. As the Brahimi report said in an often quoted sentence, we should tell the Council what it needs to know, not what it wants to hear. There is a responsibility on the part of the Secretariat to call the attention of the Council to unfolding crisis situations. If I may say so, there is also a responsibility for Member States which have a particular understanding of a region to call the attention of Council members to an unfolding situation. In the case of Sierra Leone the proactive role taken by your country, Madam President, certainly helped focus the attention of the international community on the need to have a sustained effort in that part of West Africa.

The President: I was struck, Mr. Guéhenno, by your comments on the need for wider security sector reform. I hope that will come up in the discussions we have following our next contribution, which will be from the Deputy Emergency Relief Coordinator, Ms. Carolyn McAskie. I ask Ms. McAskie to take the floor.

Ms. McAskie: In accordance with your agenda today Madam President, I will focus my remarks mainly on issues relating to the protection of civilians. As the war in Sierra Leone painted a devastating picture of the changing nature of warfare, wherein civilians are not only incidental victims, but direct objects of attack; in fact, they are targeted with extreme violence, murder, widespread rape and sexual violence, amputations, mutilation, burning alive, conscription of children, forced labour, abduction, massive destruction and looting. The list is horrendous and endless. These tactics were used to terrorize, to prevent participation in the political process, and ultimately to control illegal exploitation of natural resources.

All the issues the Security Council has discussed on the protection of civilians come to the fore in any discussion on Sierra Leone, whether it is access to

vulnerable populations or the impact of sanctions. Widespread and systematic violations of international human rights and humanitarian law underscores the importance of bringing to justice the perpetrators of these atrocities. Women and children in particular have been targeted in an unprecedented manner during the conflict. One of the questions asked in the background paper is whether or not there should be special gender provisions in the Special Court. I will return to that issue later in my remarks.

The war in Sierra Leone was further characterized, as speakers before me have said, as an ongoing regional problem, and — particularly as far as humanitarian actors were concerned — an ongoing regional problem of massive population displacement. Again, amongst those displaced, women and dependent children were disproportionately represented. The estimates are as high as 80 per cent.

Unlike many other peacekeeping mandates, that of the United Nations Mission in Sierra Leone (UNAMSIL) specifically authorized peacekeepers to take necessary measures to afford protection to civilians under imminent threat of physical violence — understandably, of course, within its capabilities and within its areas of deployment, and in accordance with Chapter VII of the Charter. The level of support UNAMSIL was able to give to fulfil its mandate was determined by troop strength, and much of the support to the protection of civilians became possible only when UNAMSIL reached full capacity, or close to it.

Because of the complexity of the task of the United Nations, I think we all agree that it was important in this case for the United Nations to adopt an integrated approach to this crisis. And, hopefully to be as frank as the preceding speaker, it is true there were concerns amongst the humanitarian community about such integration in the early days. Fears that the humanitarians would be "co-opted" by the political and military side led to great discussion amongst the organizations. The appointment of the Deputy Special Representative of the Secretary-General, was one of the issues causing the greatest discussion. I am pleased to say something I believed from the outset, that as it has turned out, many of those fears were unfounded; it has proven to be a good model and a good lesson. Under the current structure, the Humanitarian Coordinator is in a far better position to address humanitarian concerns within the mandate, within the Mission, and in fact has centralized humanitarian issues within the political and military decision-making of the Mission.

One of the issues we will need to look at, however, relates to learning from the way in which it was possible in general to preserve the humanitarian space and the independence of humanitarian workers, as appropriate. In fact, the May 2000 crisis, when peacekeepers were taken hostage, could provide a good example of the challenges. My colleague addressed this in his remarks. The humanitarians will of course be working very closely with the Department of Peacekeeping Operations in the lessons-learned study.

Let me refer to the aide-memoire (S/PRST/2002/6, annex) which the Council has adopted on the protection of civilians and touch on some of its elements. Today's workshop provides a welcome occasion to use the aide-memoire as it was intended, namely to facilitate due consideration of issues pertaining to the protection of civilians within the different phases of peacekeeping operations. As most participants know, the aide-memoire addresses 13 main objectives, ranging from access, to vulnerable populations, to the impact of natural resource exploitation. In fact, with the help of the Norwegian Government a very useful short pamphlet has been produced, but the print is so tiny that I wonder if the Norwegian Ambassador would tell us whether people in Norway have better eyesight than people in other parts of the world, as I need very good glasses to read it. But it is very handy to carry around.

UNAMSIL's mandate was very good in terms of its comprehensiveness on the inclusion of issues and objectives relating to the protection of civilians in armed conflict, in comparison to previous peacekeeping mandates. Of the 13 main objectives contained in the aide-memoire, all of the relevant objectives were addressed in Security Council resolution 1270 (1999). In fact resolution 1270 (1999) is the most frequently referred-to resolution in the aide-memoire.

Let me touch on some points arising from the aide-memoire. The first is media and information. An important lesson that has been learned is the need for accurate management of information. Security and military information was crucial for the protection of both humanitarian personnel and civilians, and the establishment of the humanitarian information centre in UNAMSIL, following the model of Kosovo but

expanded in this case to include UNAMSIL participation, played a key role in furthering that objective.

Secondly, on disarmament, demobilization, reintegration and rehabilitation (DDRR), particularly with regard to the effects on children, another important lesson comes from the successful demobilization of the 47,000 combatants, including almost 7,000 child soldiers. It was a critical lesson, that the creation of an official DDRR programme in Sierra Leone was in fact a central tenet of the Lomé Peace Accord, signed in July 1999. The Accord was the first such agreement to recognize the special needs of children in the DDRR process. UNICEF has drawn a number of important lessons from this experience; there have been integrated into its policy and programming efforts, and will continue to inform our ongoing work in this area.

As the mandate developed and matured, peacekeepers were able to play an important role in improving humanitarian access through the provision of security for humanitarian personnel and through securing safe areas for internally displaced persons and refugee returnees. That was not true at the outset, but the growing cooperation between humanitarians and peacekeepers led to some very useful outcomes.

Recently, UNAMSIL has cooperated with the Office of the United Nations High Commissioner for Refugees, transporting returnees from the Liberia border areas to safer zones inside Sierra Leone. With respect to recent movements of internally displaced persons, almost 4,000 people have been transported by UNAMSIL and by the International Organization for Migration from western-area camps, where they have received resettlement packages. Approximately 12,000 internally displaced persons remain to be formally resettled, however, following the fourth phase of the resettlement process.

A fourth point from the aide-memoire is the effect on women and girls, and I shall touch on that at somewhat greater length. Another lesson that I would add here is that, in situations such as that in Sierra Leone, women and girls have suffered an extraordinary level of rape, including gang rape, and every possible form of sexual violence. UNAMSIL's mandate could perhaps have been even more comprehensive had it referred specifically to the special protection and assistance needs of women and girls. That would include moving beyond the classic norms of gender sensitivity and mainstreaming, to include responses to endemic gender-based violence and sexual exploitation. This is an area about which we are all still learning, as the tragic events in West Africa have shown us, and we look forward to the study on the problems of sexual exploitation to point us in the right direction to deal with these matters.

When we talk about boys being taken as forced conscripts, we must also remember that an equal or larger number of girls were forced to become partners of combatants or were otherwise held as sexual slaves and forced to bear unwanted children at a young age. Many girls have suffered permanent physical harm. In Sierra Leone, UNICEF has supported the establishment and coordination of a network of services for girls who were abused during the war. The difficulty is in identifying the girls who have been victimized. Stigma, shame and lack of opportunity or resources keep many girls silent, and thousands of young girls who were abducted during the war were used for sexual purposes. We characterize Sierra Leone in terms of the horrors of the amputations, but, for every person with limbs amputated, 10 or 100 girls were abducted and abused. Many of them continue to stay with their commanders, while others have returned anonymously to their communities. In efforts to address those issues, the Government has acted extremely well, with a national sensitization campaign on rape being launched, with information on sexual abuse, on rape and on how to help victims.

I referred to the response to the crisis of sexual exploitation in West Africa. Let me also mention that, in Sierra Leone, a coordinating committee for the prevention of sexual exploitation and abuse has been formed. Among many actions taken, the committee has adopted standards of accountability for humanitarian workers, which were launched in March by the United Nations Humanitarian Coordinator, who himself is the Deputy Special Representative of the Secretary-General. At the inter-agency level worldwide, the Inter-Agency Standing Committee has now produced a report on protection from sexual exploitation and abuse in humanitarian crises as well as a global plan of action, which has now been endorsed by all the heads of agencies.

It is important to note, however, that the mandate provided for training of UNAMSIL personnel in international humanitarian, human rights and refugee

law, including child- and gender-related provisions. An important advance over previous mandates was the inclusion of human rights and civil affairs offices — a model that has been followed in subsequent peacekeeping operations. Those aspects should continue to be strengthened, even while the military component is phasing down.

My last point from the aide-memoire is the issue of justice and reconciliation. Here, the issue for the Special Court and for the Truth and Reconciliation Commission remains the issue of funding, as we are all aware. The President's background paper, as I mentioned, asks the question of whether special attention could be given to gender-related issues. I think this is clearly a case in which rape was used as a war crime, and it should be so recognized. There will need to be special measures — including measures related to witness protection programmes — to enable women to come forward.

Let me close by saying a few words on the regional aspects, as others have. The Council will be dealing with that this afternoon, but I think we all agree on the extent to which cross-border activities have destabilized the region, and that the escalating conflict in Liberia is among the factors now posing the greatest threat to stability in Sierra Leone and in neighbouring countries.

Since the beginning of this year, Sierra Leone has already received some 40,000 Liberian refugees, Guinea more than 30,000 and Côte d'Ivoire an estimated 60,000. In anticipation of any gradual drawdown of UNAMSIL's activities in Sierra Leone, due consideration could perhaps be given to enhancing the Sierra Leone Government's capacity to maintain internal security and the security of its borders; it could also assist with the effective screening of incoming refugee populations, a task that has proved very difficult in the past.

In recognition of the importance of the regional approach, the United Nations regional Office for West Africa is in the process of being finalized, and the Office for the Coordination of Humanitarian Affairs will work very closely with it. In fact, we have already opened a regional office, which will focus most immediately on issues related to the Mano River Union.

As a senior humanitarian, I should be remiss if I did not use this occasion to close by reminding us all that the Secretary-General, in his recent report to the Security Council, highlighted the fact that resources are still required to finalize the uncompleted aspects of the peace process. Only one third of the funding for the Consolidated Appeals for Guinea, Liberia and Sierra Leone has been collected. That critical funding shortfall throughout the region will seriously hamper humanitarian agencies in their desire to meet basic standards of humanitarian assistance and also to move from relief to recovery, as agencies will be forced to limit programming to the most urgent lifesaving assistance. This is particularly critical at a time when the United Nations, along with the donors and other partners and, of course, the countries of the region themselves — the most important players in all of this — move from relief through transition and into development. The United Nations is gearing up on that aspect.

Let me close by thanking you, Madam President, for the opportunity to address the Council on the important issue of the protection of civilians.

The President: Thank you very much indeed, Ms. McAskie, for that very comprehensive briefing. It has been drawn to my attention that I am already failing to meet my own standards in terms of timekeeping, because I am asking too many questions, but I should like to ask you one question. In a way, I think you answered it in your last point, about resources. It relates to the way in which donors have responded to the humanitarian crisis. That has been a priority for the United Nations, but do you consider the donor response to have been effective and adequate?

Ms. McAskie: I am sorry that your troubles with time did not spare me, Madam President, but I am delighted to answer your question. The international community has been very generous worldwide, and I would not say that Sierra Leone has suffered any more than other countries in crisis. But if I were to say that there was a serious shortfall in Sierra Leone, I would have to say that there were serious shortfalls in many other crises as well. I think we could have done a lot much sooner if more resources had been available, but I would also say that it is also up to the international agencies to be organized earlier. If one looks at our response to more recent crises, the lesson that we have learned is that we cannot allow these things to drag on for years and years before we do something about them. I think the response in Sierra Leone was horribly

slow on all levels; that is a major lesson we have learned.

The President: I would now like to call on Ambassador Adolfo Aguilar Zinser, who is the Chairman of the Sierra Leone sanctions Committee.

Mr. Aguilar Zinser (Mexico) (*spoke in Spanish*): Madam President, I am very gratified at your presence in the Security Council, and I would like to take this opportunity to express my country's congratulations and commendation to the United Kingdom for the extraordinarily generous and responsible effort that it has made in the Mano River region, and in Sierra Leone in particular.

This event presents an opportunity to reflect upon lessons learned, and the very focus of this seminar is already a lesson learned. For my country, the key to the peace process in the Mano River region is the regional approach. All national efforts that we may make to promote peace must have a regional dimension. No country acting alone in the Mano River region can create the conditions necessary to guarantee peace, security, stability and development.

Accordingly, what is needed is an international regional effort. The increasingly violent situation in Liberia demonstrates this fact. If the international community fails to give proper attention to the humanitarian situation and the violence in Liberia, then the efforts that we may make in other countries of the region, particularly in Sierra Leone, may well prove to be reversible.

The Minister for Foreign Affairs of Guinea, much better than any of us, has described the regional dimension of the problems of peace, security, economic development, protection of the environment and social security in the Mano River region. For this reason, my country feels that the Rabat process is a key factor in fostering mutual trust among the countries of the region. However difficult the situation may be when it comes to building trust among the countries of the Mano River region, we would appeal for a firm commitment on the part of the three Governments to carry out the practical measures agreed at the summit meeting held under the auspices of the King of Morocco and in the subsequent technical meetings mainly devoted to security.

Another key factor for the Mano River region is institutionalizing the political processes through the strengthening of democratic institutions and the creation of modes of representation to enable the various political actors to find the right channels through which to act on the political scene — particularly during elections, because this is where the power struggle should be acted out. A large national and international effort is needed to guarantee freedom of expression, freedom of the press, political parties, non-governmental organizations and the force of public opinion.

In Sierra Leone we have precisely the combination of will and factors. We have the United Nations plus these factors: the United Kingdom, as a fundamental ally of Sierra Leone and the United Nations in seeking peace in the region; the neighbouring countries, some of which have made a significant contribution to achieving that peace; the international community as a whole; and, no less important, the far-reaching role of Sierra Leone society, its non-governmental organizations and civil organizations and — let us state very clearly — the women of Sierra Leone, who have been a decisive factor in making this process fruitful.

In Mexico, we agree on the factors for success, as already described by Under-Secretary-General Guéhenno. The factors of success to be learned from the situation in Sierra Leone are in the first place certainly the clarity of the objectives. The main objective has been dismantling the structures of violence and restoring a new constitutional political order. With regard to his goal, there has been great intensity in establishing the major commitments of the United Nations and of the international community on a scale commensurate with the objectives. The resources applied were also consonant with the scale of those objectives.

The continuity of these endeavours is now the next lesson to learn in order to be certain that the United Nations Mission in Sierra Leone (UNAMSIL) is really a success story. The Security Council must proceed to a gradual and orderly withdrawal of the Mission, while at the same time ensuring that the Government of Sierra Leone is in a position to control effectively its territory and to assure its physical integrity, internal and external defence and social security.

The integrated nature of efforts in Sierra Leone's political, security, humanitarian assistance and

economic and social development areas are central factors in its success. The international community's support has focused not only on advances made in the political process, but also on meeting the population's basic needs, as well as on the demobilization and reintegration of ex-combatants and on the humanitarian situation of refugees and internally displaced persons. Here we should definitely take into account Mr. Guéhenno's recommendations concerning sustained efforts to reintegrate ex-combatants and the recommendations concerning the need to continue working hard to combat persistent sexual abuse, exploitation and violence, which, as we have seen, have been major features of the war in Sierra Leone.

One central aspect of the lessons learned is the coordination and integration of efforts among all the agencies concerned.

I would like to note that, in the particular case of Sierra Leone, we have seen quite clearly that the Security Council must pay much greater interest and attention in its communications with the personnel of United Nations agencies working in the field. The Secretary-General's reports fully comply with their purpose, but the views, appraisals and comments of the personnel in daily contact with the region's problems might assist the Council in better understanding the decision-making process on the basic issues that face us.

I would like to refer briefly to some of the lessons learned with respect to the sanctions applied in Sierra Leone by the Committee which I chair. First, the population must perceive the sanctions as mechanisms for contributing to peace and security and not as acts of reprisal or of political reprimand. It is very important to have the support of the population if the sanctions are to be effective. An additional effort by the United Nations is required to explain to the population the nature of the sanctions imposed. In the specific case of Liberia, in the Mano River region, the population perceives the sanctions to be unjust and not a means of bringing about change in the behaviour of its political leaders and rebel groups.

Secondly, in the case of Sierra Leone, the arms embargo has had a limited impact, because the actual presence of UNAMSIL forces and the successful disarmament process have, in fact, led to the eradication of the circulation of weapons in the country.

The sanctions are not — and will not be — a guarantee that weapons do not pass back into Sierra Leone. Accordingly, compliance with the sanctions by third parties must be emphasized, so that weapons do not get back into the hands of former combatants or those who might wish to use them to disrupt order. Thus, an additional effort is needed on the part of the community of nations to identify the origin of the weapons circulating in the Mano River region and to put an end to the trafficking in small arms and light weapons. None of the countries of the subregion has the capacity in itself to curb these illicit flows. The commitment by the States of the region and outside of the region is necessary in order to enforce the Economic Community of West African States (ECOWAS) moratorium and effectively to apply the national, regional and international measures provided for in the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

Sanctions regimes have the objective and temporary function of achieving the peace objectives set by the Council. In the case of the arms embargoes in the Mano river region, it is necessary to establish the appropriate mechanisms, beyond sanctions, to institutionalize the prohibition of illicit flows of weapons. Those mechanisms should possess the means to ensure their observance, even after the ending of sanctions.

The lesson learned from the diamond embargoes in the Mano river region is that the embargoes cannot in themselves necessarily have the desired consequences and that they have yielded mixed results. In some aspects these are positive, while in others they are limited and even counterproductive. Given the nature of diamonds, which are easily traded and which easily evade controls, embargoes must be only the starting point for a regional and international effort to create certification systems that will regulate the diamond industry to the benefit of the economic development of peoples, sparing them from the fomenting of violence. If there is no regional system for the certification of origin for diamonds, they will continue to flow from one country to another, escaping controls. Such a system must also be part of the efforts carried out through the Kimberly Process. In the diamond-trading sector, it is necessary to strengthen government monitoring structures to eradicate corruption.

Guided by national criteria and norms, the international community should increase capital investment in modern methods of diamond production, creating employment opportunities for local populations. The gradual eradication of traditional diamond mining methods — taking into account the circumstances in each country — should be pursued to favour the rational economic exploitation of those resources.

A review and updating of the lists of individuals subject to travel restrictions under Security Council sanctions should be carried out to stimulate political processes in the countries of the Mano river region. In the case of Sierra Leone, former combatants from rebel groups who have disarmed, joined political organizations, taken part in recent elections and accepted the election results should benefit from the process. Their participation in Sierra Leone's political life and their commitment not to take up arms again are factors that should be taken into account by the members of the Security Council in implementing such sanctions.

I wish to conclude by saying, as Under-Secretary-General Guéhenno has said, that much remains to be done in Sierra Leone. But the international effort made so far is a guarantee that in Sierra Leone and in the rest of the Mano river region, with the participation of the international community and the active participation of the societies of those three countries, it will be possible to establish an order of peace, security and sustainable development.

The President: I thank you very much, Ambassador Aguilar Zinser, for reflecting on learning points related to sanctions issues.

We are now going to move on to a number of speakers all of whom have been allocated five minutes — of which I am gently reminding our speakers before they start. I would like to welcome very warmly the President of the Economic and Social Council. The fact that he is addressing us today is a very good example of the kind of coordination that we have been talking about, and I give him the floor.

Mr. Šimonović: On behalf of the Economic and Social Council, I cordially welcome the convening of this workshop, the range of issues on its agenda, the breadth of participation, and its format, which favours interaction.

I would also like to use this opportunity to note that during the United Kingdom presidency of the Security Council, the level of cooperation between the Security Council and the Economic and Social Council has been unprecedented. Ambassador Greenstock, in his capacity of President of the Security Council, has addressed the Economic and Social Council. I was invited here today to the Security Council workshop. I am also invited to participate in the work of the Security Council's Ad Hoc Working Group on Africa, which will be addressing the issue of Guinea-Bissau during the course of next week.

On Monday the Economic and Social Council established its ad hoc advisory group on African countries emerging from conflict. After receiving requests from interested countries, additional ad hoc advisory groups dealing with individual countries or regions will be established. It is envisaged that the ad hoc groups of the Security Council and of the Economic and Social Council will work together closely.

Finally, during the course of this month, we had a semi-informal meeting of three Presidents: the Presidents of the General Assembly, of the Security Council and of the Economic and Social Council. There was a firm commitment to continue such coordination and semi-informal meetings. One of the issues on which we certainly want to cooperate is the issue of peace-building and sustainable peace and development in Africa. I thank the United Kingdom for its strong support and leadership in fostering the cooperation of which I have spoken.

In order to stay within my time limit, I will refer briefly to lessons learned in Sierra Leone from the particular viewpoint of the Economic and Social Council. First, it is quite clear from the example of Sierra Leone that even the most difficult situations are solvable if there is enough commitment and enough resources.

Secondly, although we have recently allocated almost $700 million for peacekeeping in Sierra Leone for the next 12 months, it is quite clear that peacekeeping has proved to be much cheaper than conflict. From Foreign Minister Koroma, we were able to hear some data on the material costs of the conflict in Sierra Leone. However, conflict prevention is much cheaper than peacekeeping itself. In that respect, I would like to emphasize that post-conflict peace-

building represents a form of prevention of the recurrence of conflict.

In view of our experience — also confirmed by the words of both ministers — for peace to be sustainable there is a need for a comprehensive approach. Every speaker today emphasized that regional and subregional comprehensiveness is absolutely necessary to end conflicts and to prevent their recurrence. However, I would like to add that comprehensiveness includes other elements as well. Peacekeeping should be accompanied from the outset by political and humanitarian measures and should be immediately succeeded by peace-building, including the strengthening of security and the rule of law, and economic recovery.

Demilitarization, which has been mentioned many times, is sustainable if job opportunities are created. The reintegration of ex-combatants into society relies heavily on job availability. Also, in Sierra Leone, infrastructure should be rehabilitated, and health and education systems should be substantially improved. As the Deputy Emergency Relief Coordinator clearly indicated, the strengthening of the overall security and justice system is essential for post-conflict peace-building in Sierra Leone and elsewhere. Civilians who have been deliberately targeted during hostilities require assurances if they are to return to their homes. The establishment of tribunals with an international element and of truth and reconciliation commissions, both of which are being launched in Sierra Leone, are encouraging in that respect.

Experience teaches us that investments in the rehabilitation of the justice system and in the rule of law are productive investments for a country. In the first phase, it facilitates the return of refugees and displaced persons as well as reconciliation, but it also helps to attract more bilateral and multilateral assistance. In the second phase, however, it is also very instrumental to track foreign direct investment when the time comes.

In order to stay within the time limit, I will conclude by saying that the Economic and Social Council has great potential because of its coordination function, which encompasses the entire United Nations system. We can bring all United Nations agencies, funds and programmes on board. Our recently enhanced cooperation with the Bretton Woods institutions as well as our capacity to engage donor countries and other stakeholders such as non-governmental organizations and the private sector provide great potential for the Council to mobilize key players. That potential has yet to be put to its best use.

The President: I thank Mr. Šimonović for his comments, which, I think, completely match the issues which have already been raised this morning.

Mr. Williamson (United States of America): Let me begin, Madam President, by thanking you and the United Kingdom presidency of the Security Council for organizing this Council workshop today. The importance of our discussions is evidenced by the presence with us this morning of the Secretary-General. We are honoured to have Foreign Minister Koroma of Sierra Leone here as well, and it is a particular pleasure to have our former colleague and good friend, Foreign Minister François Fall of Guinea, back in New York this morning to join us once again around this table.

The United States delegation looks forward to a useful discussion of the lessons to be learned from Sierra Leone and of the way forward in the Mano River Union. The wars and civil unrest in the Mano River Union region have taken a terrible toll in lost life, human suffering and lost opportunities. There have been unconscionable abuses of women and children. There have been mutilations, murders and terror, as well as the systematic trampling of basic human rights. Tragically, civilians indeed were the deliberate targets of a great many of these horrible acts of violence and abuse.

The remarks of our opening speakers have gotten us off to a good start, and I thank both Under-Secretary-General Guéhenno and Deputy Emergency Relief Coordinator McAskie for their insights this morning.

Let me start by asking whether there are, in fact, any overarching lessons to be learned from Sierra Leone and how the United Nations and the Security Council can resolve the other conflicts on our agenda. As we begin our discussion, we need to keep in mind the fact that each conflict situation on the Security Council's agenda has its own causes, its own unique personality and its own geopolitical variables. The successful resolution of any conflict is a matter of these variables aligning in such a way that, if the Security Council is focused and united but realistic about its abilities, the Security Council and the United Nations

can help the parties themselves see a hinge of history and push open the door towards lasting peace.

But let me be clear: the United Nations and the Council rarely have the ability themselves to ensure a successful peace process. Seldom can the United Nations on its own impose a successful solution. In most cases, the parties themselves must create facts on the ground that will allow the United Nations to contribute to a lasting peace.

We neither strengthen the United Nations and the Security Council nor help bring peace to any conflict by overpromising, raising unrealistic expectations or overextending the capacity of the United Nations to deliver on the ground. What the Security Council and the United Nations can do is to stand ready, so that, when the external factors fall into place, we can support the parties' own efforts to make peace. The United Nations and the Security Council also can help to foster an environment that permits peace to take root if the parties want it.

In Sierra Leone the crucial factors behind our current success range from the commitment of the United Kingdom to provide military training to the Sierra Leone army to the military weakness of the Revolutionary United Front (RUF) following its miscalculation in invading Guinean territory.

Other factors were the Security Council sanctions on President Taylor as well as, and most important and decisively, the courage and dedication of the people of Sierra Leone to end violence and to restore democracy.

All of these external factors came together in a way that created an opportunity for a stable peace and for the United Nations and the United Nations Mission in Sierra Leone (UNAMSIL) to play an important but supporting role.

As we look at our experience in Sierra Leone, we can review what those external factors were for guidance and historical understanding, but we are making a mistake if we too readily embrace the view that the events in Sierra Leone provide universal lessons for the United Nations that automatically can be imposed on other situations. To a large degree, each must be tailor-made and adapted to the unique situations of each conflict.

Nonetheless, it is important to learn from experience, and therefore let me thank the United Kingdom once again for its leadership in presiding over this workshop. In my delegation's view, what we can learn from our experience in Sierra Leone are lessons in how the Security Council and the United Nations can better manage and organize our efforts, be they peacekeeping, diplomatic or humanitarian, to support peace processes in conflict situations in which there is an existing commitment by the parties to resolve the conflict. These lessons are valuable to our work going forth.

My delegation takes away several such management lessons from the United Nations experience in Sierra Leone: first, the need for careful matching of the resources and mandate of peacekeeping missions with the risks involved in the operation; secondly, the importance of frequent consultations with troop-contributing countries on the rules of engagement for any peacekeeping mission; thirdly, the need to find a mechanism for donor group coordination and follow-up, and the need for the reintegration element of any disarmament, demobilization and resettlement programme to be undertaken as part of a peace process; fourthly, the requirement for better coordination of humanitarian assistance between peacekeeping operations, international aid agencies and humanitarian groups; and finally, a strong special representative of the Secretary-General is critical to the success of a peaceful operation to ensure good coordination among the peacekeeping, humanitarian and, if necessary, judicial elements of a mission.

Finally, I will make a brief comment on these lessons. Regarding peacekeeping missions, a key lesson is that we must give missions the appropriate rules of engagement, force size and mandate for the situation on the ground.

The President: I should like to inform the Council that I am going to be quite firm on our five-minute time limits.

Mr. Tidjani (Cameroon): Madam President, Cameroon would like to join previous speakers in commending your Government's timely initiative to convene this important and useful workshop. The Mano River Basin is, regrettably, one of the most unstable subregions on our continent. As Africans, we in Cameroon welcome and deeply appreciate the support and solidarity extended to the Governments and peoples of the Mano River Union countries

towards the attainment and consolidation of sustainable peace and stability in the area.

Much progress has been achieved, at great cost, on the Sierra Leone front, but the job is far from being completed, as the unfortunate developments taking place next door, on the Liberian front, confirm. The three Mano River Union States are connected by more than geography alone. They share deep bonds of history, and culture and socio-economic interrelationships which make it difficult, if not impossible, to treat developments in one country as isolated or limited to that country alone.

That is why we fully support the approach taken by the present workshop to address the challenges facing the three Mano River Union countries from a subregional angle. That is the right way to go.

That is why Cameroon believes that, even as the international community rightfully rejoices over the successes registered in Sierra Leone, we should resist any temptation to become complacent. Not only does the overall situation inside that country remain fragile and volatile, the subregional neighbourhood is increasingly turbulent as a result of the worsening crisis in Liberia. We feel that the continued policy of containment against Liberia runs the risk of prolonging the suffering of the civilian population. How can the international community strike a fair balance between pressing the Liberian Government to comply with the Security Council's demands under the sanctions and making Liberia a contributing factor to peace and stability in the entire Mano River Union subregion? Given the fact that the situations in Sierra Leone and Liberia are interconnected, peace consolidation efforts in Sierra Leone will not be sustained unless similar efforts are made to stabilize Liberia. That is an issue we need to address squarely.

As we collectively reflect on the way forward in the Mano River Union countries, Cameroon would like to put the following questions on the table. What is the fate of the Liberian soldiers and members of other armed groups who fled the fighting in Liberia and crossed over into Sierra Leone? Is there any risk of seeing them regroup into a vanguard force allied with disgruntled Sierra Leonean elements to destabilize Sierra Leone? What are the prospects for convening a follow-up to the Rabat summit of heads of State of the Mano River Union countries? How do we best harmonize the Rabat dialogue process and the peace efforts of the Economic Community of West African States (ECOWAS)? What action has been taken so far by the ECOWAS committee of three on Liberia in implementing the Yamoussoukro peace plan on Liberia? How does ECOWAS intend to engage Liberians United for Reconciliation and Democracy (LURD) and the Liberian Government to seek a peaceful settlement of the ongoing conflict? Should ECOWAS fail to deploy a peacekeeping force in Liberia, what role should the United Nations play in that regard? As both the African Union and ECOWAS have banned unconstitutional changes of Government, should the United Nations go on record as taking a similar stance with regard specifically to the current stand-off in Liberia? Should the Security Council emulate the Secretary-General's example by condemning any attempt by any armed group in Liberia to take power by force? What role should key international actors, including members of the Security Council and bilateral and multilateral partners, be prepared to play to promote dialogue, national reconciliation and stability in Liberia? Could they envisage forming a forum for forging a coherent approach to the challenges facing the Mano River Union subregion, in particular Liberia?

The President: I thank the representative of Cameroon for identifying those questions, to which I think we will return this afternoon.

The next speaker is the representative of Japan. I invite him to take a seat at the Council table and to make his statement.

Mr. Motomura (Japan): Thank you, Madam President, for convening this public meeting of the Security Council.

I would like to touch upon three points relating to post-conflict situations, which are especially salient with regard to Sierra Leone and to the Mano River Union. First, in order to ensure the stability of West Africa, every effort should be made to encourage confidence-building among the countries concerned. My delegation notes and welcomes the efforts that the Economic Community of West African States (ECOWAS), Morocco and other countries are making toward that end.

Secondly, the smooth transition from a post-conflict situation to development is also essential for regional stability and will require the support of the international community. Japan has thus decided to

extend, through the United Nations Trust Fund for Human Security, assistance in the amount of $3 million to the project for the reintegration of ex-combatants in Sierra Leone that will be implemented by the United Nations Mission in Sierra Leone (UNAMSIL) and the United Nations Development Programme (UNDP). This assistance will be used for capacity-building activities and the creation of employment opportunities in that country.

Thirdly, I would like to emphasize the importance of a system of justice in post-conflict situations, and I thus express my Government's strong support for the activities of the Special Court in Sierra Leone. To that end, Japan has contributed $500,000. We welcome the recent progress towards establishing the Court.

I would like on this occasion to refer to Japan's new strategy regarding Africa, which was recently announced by Prime Minister Koizumi. Under this strategy, entitled "Solidarity between Japan and Africa: concrete actions", Japan over the next five years will extend to low-income countries more than $2 billion in assistance for education. In addition, in cooperation with UNDP, Japan is promoting the development and dissemination of Nerica rice — New Rice for Africa — which is the product of hybridization between African and Asian rice strains. This miracle rice is expected to help solve the problem of food shortages, especially in West Africa. These efforts are based on the concept of human-centred development, which Japan emphasizes in extending assistance. Finally, under this strategy Japan will provide support to reinforce the conflict-prevention and peace-building efforts of African countries themselves. We are confident that our efforts under this new strategy will make a genuine contribution to the stability and development of the region.

Mr. Franco (Colombia) (*spoke in Spanish*): I would like to thank you very much, Madam President, for having organized this meeting. I shall heed your appeal to be a bit more interactive by making use of an inductive thinking process to offer some very specific ideas. I will not speak specifically about the Mano river region, but will instead attempt to draw lessons on the basis of the experience gained in that region.

First, there are a number of specific lessons in the political sphere. It is not possible to resolve a situation without taking a regional approach when a conflict clearly has such a dimension. The regional dimension not only can ease or resolve a conflict; at times it can also be an additional disrupting factor, either due to arms trafficking, refugee movements or cross-border activities of armed groups. A second lesson in the political area is the importance of having a leading country in the Security Council if this body is involved. Such a leading country must also have political influence in the region. This helps to mobilize financial resources and heightens awareness in the international community with regard to a given situation. The third lesson in the political area relates to the potential of subregional organizations. Such organizations offer opportunities, but have great limitations. The dilemma for the Security Council is what to do when there are political differences between the subregional viewpoint and the prevalent viewpoint in the Security Council. This is a reality in the case of Liberia and in other situations in Africa that we need to face.

The fourth political lesson has to do with relations with armed groups. The lesson is the need to understand the political agenda of those non-State actors and to open the appropriate political spaces for them. But in doing that, we must be cautious, we must not be naïve, and we must maintain firm positions vis-à-vis these actors. We must create sanctions if necessary. We must not compromise, and we must deny amnesty for atrocious crimes.

There are three concrete lessons in the humanitarian area that we want to highlight. The first has to do with the complex management of internally displaced persons and refugees as concomitant phenomena. The lesson there is that the Office of the United Nations High Commissioner for Refugees can and must play a pragmatic role in the area of meeting the needs of internally displaced persons, even if there is no specific mandate to do so. We believe that it has been proven that it is a valid focal point in this regard because it has strengths that other agencies of the United Nations system lack.

The second lesson that we still need to digest is what to do when sanctions are imposed on a country which are politically justified but which reduce the availability of resources for humanitarian activities. In other words, the challenge before the Security Council is ensuring that humanitarian assistance is not subject to or conditioned by political strategies or the imposition of sanctions.

Finally, concerning the role of women and children that Ms. McAskie has referred to, I think that we have learned that women and children are not merely victims of conflicts. They may also be basic actors in peace building, particularly at the grassroots community level.

I wish to conclude with an additional lesson about the participation of the international community. We have learned that international assistance in the humanitarian field and in the reconstruction process is unpredictable and volatile. That is something that we always have to take into account when the Security Council is making decisions. The appeal that Ms. McAskie made, and the appeal made with regard to the court, is a recurring one, not only with regard to the Mano River, but to other areas as well.

The President: I think key themes are emerging from all our speakers.

The next speaker is Mr. Sylvain Ngung, the Deputy Permanent Observer of the African Union to the United Nations. I invite him to take a seat at the Council table and to make his statement.

Mr. Ngung (*spoke in French*): I wish at the outset to thank you once again, Madam President, for your gracious invitation to the African Union to participate in this workshop devoted to the Mano River subregion. As you have requested, our statement will focus mainly on the experience of Sierra Leone, which, in our opinion, is an encouraging example in the framework of efforts that must be deployed to help the countries of the region.

For more than a decade the West African region, particularly the Mano River subregion, has been the theatre of bloody conflict with war in Liberia and Sierra Leone. The situation of war in Liberia and Sierra Leone over the past dozen years has always been cause for serious concern for the Organization of African Unity (OAU), which sent its special envoy to the region to consult with the authorities of the countries of the subregion.

Speaking at the sixty-sixth regular session of the Council of Ministers of the Organization of African Unity, held earlier this month at Durban, South Africa, the OAU Secretary-General — today Acting President of the African Union Commission — said with regard to the situation in Sierra Leone:

> "I am pleased to report that, since the last Council session held at Addis Ababa last March, there have been new developments in efforts to promote lasting peace in Sierra Leone."

Indeed, completing the disarmament of ex-combatants in Sierra Leone has facilitated deployment of elements of the United Nations Mission in Sierra Leone (UNAMSIL). That contributed greatly to improving the overall security situation, particularly along the borders between Sierra Leone and Guinea. As we know, on 28 March 2002, the Security Council adopted resolution 1400 (2002), extending the mandate of UNAMSIL for a further six-month period.

Arrangements were made during that period for the holding of the first presidential and legislative elections in Sierra Leone since the end of the civil war, which lasted some 12 years. The OAU has worked closely with international organizations, particularly the Economic Community of West African States, sending observers to monitor the elections and to ensure that they were free and fair. The presidential and legislative elections took place on 14 May 2002, and the various observer groups said afterwards that they had been held in a calm atmosphere and virtually without incident. The outgoing President, Ahmad Tejan Kabbah, was re-elected with a large majority of 70.6 per cent of the vote, for a new five-year term.

It should be pointed out here that, following practices in other countries where there have been cases of acts of impunity and flagrant violations of human rights, a Special Court, proposed by the Secretary-General of the United Nations, and a Truth and Reconciliation Commission were set up in Sierra Leone. The Truth and Reconciliation Commission will begin its public hearings on 1 September 2002.

In the meantime, the Secretary-General of the United Nations has appointed the Prosecutor for the Special Court and will be appointing its judges. The Special Court will be trying persons responsible for war crimes committed in Sierra Leone since 30 November 1996.

The humanitarian situation in Sierra Leone is tragic. The country is emerging from a protracted war and is facing many challenges, including rebuilding infrastructure destroyed by the war. The other major challenge facing Sierra Leone is rehabilitation and reintegration of a large number of ex-combatants into society.

It is true that the international community has provided Sierra Leone financial assistance for the demobilization process. It is also true that the situation of refugees, displaced persons and repatriated persons remains critical in that country. The African Union appeals to the international community to provide more consistent support for the reintegration of ex-combatants into society and greater assistance for the rehabilitation of repatriated persons. The international community should also provide assistance to Sierra Leone in training the army and police, which will be ensuring security in the country in the future. It goes without saying that stability in Sierra Leone will depend on the situation in neighbouring countries, including Liberia, which is still a victim of war.

The African Union, for its part, welcomes the experience of Sierra Leone, which has followed democratic processes. The African Union will continue to cooperate with the Government of Sierra Leone, ECOWAS, the United Nations, the European Union and other organizations and entities to promote peace and security in Sierra Leone and hence throughout the subregion of West Africa.

The President: I thank the representative of the African Union for his comments and in particular for identifying the role that the African Union will play.

Mr. Tafrov (Bulgaria) (*spoke in French*): I should like to thank the Secretary-General for his presence at the beginning of our discussion this morning. My thanks go also to Under-Secretary-General Jean-Marie Guéhenno, and to Ms. Carolyn McAskie, Deputy to the Under-Secretary-General for Humanitarian Affairs, for their very complete and useful briefings. It is also a pleasure to see around the table the Foreign Ministers of Sierra Leone and of Guinea. I welcome in particular the presence of François Fall in his new capacity as Minister for Foreign Affairs of Guinea.

The very choice of the format for this discussion on the part of the British presidency of the Council, I think, attests to an approach that is becoming more and more necessary. Bulgaria welcomes this approach to various conflicts, particularly in Africa but also elsewhere: the regional approach. We are discussing today not only the crises in Sierra Leone and Liberia, but also the situation in the Mano river region as a whole. This approach is extremely sound, and we commend it. I must state that the situations in those countries are very intimately interconnected, almost like communicating vessels. The Council is right to address them simultaneously.

Before I make some further brief remarks, I would like to say that Bulgaria fully associates itself with the statement that will be made this afternoon by Denmark on behalf of the European Union. Bulgaria, as members know, is an associated country of the European Union.

One of the most important lessons of the success of the United Nations Mission in Sierra Leone (UNAMSIL) is undoubtedly the fact that it was made possible by the resolute action of a country having historical links with the region. I am speaking of your country, Madam President, the United Kingdom. Bulgaria pays tribute to the role played by the United Kingdom in the resolution of the Sierra Leone tragedy, a resolution which would not have been possible without the resolve and engagement of the United Kingdom.

Of course, the other Members of the United Nations, and of the Security Council in particular, made possible a remarkable harmony of approach to this crisis, which was so difficult in humanitarian terms. That harmony and unity of approach was reflected in the mandate that was given UNAMSIL once the shortcomings of the mandate and the weakness of the United Nations presence in Sierra Leone had been identified. Jean-Marie Guéhenno spoke of this eloquently. I fully concur with his appraisal. One thing is certain: while we cannot make the integrated mission of the United Nations a rigid principle in conflicts all over the world, it is important to understand that that integrated approach can very often ensure greater effectiveness, particularly in the humanitarian sphere. I was glad to hear this impression confirmed by Ms. McAskie. This has been the case for Sierra Leone. It is the case for Afghanistan. It is increasingly the case elsewhere. The fear of humanitarian workers of seeing their room for manoeuvre and independence somewhat limited by politicians and the military is, I believe, offset by their ability to have a genuine impact on the political and military decision-making process. I think that this is extremely valuable.

Much has already been said about the clarity of the mandate and the fact that the investment was

thoughtfully made commensurate with the risks of the Mission.

With respect to other conflicts in Africa, we must also bear in mind another dimension: the scale of Sierra Leone and of Liberia, which are relatively small countries, which makes it possible perhaps to take the same approach in these situations. But the resources required in other situations are clearly greater. I am especially thinking, of course, of the Great Lakes region, which, I believe, should particularly benefit from this debate, given that we are far from stabilizing the situation in that region of Africa.

The role of sanctions is an aspect that we will never be able to discuss enough. Ambassador Aguilar Zinser has spoken about this, and I agree with him. Sanctions will work in the case of Sierra Leone. That is true because, while in other situations the lifeblood of war is money, in this case the lifeblood of war is diamonds. When we speak of diamonds we are speaking of interests that go well beyond the subregion.

On that note, I would like to conclude by saying that the lessons of Sierra Leone may not be of universal application, but they are relevant to a large number of crises, in particular in Africa, where natural resources are among the causes of the misfortune of the people afflicted by the situation.

Mr. Wehbe (Syrian Arab Republic) (*spoke in Arabic*): We welcome your presence in the Chair, Madam President, and we thank the delegation of the United Kingdom for convening this important meeting. Allow me also to welcome Mr. Momodu Koroma, Foreign Minister of Sierra Leone, and my friend and colleague François Fall, Foreign Minister of Guinea. The Foreign Ministers of Sierra Leone and Guinea; the Under-Secretary-General for Peacekeeping Operations, Mr. Guéhenno; the Deputy Emergency Relief Coordinator, Ms. McAskie; and the representatives who spoke before me in fact covered all the important lessons to be learned from the experience in Sierra Leone.

Nevertheless, I would like to put forward the following points. The 14 May 2002 elections in Sierra Leone were a major landmark on the road to peace in that country. The people of Sierra Leone and the elected Government under the presidency of Mr. Kabbah, deserve our congratulations on the success of those elections. The United Nations, particularly the United Nations Mission in Sierra Leone (UNAMSIL), deserve appreciation and thanks for the essential contribution. We believe that the important role played by the United Nations is in itself a lesson to be learned and built upon in other African regions suffering similar conflicts.

UNAMSIL's completion of the disarmament and demobilization of some 50,000 combatants and the achievement of peace and security in Sierra Leone constitute a success story. They prove that the international community's determination to bring about peace and security can be realized with the requisite political will, with clear resolutions adopted by the Security Council and with a clear mandate and adequate resources for a United Nations force. We have to preserve such a situation and build upon it. But completion requires reintegrating ex-combatants and confronting the problem of financial shortfalls.

We believe that failure in this regard can represent a serious threat to the stability that has been realized so far. This in itself is another lesson to be learned. The success of the elections, the completion of the disarmament of ex-combatants and the progress achieved regarding the return and reintegration of many refugees and internally displaced persons mark the end of the current stage of the peace process and the beginning of a new stage. In that stage, the elected Government must strengthen the bases of stability and peace by moving towards national recovery. The country continues to require assistance from the international community. This leads us to comment briefly on the regional dimensions of the crises in the Mano river region, where refugees are among the most important factors. We look forward to our discussion of that issue this afternoon. The waves of refugees who are intermittently fleeing the fighting in Liberia are the best example of this, as stated by the Foreign Minister of Guinea in reply to your question, Madam President.

Finding regional solutions to the problems of the region and reversing the destructive fighting in Liberia, in particular, are the key to maintaining and building on the success achieved in Sierra Leone, and the key to many chronic and thorny crises, such as those related to refugees.

Finally, we believe that this successful experience can be repeated with political will on our part with respect to other regions in Africa, such as Somalia.

In conclusion, I would like to pose the following question. When the crisis in Sierra Leone was at its worst, the United Nations dispatched one of its largest missions, and its success was one of the most important lessons to be learned, as has been mentioned by everyone here, and as I mentioned at the beginning of my statement. What does the Security Council expect with regard to the crisis in Liberia? Are we going to wait until that crisis escalates further before addressing it, as we did in Sierra Leone? That question has implications for the lessons learned.

I believe that the success of UNAMSIL is a good lesson for us, a lesson that we ought to draw on in Liberia. Otherwise, we believe that the intensity of the crisis could spread again to Sierra Leone, which would not lead to peace and security in the Mano River Union region.

The President: I thank all of our speakers this morning, in particular for their discipline in relation to time. I would now like to return to Foreign Minister Koroma and Foreign Minister Fall, and just ask if they have any very brief comments they would like to make in response to what they have heard this morning. I call on the Foreign Minister of Sierra Leone, Mr. Koroma.

Mr. Koroma (Sierra Leone): I would like to say here that important lessons come from the engagement in Sierra Leone of the United Nations Mission (UNAMSIL), and that those lessons can be applied in the subregional context. It is important to note that the job of UNAMSIL, as a lesson, is not yet complete in Sierra Leone. There are a few things that need to be further addressed. They have been addressed very well, but they need to be addressed adequately to ensure that we do not slide back internally. They include issues of reintegration of ex-combatants, issues of getting a more comprehensive mandate for UNAMSIL to cover recovery and issues of governance which must equally be addressed to ensure that the country does not slide back.

I want to add that the lessons learned by UNAMSIL in Sierra Leone can help us not only to extend the UNAMSIL mandate, but to expand it to include the subregional context. I believe we should find a way of integrating what the Mano River Union is doing, what ECOWAS is doing, and what UNAMSIL can also do to improve the situation. It is important that we do this because UNAMSIL is already mobilized in the subregion; it is already there. There will be a lot of cost-saving if UNAMSIL, as it is in Sierra Leone, can review its mandate to include the subregional situation.

The President: I give the floor to the Foreign Minister of Guinea, Mr. Fall.

Mr. Fall (Guinea) (*spoke in French*): I will be brief. I have a couple of comments on Sierra Leone. We will look at the question of the Mano river basin region this afternoon. Almost all members of the Council recognize that the mandate given to the United Nations Mission in Sierra Leone (UNAMSIL) was a clear and precise mandate which facilitated the success of the operation. I note the key role played by the United Kingdom in the past, and today, in stabilizing the situation in Sierra Leone. Let me repeat: UNAMSIL's role is not over. It must continue to support ongoing activities until there is lasting peace in Sierra Leone. The international community must also continue its work, helping to stabilize the situation in Sierra Leone, which can bolster the efforts made to date.

What has been done in Sierra Leone is something innovative, something that can also serve as a model for other parts of Africa. The success of the operation in Sierra Leone, if we look at it squarely, contains some elements we must take into account. Here, we are also thinking of Liberia, and other countries in Africa. We believe this example should be considered and analysed by the Council, so that all the lessons of the successful Sierra Leone experience are learned and so that the Council can make progress elsewhere in Africa.

The President: I give the floor to Mr. Guéhenno, and ask him please to be brief.

Mr. Guéhenno: I would say, as the Foreign Minister of Sierra Leone just said, that the challenge now is to move from a peacekeeping situation to a peace-building situation, to transform what is indeed a real success into a sustainable success. That is where, now, the international community must stay the course. Peacekeeping is funded through assessed contributions; development will require voluntary contributions. I think the future of the peace process in Sierra Leone very much depends now on the sustained efforts of the international community in partnership with the Government and the people of Sierra Leone to consolidate the results so far achieved.

3621.A

The President: Ms. McAskie, did you have anything to add?

Ms. McAskie: Certainly I support what my colleague has just said, and would also add that it is terribly important for us to keep a very close eye on the humanitarian and political situation in the surrounding countries, not only because of the impact on those countries themselves, but also because of the need to address these issues in terms of maintaining the stability of the peace process in Sierra Leone. It would be unfortunate if events in those countries were to derail the gains that have been made so far.

The President: I would like to sum up by identifying the key themes which I think emerged out of our very good discussion this morning. We identified the need for early international action, including by the Security Council; the need for a regional strategy from the beginning; the need for properly coordinated intervention, both within United Nations agencies and between the United Nations and regional players; the need for rapid agreement to an appropriate and robust mandate for any United Nations peacekeeping force, backed up with adequate resources and with the unity of Security Council members; and the critical role of humanitarian and economic action, both short-term to alleviate the suffering and longer-term to sustain post-conflict recovery. In post-conflict support, security-sector and justice reform was identified as being absolutely critical. We also touched on the value of having a lead nation to give focus to international action and to Security Council action in conflict areas. And finally, the importance of flexibility to respond to changing circumstances was highlighted. I think it came across very strongly that it was important that we not get locked into strategies which clearly are not working.

I look forward to this afternoon's discussion. I hope to have a prompt start at 3 p.m.

With the concurrence of the Council members, I shall now suspend the meeting until 3 p.m.

The meeting was suspended at 1.10 p.m.

3622

United Nations S/PV.4577 (Resumption 1)

Security Council

Fifty-seventh year

Provisional

4577th meeting

Thursday, 18 July 2002, 3 p.m.

New York

President:	Baroness Valerie Amos	(United Kingdom of Great Britain and Northern Ireland)
Members:	Bulgaria	Mr. Tafrov
	Cameroon	Mr. Chungong
	China	Mr. Wang Yingfan
	Colombia	Mr. Franco
	France	Mr. Levitte
	Guinea	Mr. Fall
	Ireland	Mr. Ryan
	Mauritius	Mr. Koonjul
	Mexico	Mrs. Arce de Jeannet
	Norway	Mr. Kolby
	Russian Federation	Mr. Gatilov
	Singapore	Mr. Mahbubani
	Syrian Arab Republic	Mr. Wehbe
	United States of America	Mr. Rosenblatt

Agenda

The situation in Africa

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room C-178.

02-48524 (E)

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The meeting resumed at 3 p.m.

The President: We now begin the second session of the workshop, which is on developing a coordinated action plan for the Mano River Union.

In accordance with the understanding reached in the Council's prior consultations, and in the absence of objection, I shall take it that the Security Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Sir Kieran Prendergast, Under-Secretary-General for Political Affairs.

It is so decided. I invite Sir Kieran to take a seat at the Council table.

In accordance with the understanding reached in the Council's prior consultations, and in the absence of objection, I shall take it that the Security Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Mr. Abdoulaye Mar Dieye, Director for West Africa of the United Nations Development Programme.

It is so decided. I invite Mr. Dieye to take a seat at the Council table.

I should like to inform the Council that I have received a letter dated 15 July 2002 from the Permanent Representative of the United Kingdom to the United Nations, which reads as follows:

> "I have the honour to request that the Security Council extend an invitation to General Chekh Omar Diarra, Deputy Executive Secretary of the Economic Community of West African States, to address the Security Council under rule 39 of the provisional rules of procedure of the Council, during its consideration of the Mano River Union on 18 July 2002".

This letter will be published as a document of the Security Council under the symbol S/2002/760.

If I hear no objection, I shall take it that the Council agrees on an invitation under rule 39 to General Chekh Omar Diarra.

There being no objection, it is so decided. I invite General Diarra to take a seat at the Council table.

In accordance with the understanding reached in the Council's prior consultations, and in the absence of objection, I shall take it that the Security Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Mr. Florian Fichtl, Senior Social Protection Specialist for Regional Human Development of the World Bank.

It is so decided. I invite Mr. Fichtl to take a seat at the Council table. We will now start our second session. We have three keynote speakers, and I should like to give the floor to Sir Kieran Prendergast, Under-Secretary-General for Political Affairs.

Mr. Prendergast: Madam President, I understand that you spent the morning session discussing lessons learned in Sierra Leone, so I propose to restrict myself to a brief look at the situation in Liberia and at political efforts to stabilize the subregion.

I will start with the current situation in Liberia, which has come full circle for the United Nations — from civil war to a peace agreement, followed by democratic elections accompanied by a United Nations peacekeeping operation, and now, since July last year, a drift back into civil strife as a result of the armed confrontation between Government forces and the Liberians United for Reconciliation and Democracy (LURD).

Clearly, the international community and the Government of Liberia in particular need to learn lessons from the way in which the transition from peacekeeping to peace-building was managed in that country.

As the Council knows, the ongoing fighting has caused thousands of civilians to flee to camps for refugees and internally displaced persons. There are approximately 130,000 internally displaced Liberians today. Since the beginning of the year, 40,000 Liberian refugees have crossed the border into Sierra Leone. During the past few weeks, LURD forces have come perilously close to Monrovia. Government forces recently embarked on a new military offensive against the LURD positions at Tubmanburg in Lower Lofa. The Government are also trying to recapture other cities.

As military offensives and counter-offensives are carried out, both sides have looted and pillaged, including in residential areas and against civilians. As a precautionary measure, United Nations international civilian staff have relocated their residential and most working premises to safer locations.

I now turn briefly to the question of reconciliation in Liberia, including the role played by

the Rabat process, the Mano River Union and the Economic Community of West African States (ECOWAS). I would like to say that, unless urgently and decisively addressed, instability in Liberia risks reversing the significant gains made in the peace process in Sierra Leone. That instability could have a further domino effect in the region, negatively affecting the situations in other neighbouring countries, in particular Guinea and Côte d'Ivoire.

The view of the United Nations is that the current containment policy towards Liberia has its limitations. It needs to be complemented with a coherent and a constructive political agenda. In our view, the international community needs to encourage and support the efforts by ECOWAS and by Liberian political and civil society organizations to exert pressure on President Taylor to create a conducive environment for carrying out security sector reforms and for promoting good governance, dialogue and national reconciliation.

We hope that President Kabbah can be encouraged to persevere in his efforts to facilitate a peaceful settlement of the Liberian crisis now that LURD seems to be ready for dialogue. We also hope that Guinea, as a member of the Security Council and as a neighbour, will be able to play a role. To that end, we look to the new Foreign Minister, our friend and colleague, His Excellency Mr. François Fall, to energize his country in playing that constructive role. In that connection, I also wish, on behalf of the Secretary-General, to commend Morocco for the King's efforts to convene a follow-up Rabat summit with the leaders of the three Mano River Union countries. I know that the summit has been repeatedly postponed — for good reasons I am sure. But we would nevertheless want to encourage Morocco to persevere.

Given that the situations in Liberia and Sierra Leone cannot be addressed in isolation, some Member States have shown interest in establishing a contact group on the Mano River Union to serve as a forum for forging a coherent agenda in support of the Rabat dialogue process and the subregion's peace efforts. We think that the time may have come for them to constitute themselves as that group.

Finally, a word on cooperation with subregional organizations: we believe that such cooperation has proved to be indispensable in pursuing the peace and security objectives of the United Nations in the Mano River region, as elsewhere in Africa and — for that matter — in the wider world. Indeed, the United Nations can greatly benefit from the many comparative advantages of those organizations, which include sound knowledge of, and close involvement in, the subregional dynamics, the personal stature and influence of leaders in the region and the existence of regional mechanisms for conflict prevention, peace-building and the promotion of regional development.

Indeed, it was precisely in view of the linkages between the countries in the subregion and the transborder challenges that they face, as well as the consequent need to interact with regional and subregional actors, that the Secretary-General recently decided to establish a high-level United Nations Office for West Africa, headed by his Special Representative, who is going to be, as the Council knows, Mr. Ahmedou Ould-Abdallah. We regret the delay in the opening of the Office, but the necessary administrative and logistical arrangements are now being finalized, and Mr. Ould-Abdallah will soon be dispatched to the region. Liberia, Sierra Leone and the Mano River Union will feature high on his agenda.

The President: Sir Kieran, you painted quite a complex and difficult picture in terms of what is actually going on in Liberia. Given that there will be presidential elections next year and given the importance I think we all attach to there being some kind of dialogue within Liberia to ensure that we move away from the current instability, what do you think the Security Council and others in the international community can do to foster a constructive, democratically based dialogue in Liberia?

Mr. Prendergast: I suppose that is the $64,000 question, Madam President. The first step towards making a situation better is usually to acknowledge that you have a problem and to be willing to accept internal and external advice. We have been trying to do that.

We have been somewhat hampered because for a while we have had no head of the United Nations Peace-Building Office in Liberia. We have encountered some difficulties in appointing a head. I hope that we shall be able to overcome that obstacle soon, because that will give us some leverage and enable us to develop some traction. As I mentioned, we are aware of the efforts that the subregion is putting into that. We want to give maximum encouragement to the neighbours.

Thirdly, I think we need to encourage the elements within Liberian society who are looking for an improvement in the situation and who are pressing for national reconciliation. I am thinking here primarily of the churches in Liberia and other elements of civil society. Liberia is fortunate in that it has a vibrant civil society, and I think they are making exactly the right noises in pressing for dialogue and national reconciliation. But there has to be a response from the players within the country. I think it is also difficult to dispute that an improvement in Liberia's relations with its neighbours would also be a positive factor in helping to stabilize the situation inside the country. In fact, it is quite difficult to think of a major improvement in internal stability unless there is some improvement in those relations with the immediate neighbours. Thank you, Madam President.

The President: You said "thank you" in a way that indicated that you do not want me to ask any more questions. But thank you very much indeed.

Mr. Prendergast: You have a reputation, Madam President. So, ask away.

The President: We may come back to you later, Sir Kieran.

I would now like to invite the Director for West Africa of the United Nations Development Programme to take the floor.

Mr. Mar Dieye: Today, we are dealing with a region that, after almost 10 years of conflict, has, overall, lost 25 per cent of its gross domestic product (GDP), with acute losses in countries such as Liberia and Sierra Leone of more than 50 per cent of GDP in real terms. We are also dealing with a region with an alarming rate of HIV/AIDS prevalence. We are reaching the rate of 13 per cent in Liberia and of 7 per cent in Sierra Leone. One can understand the spillover effect that might cause in Guinea. This is also the region that ranks lowest on the human development index, hence a region with socio-economic development trends that are not so bright. Yet it is a region with promising development opportunities, given the recent return of peace in Sierra Leone. It thus behoves us to seize the moment and to help transform the emerging glimmers of hope into real development.

This Security Council workshop is very timely because it provides a unique opportunity to bring the peace and development dimensions together in helping shape and chart the way forward in the Mano River Union zone. It will not be the work of a moment to undo the accumulated destructive work of 10 years of evil forces. Not only will we need to act immediately, but we must also set our action within a longer time frame in order to integrate progress towards the achievement of the Millennium Development Goals.

The United Nations system, including the Bretton Woods institutions, is actively engaged in this process and is implementing various strategic initiatives and programmes on the ground to support the reconstruction and recovery process. These include the United Nations Development Assistance Frameworks in Guinea and Liberia, the poverty reduction strategies in Guinea and Sierra Leone and the United Nations strategy to support national recovery and peace-building in Sierra Leone.

But from a development perspective, we are currently facing the following constraints on the way forward: first, insufficient financial resources to implement, at the national levels and on a wider scale, quick-impact projects that would help consolidate peace and prevent the risk of reversal; secondly, weak institutional capacities which then limit the various economies' absorptive capacities. In the three countries we have absorptive capacity ranging from 40 per cent to 60 per cent, and one can see how limited our effectiveness may be; thirdly, dysfunctional productive capacities, including the basic economic and social infrastructures such as roads, schools and health facilities; and fourthly — and this is critical — the absence of an adequate coordinating policy mechanism at the regional level to synchronize the various programmes in the three countries and to deal with cross-border issues.

To address these various constraints, we see the way forward as follows.

First, programme funding should be secured at the national level through the following mechanisms.

The first mechanism is the donor forum on the Sierra Leone strategy document for recovery and peace-building, which is scheduled for the last quarter of this year in Paris, which we are organizing with the World Bank and the Government. I wish to inform the Council that at the end of this month, on 31 July and 1 August, we will be holding an in-country round table in Freetown to discuss the governance programme that the Government is putting forward to deal with civil

service reform, the problem of accountability in rebuilding the failed State, the problem of corruption, the problem of local governance and so on.

Efforts should be made to revive the project of organizing a special consultation on Guinea to address the impact of the conflict. The economy of Guinea has been severely taxed by the conflict in the subregion. It has affected its public finances and its productive capacity. I think that we have once again to put on the table the issue of special consultations, which we were discussing two years ago.

Also important is the implementation of a policy of constructive engagement in Liberia — and again, here we agree with the Department of Political Affairs that we cannot have a long-term policy of containment. This can be done by addressing on a wider scale the humanitarian crisis, community development programmes that promote sustainable livelihoods and the creation of job opportunities, peace education, and the promotion of a system of just and accountable governance. This policy can leverage upon existing United Nations programmes on the ground, which, unfortunately, lack sufficient funding.

The second line of strategy, in my view, would be to mandate the United Nations Office for West Africa to prepare, jointly with the United Nations country team, and in association with the Mano River Union secretariat in the Economic Community of West African States (ECOWAS), a coordinated and integrated United Nations strategic framework document that will not only back the Rabat peace process but also help in building confidence among the parties by focusing on key cross-border initiatives on issues such as HIV/AIDS, fishing rights and cross-border trade. This would include, of course, supporting the parties, civil society and entrepreneurs on the ground.

I will conclude by highlighting the fact that UNDP, through its Regional Cooperation Framework, is finalizing a support programme for ECOWAS and the United Nations Office for West Africa to address some of the various challenges in the subregion that I have outlined. This would complement the support that we are already providing for the implementation of the ECOWAS moratorium on small arms, and the involvement of civil society, including the Mano River Union Women's Network, in the peace process.

UNDP will also lead the efforts of the United Nations country teams on the ground in advocating for the attainment of the Millennium Development Goals.

The President: I thank Mr. Mar Dieye in particular for the thoughts he has given on the way forward. I was struck by the comments that he made about what is needed in each country. I would ask him to tell me if, in his view, he thinks that the United Nations Development Programme (UNDP) actually has the right kind of machinery in place for the coordination and integration of institutional development programmes at a subregional level? He focused very much on what needs to be done in each of the countries within the Mano River Union, but on a subregional basis, does the capacity exist?

Mr. Mar Dieye: I must say here that the United Nations Development Programme (UNDP) has been a kind of precursor in terms of this integrated framework. Indeed, we already have our Regional Cooperation Framework, which is helping to implement programmes at the regional level. As I said earlier, we are supporting the Economic Community of West African States (ECOWAS) moratorium on small arms; we have a regional programme to help civil society participate in the ongoing peace process; and we have a regional programme that is promoting entrepreneur development, with a focus on women entrepreneurs. All of these instruments are available to us. What has been lacking so far is the political framework to secure our economic and development efforts.

I think that, now that we have the United Nations Office in Dakar, we have the right mix so that collectively we can do optimum work on the ground.

The President: I have one follow-up question on economic development. Mr. Mar Dieye talked about where the region sits in terms of the Human Development Index. We all know that if a country or a region really wants to develop quickly, then we need to attract investment and to retain capital in-country. It seems to me, given what Mr. Mar Dieye and, indeed, what Sir Kieran said, that we are very far from that in this region. What should the priorities be to enable us to get to the place where economic development becomes a reality?

Mr. Mar Dieye: This is an excellent question which touches on the crux of the matter. You know, Madam President, that investment will just follow

where good governance, peace and security are, and that has been lacking in the subregion. That is why our key priority in all three countries is to ensure that governance is restored, so that the confidence level is high enough to attract investment. UNDP will continue to work along these lines.

The President: I give the floor to the Deputy Executive Secretary of the Economic Community of West African States (ECOWAS).

Mr. Diarra (Economic Community of West African States) (*spoke in French*): Madam President, it is a great honour for me to represent the Economic Community of West African States (ECOWAS) at this Security Council workshop on lessons learned from resolving the crisis in Sierra Leone, on questions related to the transition from peacekeeping to peace-building, and, finally, on the subregional dimension of the resolution of this conflict.

On behalf of the Executive Secretary of ECOWAS, Mr. Mohammed Ibn Chambas — who could not be here today because of a previous engagement — I should like to thank members of the Security Council for having organized this workshop, and in particular the current President, Sir Jeremy Greenstock, head of the Permanent Mission of the United Kingdom to the United Nations, for having kindly invited ECOWAS to participate in this workshop.

ECOWAS welcomes the convening of this meeting, which is very timely because it seeks to consolidate the hard-won peace in Sierra Leone from the broader perspective of the Mano River Union. Here let me recall the exemplary partnership developed by ECOWAS, the United Nations, the United States, the United Kingdom and the Organization of African Unity that made possible the signing of the 1999 Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF), thereby putting an end to atrocities that will remain seared into the memory of humanity for all time.

I should like also to recall and commend our firm resolve and our unreserved determination in the face of the events of May 2000, when the RUF attempted to call the peace process into question. I wish in this respect to commend in particular the contribution made by the United Kingdom, which was a decisive factor at the time in helping to stabilize the situation.

Finally, I wish to recall and welcome the very close cooperation between the United Nations Mission in Sierra Leone (UNAMSIL), the Government of Sierra Leone and ECOWAS, which made possible the relaunching of the peace process. It is therefore thanks to the combined efforts of all concerned that we have achieved the positive results that we can now welcome.

We wish to express gratitude on behalf of the peoples of West Africa. ECOWAS welcomes this workshop, which is consonant with the commendable efforts made to bring about, though our shared will, a lasting peace throughout the entire subregion, which is a sine qua non for any development.

The States of the Mano River Union, particularly Sierra Leone and Liberia, have always received special attention from the political bodies of ECOWAS responsible for matters of peace and security. Whether it be through the Conference of Heads of State and Government or through the Mediation and Security Council, set up in the framework of the Mechanism for Conflict Prevention, Management and Resolution, Peacekeeping and Security, many decisions have been taken to end the conflicts that have cast a pall over this part of our subregion. Those various decisions and recommendations form the basis of the policy on subregional peace and security. The main elements of that policy for the Mano River Union region are in turn based on three pillars: internal peace in Sierra Leone, peace in the Mano River region, and the subregional context. I shall first take up the issue of domestic peace in Sierra Leone.

Peace in Sierra Leone was sufficiently discussed this morning. ECOWAS believes that the disarmament and reintegration programme should be continued. State institutions should be reformed and strengthened. The programme aimed at reconstruction, rehabilitation and national reconciliation should also be continued. Finally, we need to carry out a policy of democracy and justice, establish the rule of law and gain the support of the international community. These various points have already been adequately covered.

The second element of our policy is peace in the Mano River Union region. That means peace in each State of the region. We cannot talk about peace in the Mano River Union region without talking about peace in Liberia. It is for that reason that ECOWAS has a very specific policy with regard to promoting peace in Liberia. ECOWAS heads of State have given Presidents

Obasanjo and Wade a mandate to organize a discussion so that the three heads of State can meet around the table. ECOWAS also welcomed the Rabat initiative, which has made it possible for these heads of State to meet and to relaunch the Mano River Union mechanism. The second axis of that strategy is non-tolerance for the presence of armed gangs. We think that the presence of such gangs was one of the causes of the conflict.

There is the relaunching of the Mano River Union mechanism, the issue of refugees, and internal peace in Liberia. I would like to emphasize internal peace in Liberia. We confronted a difficulty during the Sierra Leone crisis, namely, that we thought that there could not be peace in Sierra Leone unless there was peace in Liberia. It is for that reason that we joined together to act to end the linkage between Liberia and Sierra Leone, that is to say, to end the linkage between diamonds, arms trafficking and Sierra Leone. I think that link is what should today lead us to take a step forward to consider the question of peace in Liberia, so that that peace can be a factor for stability and peace in Sierra Leone.

ECOWAS has taken a number of steps towards that end. I should like to refer to some initiatives whose results should make it possible to restore peace in Liberia. Those include Liberian civil society initiatives as part of preparations for a national reconciliation conference. There have also been initiatives among Liberia's religious councils. Finally, a meeting has just been held among representatives of political parties and civil society organizations.

The last pillar of our strategy is the subregional context. No peace policy that brings together one, two or three of the countries of the Mano River Union can be viable unless it is part of the ECOWAS framework as such. That is why we say that the Security Council should support the efforts of ECOWAS. We are sure that with the support of the Security Council, peace will be restored in Liberia. That peace will be a stabilizing factor in Sierra Leone, the region and the entire community of West African States.

The President: Thank you for those comments and for setting out the role of the Economic Community of West African States (ECOWAS) as you see it.

You described a role that sounds very resource-intensive, and that I am sure is resource intensive in terms of being able to work with the different countries to not only bring about peace but to try to consolidate peace. Does ECOWAS have the financial and institutional capacity to meet subregional requirements? If not, are there proposals or plans for expansion?

Mr. Diarra (*spoke in French*): ECOWAS is a subregional organization that is concerned with integration, with economics, with development. We believe that development can take place only if there is peace. With respect to development and integration, we do in fact have very specific programmes to deal with economic and monetary issues, as well as issues related to the fight against poverty. All of those issues will be part of the New Partnership for Africa's Development. We do have the willingness. Of course, we do not have all the means. But we think that, with the willingness and confidence of our partners, we can move forward.

The President: You talked about the importance of the Security Council bolstering the efforts of ECOWAS. Did you have any specific things in mind that the Security Council might do?

Mr. Diarra (*spoke in French*): What the Security Council can do is, first of all, to strengthen the credibility of the decisions taken by ECOWAS. What are our decisions? Our decisions have been to firmly condemn attacks in Liberia, not to tolerate the taking of power by unconstitutional means, to condemn Liberians United for Reconciliation and Democracy (LURD), to put pressure on various parties in Liberia to bring them to the negotiating table, and to create the conditions for dialogue in Liberia, making it possible to create favourable conditions for elections next year. That is what we expect from the Security Council.

The President: I will now call on Ambassador Koonjul in his capacity as Chairman of the ad hoc Working Group on Conflict Prevention and Resolution in Africa.

Mr. Koonjul (Mauritius): I am going to skip the courtesies, in the interest of time. But I would like to assure you, Madam President, that we are indeed very pleased to see you presiding over this very important meeting and to have the Ministers from Guinea and Sierra Leone around the Council table.

We would like to thank Sir Kieran Prendergast, Mr. Dieye and Mr. Diarra for their very important statements. We were also very pleased to see the

President of the Economic and Social Council, Ambassador Šimonović, at the Council table this morning. We hope that his presence will not be restricted to debates on Africa only.

The topic of our discussion this afternoon — the way forward: developing a coordinated action plan for the Mano River Union — is very timely in order to build upon the glimmer of hope that is being observed in Sierra Leone at present. One of the tasks of the Security Council's ad hoc Working Group on Conflict Prevention and Resolution in Africa is indeed to see how to promote confidence-building measures in the Mano River region as a means of promoting durable and sustainable peace and stability in the whole region. The Group has had a preliminary exchange of views on this issue, with the contribution of the Organization of African Unity (OAU) and the International Crisis Group. It is the intention of the Working Group to invite, in its future meetings, countries of the region, subregional organizations and other interested parties to pursue further discussions. As an initial step, various recommendations have been examined by the Working Group, and this is going to continue.

The question of peace and stability in the Mano River region has to be viewed from a regional perspective. The insurgency in Liberia, the problem of refugees in Guinea and Sierra Leone and the restoration of peace in the latter country are all interrelated. Any approach to resolving these problems should be closely coordinated with initiatives undertaken by the African Union, particularly by its Peace and Security Ministerial Coordinating Committee, with the Mano River Union countries and with the Economic Community of West African States (ECOWAS). We believe that we should work very closely with the African Union, and more particularly with the leaders of ECOWAS, who could use their good offices to bring peace and stability to the region. Inconsistencies among the policies of the Security Council, the African Union and subregional organizations will not be in the best interest of the region.

The launching of the African Union and the implementation of the process of the New Partnership for Africa's Development (NEPAD) represent a new dynamic for bringing peace and stability to Africa as a whole. The principles of the African Union Charter, namely democracy, good governance and respect for human rights, as well as NEPAD's own principles, implemented through its peer review mechanism, economic and corporate governance, and subregional and regional approaches to development provide an excellent basis for a new approach to peace-building and overall stability and development in the continent. The Security Council and the international community as a whole will need to extend all their assistance to help African countries uphold and promote these principles.

The new situation in Sierra Leone following the peaceful elections, which we most heartily welcome, will no doubt be a catalyst in helping the whole Mano River Union region move away from conflict, instability and lack of socio-economic development to a more prosperous phase, provided that the necessary support and focus are given. In that regard, the recently established Economic and Social Council ad hoc advisory group on African countries emerging from conflict should give the necessary attention to Sierra Leone.

Let me now briefly dwell on the situation in Liberia, to which many speakers referred this morning. It is clear that instability in Liberia will have adverse effects on peace in the region. The Council, together with the African Union and the leaders of the region should, in our view, find ways of engaging constructively with Liberia rather than isolating it any further. The sanctions imposed on Liberia have been of tremendous help in bringing peace to Sierra Leone, but if we want real regional peace, then we will have to engage in a process that will help us attain our objectives. I say that in the light of the elections that are going to take place in Liberia next year. It could be extremely important for the Council and the international community to engage in some kind of constructive dialogue that will further the objectives of the Council and peace in the region.

The success of any action plan for the Mano River Union rests on the degree of trust and confidence among the members of the Union. Every effort should be made to encourage frequent meetings at the highest level among the countries of the region in order to reduce tension and rebuild trust and confidence. In this context, we welcome the summit hosted by the King of Morocco at Rabat, bringing together the Presidents of the countries of the Mano River Union. Such initiatives aimed at reviving social, political and economic integration deserve to be encouraged in the region.

Likewise, it will be in the interest of the countries of the region if they invest seriously in bilateral talks.

One important field of cooperation among countries of the region could be the joint monitoring of borders with the help of the international community. The Mano River Union countries could work out modalities leading to agreements on joint monitoring of borders and they could be encouraged to enter into agreements by which they would undertake not to support rebel activities in neighbouring countries. The international community could be invited to provide assistance in reactivating the implementation of the existing Mano River Union pacts and agreements.

There is a vital role for the United Nations Office for West Africa to play in developing a coordinated plan for the Mano River region. I am glad that the representatives of the United Nations Development Programme (UNDP) and of ECOWAS, who spoke earlier, mentioned this. The idea of the Office assisting in carrying out an audit of the armed groups in the region should be implemented as soon as possible. The findings of such an audit exercise could be used to plan a full and comprehensive process of disarmament, demobilization, reintegration and repatriation or resettlement.

The United Nations Office for West Africa could also assess the requirements of the countries of the Mano River Union in the fields of security, economic, social and development issues. The assistance of the Mano River Union in the field will be very helpful. The outcome of this exercise could provide the basis for all the agencies involved in the region to prioritize their responses to the post-conflict peace-building needs of the countries individually and of the region as a whole.

In the field of post-conflict peace-building, relief and development assistance by the international community should be geared towards capacity-building in the individual countries of the region, rather than only responding to immediate needs. The UNDP and the Bretton Woods institutions should adapt flexible financial instruments to strike a balance between the need for macroeconomic stability and the peace-related priorities of the Governments of the Mano River Union countries. For instance, a country such as Guinea, which has been hosting a huge number of refugees, deserves international assistance. We should not overlook the fact that, if refugee problems are not addressed adequately, there will be the potential for further conflict. It is, therefore, important to find a long-term solution to the problem of refugees.

The illegal exploitation of natural resources and the illicit flow of arms in the Mano River region have been important destabilizing factors. The capacity of the countries of the region to strictly observe the diamond certification scheme and the relevant arms control programmes, such as the ECOWAS moratorium on small arms and light weapons, should be substantially reinforced with a view to securing peace in the region. While we recognize that Guinea and Sierra Leone have put in place diamond certification regimes, it is important that we impress upon the Republic of Liberia the importance of setting up such a scheme in order to ensure a coordinated approach in the region, and that we assist it in doing so.

We believe that it would also be useful to have a contact group on the Mano River Union countries, as we have in the case of Somalia, bringing together all stakeholders in the conflict, where we can discuss means of advancing durable peace in the region.

Finally, the countries of the Mano River Union have many things in common. The cultures, languages, history, geography and socio-economic and political backgrounds of the three countries are factors that bind them. We must build up confidence in the region using these commonalties. The establishment of relationships among civil societies, students, scholars, the private sector and businessmen of the countries of the region will help in promoting confidence. Already the Mano River Union Women's Peace Network and other non-governmental organizations are doing a wonderful job. It is important that we encourage them.

Civil society, we believe, could also play a major role in mediation efforts to bring about peace and reconciliation. The private sector should be given a greater role in the region's integration process. We think that the international community should be exhorted to fully support such a process.

The President: I thank Mr. Koonjul in particular for his thoughts and ideas on the way forward.

I would now like to give the floor to Ambassador Mahbubani of Singapore in his capacity as Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia.

Mr. Mahbubani (Singapore): In the interest of time, I will just say that I agree with every

complimentary word that Ambassador Koonjul just spoke. But I want to add two other important compliments. First, I would like to express our strong support for this new concept of the workshop. I think that this is the first time that we are having a workshop in the Security Council Chamber. It is a useful idea to work on, because one of the structural weaknesses of the Council is that even though we have been sent here to shoulder the collective security responsibilities of the United Nations, more often than not we wear our national hats rather than our collective hat around this table. I hope that in this dialogue that we are having, we will focus on the collective responsibilities that we face as members of the Security Council.

The second compliment we would like to pay is to the United Kingdom for the exceptional role that it has played in Sierra Leone. I think that it is no secret that without the significant British support we would not see the success that we see today in Sierra Leone compared to the situation that we saw just two or three years ago. When the history books are written, historians will be puzzled as to why that nation carried out such an exceptionally altruistic act in international relations.

As we look ahead, I think that the best contribution we could make is to look at what might be the problem areas. I would like in the five minutes that I have to focus on two key problem areas and, if there is time, two or three other minor points.

The first key problem area, which has already been touched upon, is the sore question of resources. Here, I shall touch on a sacred cow that I have occasionally touched upon in previous discussions of the Council: how do you move smoothly from peacekeeping to peace-building? The fundamental structural problem we have is that when it comes to peacekeeping, we have scales of assessments; we can generate $500 million or $800 million. In the case of the United Nations Mission in Sierra Leone (UNAMSIL), as I have said in the Security Council, as of 31 December last year, we had already spent $1 billion on UNAMSIL — probably $1.5 billion by now.

But, if I may use an analogy, when you complete a peace-building operation, it is like walking through a garden which has been well tended with a wonderful sprinkler system. You remove the sprinkler system and then say now the garden will depend on people walking in with buckets of water. It is very hard to bring in enough buckets of water to replace a sprinkler system that is established in the garden.

This is a structural problem that I think applies to all peacekeeping operations, but certainly to the case of UNAMSIL, which has been one of the best-funded operations. Look at the discussion that we have already had today, for example when Mr. Jean-Marie Guéhenno spoke this morning about the difficulty of raising $13.5 million — which I think is less than 1 per cent of what we have already on UNAMSIL — to pay for disarmament, demobilization and rehabilitation (DDR). If you do not take care of DDR and do not find a way out for the combatants, you are basically giving the combatants an incentive to return to combat, because there is no other choice for them. If you have already spent $1.5 billion on UNAMSIL, why can you not find a secure system of funding?

There are, by the way, very strong theological arguments that have been put forward as to why you cannot have assessed contributions for peace-building. I think there is some merit to those arguments. But can we not create a twilight zone, so that when we move from peacekeeping to peace-building we ensure that we do not remove the sprinkler system completely? Can we not have a phased removal of the sprinkler system, and ensure that resources continue to be plowed in for the Revolutionary United Front (RUF) and the other ex-combatants and for their integration when the peacekeeping operation is finished? Here, I think, it is those countries which have invested the most in the success of UNAMSIL that have the greatest vested interest in ensuring a smooth transition to peace-building.

The second problem that I was going to touch upon is one, frankly, that I am glad has already been touched upon frequently this afternoon — the whole question of the regional approach. We have succeeded in creating a pool of stability in Sierra Leone. There is a pool of stability in Guinea. But now, as Sir Kieran Prendergast said, we have come full circle in Liberia. We have gone from civil war to elections and peace and back now to civil war. Everybody has agreed, from what I can tell, that all the success we have secured in the Mano River Union will be endangered if we do not fix the problems in Liberia.

Here, the question that you posed, Madam President, to Sir Kieran — what can the Security Council do? — should have actually been posed to the

Security Council. If I speak honestly, as you say, in my capacity as Chairman of the sanctions Committee on Liberia, I know the sticks that the Committee on Liberia is applying to Liberia, but I do not know what carrots are being applied. We had a very frank discussion at lunch today — which we cannot repeat, obviously, in this Chamber — about how to find possible solutions for Liberia. But the theme that is emerging is the need to find a policy of constructive engagement of some sort with Liberia. I am looking at the Human Rights Watch report that someone dropped on our table here. They all say, let us focus on Liberia. I have not read this report, but that is what the theme is. So I hope, as a result of this debate, that we will find a fuller answer to the question that you posed to Sir Kieran.

I would like to raise three minors points that I just think we should pay attention to. One is, of course, that in the case of Sierra Leone we have set up a Truth and Reconciliation Commission and a Special Court. How to find the balance between the two is always a challenge. Secondly, in terms of the Special Court that has been set up, the question of resources has come up already. Of course, we do not want to see a repetition of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, which have become enormously expensive. That is why there is no real formal court for Sierra Leone. But how do you ensure that there are enough resources for this?

My third and final point builds on a point that Ambassador Koonjul just made about the question of refugees — and I agree with him that Guinea has been exceptionally generous in hosting refugees from Sierra Leone and Liberia. Can we in the Council begin to look at refugees not purely as a humanitarian problem, but, as Ambassador Koonjul said, as a leading indicator that conflict may be on the way? Perhaps we should monitor the refugee flows that are taking place. If they begin to rise, then clearly this is an indication that trouble is coming. If we are looking forward, we should pay attention to this.

The President: Ambassador Mahbubani's analogy about the sprinkler system leads me to think that perhaps we should not be thinking about people coming along with buckets, but about building replacement sprinkler systems. But this is something that I hope that others will return to.

The next speaker on my list is the representative of Morocco. I invite him to take a seat at the Council table and to make his statement.

Mr. Bennouna (Morocco) (*spoke in French*): Allow me at the outset to say how grateful we are to you, Madam, and to Ambassador Greenstock for having organized this workshop — this laboratory of ideas, which has been quite lively. I am a little uncomfortable speaking just after Ambassador Kishore Mahbubani, who is well known for being thought-provoking in the Council. In any case, it is an excellent and very useful idea.

I would also to pay tribute to the United Kingdom for the role that it has played in the restoration of peace in the region. I do not want to speak about leadership, because that could have other connotations, but it is a very positive role, and one that is greatly appreciated by the international community.

I would like finally to welcome the Foreign Minister of Sierra Leone and our former colleague, the Foreign Minister of Guinea, our friend François Fall. I told him before he left that he would often come back to New York, because, in the end, ministers for foreign affairs prefer coming to New York and doing the work themselves here rather than sending instructions from their capitals. In any case, it is always a pleasure to see him here.

One may wonder why Morocco is here. First of all, it is because we are African, and we have always been very interested and involved in the history and future of Africa. But we are here also because we are particularly involved in West Africa. Traditionally, Morocco has always had very close economic and cultural relations with West Africa. But we are also a cultural and geographic link between Europe and North Africa, including the Arab world, as well as between Europe and West Africa. This is a very important role, including from a religious point of view.

The second reason, it has turned out — and perhaps this is the result of the first reason — is that the heads of State of the three fraternal countries of the Mano River region, who are all aware of the regional dimension of the problem of the maintenance of peace and security in their respective countries, naturally turned towards Morocco, and in particular towards His Majesty King Mohammed VI, because they felt that it was with that head of State and that country that they could advance their regional relationships. Naturally,

we welcomed this, because, as I said, we have always had a special relationship with West Africa.

We have to add that Secretary-General Kofi Annan strongly encouraged the regional dimension and the convening of the first Rabat summit. Along with my colleagues, including François Fall, I recall that the Secretary-General greatly helped and encouraged that initiative and urged that the Rabat summit should take place, and that we begin the dialogue. The dialogue began, not easily, on 27 February, in Rabat, at the invitation of His Majesty King Mohammed VI. As the King said to the Secretary-General, "We have broken the ice."

Well, we did break the ice, and it is very important to break the ice. This means that the three heads of State spoke with each other. They lunched. They dined. They had exchanges. But I believe that they went beyond breaking the ice. They acknowledged the 1986 treaty on non-aggression and cooperation. They acknowledged that they should engage in dialogue to settle their differences. They also recognized that they had to revitalize all the security protocols. They recognized that they had to undertake a certain number of concrete measures. And they placed these on the table. They asked their Foreign Ministers to follow up. I believe that this was recalled this morning, and I need not come back to it now. As noted, there were four ministerial follow-up meetings.

We succeeded in some areas, and we failed in others. For example, the "caravan" project to restore confidence was a good idea. It has not yet materialized, but it is still on the table; we have not given it up. I think we have also done things to make the borders more secure. We have improved the possibility of border patrols at some point.

Now, I think, we have reached a stage where we have to go further. As Mr. Prendergast recalled, we are preparing a second summit. It has been delayed for both logistical and substantive reasons. The King of Morocco does not want a second summit that would be purely a matter of protocol. Let me say it clearly: he wants the second summit to be productive, where we would take a decisive step towards a settlement and towards bringing the countries closer together in order to keep the peace.

As we said, diplomats are working today to put in place the elements of fresh progress in peacekeeping, before we convene the summit. That proves that we take this very seriously and that this will not simply be a meeting for a photo opportunity or to appear on television. Even though some people find it rather pleasant to appear on television, that is not enough.

The other substantive matter on which I can speak briefly is the recent developments in Liberia, about which Mr. Prendergast and other participants have spoken. These events are a matter of concern for all who wish for peace in the region, and who are working for peace in the region. Of course, these developments are worrisome; they have once again destabilized the borders, if only because of the flow of refugees into Guinea and Sierra Leone. This once again has created or exacerbated a pocket of instability.

Everything that has been done has been complementary. The United Nations, of course, must probably strengthen its presence in Liberia in a way that it decides; it may require additional resources. The representative of the subregional organization has just spoken here: the Economic Community of West African States (ECOWAS) has a very important complementary role to play in bringing together the stakeholders in the conflict in Liberia. I think that this relates to the Rabat summit. The effort to convene a meeting of the stakeholders, centred perhaps on President Wade, to begin the process of restoring civil peace in Liberia, is also linked a Rabat summit.

There should be an agreement on some principles of good governance, especially for Liberia. Otherwise, there will be no peace in Liberia, and there will be no peace anywhere in the Mano River region. I believe that this is the main issue on which the international community should probably exert pressure. We in Morocco believe that if we let things progress on their own, nothing will happen from within Liberia, and that pressure has to come from outside. That is the role of the international community, and it is also the role of ECOWAS in coordination with the United Nations.

With all modesty, His Majesty the King of Morocco is always ready to help his African brothers in Liberia, Sierra Leone and Guinea, to bring them closer together, to restore peace in that region, which is very dear to us. This peace, which must be established by the leaders, should benefit the generations of the region who have already greatly suffered as a result of war. And the young people of this region have probably experienced the most appalling suffering in the world.

Perhaps this is a model on which we should reflect. Perhaps this is not the place to do so, but we have to draw certain conclusions about the need for complementarity among all the efforts that I have mentioned.

The President: I think we all recognize the importance of regional initiatives, and in particular the importance of what went on in Rabat. I hope that it will be possible to coordinate the different regional initiatives which have been taken in the Mano River Union.

Mr. Levitte (France) (*spoke in French*): I too wish to welcome the two ministers who have honoured us with their presence today, in particular my neighbour at the Council table, François Fall. I also thank you, Madam President, for your presence and for the excellent way in which you are guiding our debate today.

I would like to begin by paying special tribute to the United Kingdom for its determined commitment in service of peace in Sierra Leone through the presence of ground troops, which at a particularly difficult time made it possible to restore full credibility to the United Nations Mission in Sierra Leone (UNAMSIL), and through the United Kingdom's resolute commitment to rebuilding the State and the economy of a devastated country.

We are here in a brainstorming session. I would like to note three things.

First of all, personal relations between heads of State are a key factor for peace in this region, as indeed elsewhere in Africa. Restoring good relations among the three presidents of the Mano River Union is a priority, and that is why France welcomes in particular the role now played by the Rabat process. I salute the commitment of King Mohammed VI to the peace process in the Mano River Union region.

My second point is there can be no peace in the region unless there is peace among the three countries — I would say within each of these three countries. What is striking today is that, if we have a clear strategy that is working for Sierra Leone, we do not have a comprehensive strategy for Liberia. Of course, we have the sanctions committee, and I welcome the role played by the Ambassador of Singapore. However, a sanctions committee is not enough for providing a strategy. I entirely support what General Diarra has said on behalf of the Economic Community of West African States (ECOWAS). We discourage any seizure of power by force, and we must condemn Liberians United for Reconciliation and Democracy (LURD) in its attempt to do this. We need to assist all political forces in Liberia to prepare as best they can for the presidential elections to be held in 2003. Accordingly, the statement adopted last week in Ouagadougou seemed very positive to us. One understands that we need to elaborate, in partnership with the other stakeholders, a true strategy for Liberia, just as we did for Sierra Leone.

From that standpoint, today's dialogue, including with ECOWAS and Morocco, is particularly useful. We believe ECOWAS deserves encouragement in their its efforts. The United Nations should, for example, help ECOWAS set up the four early warning regional centres.

I would like to refer specifically to four elements. First, and this point was made by other speakers, we need to set up the contact group of interested countries within the Mano River Union as quickly as possible. This group should be limited in composition, but it needs to be established urgently.

Second is another urgent matter. We need a representative of the Secretary-General of the United Nations in Liberia. I am sure the United Nations Office in Liberia should be strengthened. I know this is not easy, because President Taylor has the unfortunate habit of rejecting people proposed to him. But I would like to ask Under-Secretary-General Prendergast, what stage are discussions between the Department of Political Affairs and the Liberian authorities on this point.

The third idea was mentioned by Sir Kieran, the upcoming installation in Dakar of the Special Representative of the Secretary-General for West Africa. How does he see the role of Mr. Ould-Abdallah, among the other stakeholders — that is, ECOWAS and the Rabat process, lead by the King of Morocco?

The fourth and last idea concerns the Rabat process. If it makes good progress in coming months, could we take advantage of the General Assembly session this autumn to invite to a meeting of the Security Council the three foreign ministers of the region? We already have two right here. Perhaps with the three heads of State we can crystallize the progress that will have taken place in the intervening period

through the activities of Morocco and give additional momentum to the peace process in the region of the Mano River Union.

The President: You asked some specific questions which I will ask Sir Kieran to respond to at a slightly later stage. I know we are due to move to speakers' responses now, but I would like to hear from our speaker from the World Bank before I move to speaker responses at a later stage. Thank you for your comments and also your idea about a meeting in the margins of the General Assembly later this year.

I would like to invite Mr. Fichtl, the Senior Social Protection Specialist for Regional Human Development of the World Bank, to take the floor.

Mr. Fichtl: I would like to echo the sentiments of previous speakers as to the timeliness and relevance of the workshop. I would like to focus my observations on Sierra Leone. I believe this also offers important lessons for developing a coordinated and comprehensive approach towards Liberia.

A real window of opportunity for sustainable peace and economic recovery exists following the disarmament and demobilization of about 68,000 ex-combatants in Sierra Leone and the re-election of President Kabbah on 14 May 2002. Immediate priorities are the return of displaced populations; reintegration of ex-combatants; rehabilitation of the basic social and economic infrastructure, especially in areas most affected by the conflict; expansion of access by the poor to social services, markets and assets; and the facilitation of reconciliation.

A major challenge for the Government and its international partners will be to address the needs of the youth. Forty-five percent of Sierra Leone's population is under the age of fifteen. Their potential needs to be utilized, and they need to be equipped with necessary skills to earn an income. This will depend, to a large degree, on an environment conducive to economic growth, in such a manner that a maximum number of people benefit from the growth and have a chance to find employment.

Looking at the lessons learned from the point of view of the World Bank, clearly the early engagement of development partners, including the World Bank, in support of the lead role played by the United Nations, ECOWAS, and the United Kingdom has paid off and contributed to the significant progress made. We have learned that in complex emergencies, coordinated and complementary efforts focusing on humanitarian assistance, political mediation, security sector reform and early developmental efforts dramatically increase the impact of the international community's response. This coordinated and complementary approach led to the success in Sierra Leone thus far.

We also learned that disarmament, demobilization and reintegration programmes (DDR), as important as they are, cannot be used to break a political impasse, nor can they guarantee security in a fragile environment. DDR programmes are more likely to succeed and to be sustained if they are anchored in a larger peace process that is based on political commitment and on the means to provide a minimum of security.

Civil society understood that in Sierra Leone the large majority of former combatants were both perpetrators and victims, and that their reintegration was key to rapid and sustainable recovery and reconciliation. In that regard, the international community correctly pursued a two-pronged approach, focusing simultaneously on individual ex-combatants and on supporting communities. Financial assistance to complete those programmes should not diminish at this critical juncture. We also believe that the nascent Truth and Reconciliation Commission has an important role to play for Sierra Leone's future. Complementing investments in bricks and mortar, the Commission deserves to be fully funded.

More specifically with respect to the World Bank and its efforts through the International Development Association (IDA) programme, the Bank is focused on new financial assistance to support the transition out of conflict through budget support to maintain key Government functions, projects in support of the disarmament and demobilization programme and the reintegration of ex-combatants, and community-oriented rapid rehabilitation efforts.

Complementing that financial assistance, the Bank has provided technical support to empower the Government to lead demobilization and recovery efforts and to encourage partners to support a comprehensive recovery framework. The Bank supported the Government in donor coordination and in broadening the initially very small donor base through the establishment of a multi-donor trust fund in support of the DDR programme. In collaboration with the

United Nations, and with the personal leadership and support of Secretary-General Kofi Annan — which we would like to acknowledge here — the Bank to date has been able to raise $31.5 million in support of the DDR programme, of which $28.5 million has been disbursed thus far. In addition, as my colleague from the United Nations Development Programme mentioned, the Bank has facilitated regular donor meetings and will convene a Consultative Group meeting, most likely in Paris in October.

In these transition situations, Government capacity is limited and constrained. In Sierra Leone, the Bank helped the Government to establish an independent and effective implementation mechanism in two key areas: the demobilization programme and a social fund to finance a community-oriented rehabilitation programme.

In summary, IDA assistance, built on ongoing humanitarian assistance — for example, the social fund was disbursed directly to national and international non-governmental organizations — focused its early development assistance on complementing the efforts of key partners in the political and security areas. We find that timeliness and flexibility are of great importance in a rapidly evolving post-conflict situation.

As to the challenges ahead, stability in Sierra Leone is linked to regional stability in Guinea and in Liberia. Continued leadership and close cooperation of the partners key to Sierra Leone's recovery — including the Economic Community of West African States, the United Kingdom, the United States and the United Nations — are required for regional stability. Disenchanted ex-combatants pose a threat if they are not reintegrated into society and the economy; reconciliation remains a major challenge. In addition, the success of the transition to date is no guarantee that the root causes of the conflict will be successfully addressed in the future; the challenge is with the Government and its development partners. For example, if resources — including the proceeds from mineral resources — are not used equitably and transparently, there is a danger that latent tensions will re-emerge and will undermine stability.

The Bank's strategy for the immediate future builds on the Government's framework for poverty reduction. It will focus on consolidating peace and security through resettlement, rehabilitation and reintegration, supporting governance, targeting institutional reforms and economic growth through a stable macroeconomic environment, expanding access to the financial services infrastructure and expanding the access of the poor to social services, including through better public expenditure management.

The proposed lending programme for fiscal years 2002-2004 amounts to approximately $205 million. New projects are being finalized this fiscal year, with the Government supporting the areas of education, health care and community rehabilitation, along with continued budgetary support. The Bank has also committed resources to assist the Government in protecting Sierra Leone against the threat to which it is most vulnerable in a post-conflict transition: that of HIV/AIDS.

Lastly, Sierra Leone reached the decision point in the framework of the Enhanced Heavily Indebted Poor Countries (HIPC) Initiative earlier this year, in March. HIPC relief amounts to approximately $600 million in terms of net present value, of which $122 million will be provided by the IDA.

In closing, allow me once again to thank you, Madam President, for affording us the opportunity to address the Security Council. Indeed, that reflects the close cooperation we have enjoyed in working with the United Nations and with other key partners in Sierra Leone.

The President: Mr. Fichtl, you spoke about the support given to Sierra Leone during the transitional period. In the light of that experience, is the Bank prepared to move into peace-building activity before a conflict is fully over?

Mr. Fichtl: I think that is a question which we all have to ask ourselves: if all of us, as partners, missed opportunities in Sierra Leone. With hindsight, I think there were missed opportunities. Are we going to engage in peace-building in other cases? I might not be the right person to answer that, as we are talking about mandate issues, in which we have to coordinate very closely with the United Nations and with other partners. Our focus is on development issues, and I think the question there is whether the development assistance is targeted in such a way that it contributes to diminishing the risk of conflict. If a conflict has arisen, I believe the challenge is not to crowd out the development partners, but rather to bring them in as early as possible.

In that context, I should like to make an observation: I would be a bit careful about expanding the mandate of peacekeeping operations, for example, to include rehabilitation and development efforts, but would rather focus them on their priority mandate and, on the other hand, try to engage the development partners as strongly and as early as possible.

The President: Clearly, this is something to which we will have to return. Moving from peacekeeping to peace-building, I think, is the core of some of the issues we have been discussing this afternoon.

Mr. Wang Yingfan (China) (*spoke in Chinese*): First of all, Madam President, allow me to welcome you to New York to preside over this meeting. I also wish to welcome Foreign Minister Koroma and Foreign Minister Fall, and to express our appreciation to the United Kingdom presidency for the initiative to convene this meeting.

I focus my remarks today on two points. First, the situation of the internal conflict in the host country of a United Nations peacekeeping operation, the aspirations of its people, the attitudes of the neighbouring countries and the unity of the international community are very important conditions for the success of the mission.

In Sierra Leone, what is right and wrong between the Government and the Revolutionary United Front (RUF) is quite clear. The parties to the conflict are few, and the Economic Community of West African States (ECOWAS) has a relatively united position on the conflict. Once it was isolated and had come under tremendous external pressure, RUF disintegrated in relatively short order. The timely dispatch of troops by the United Kingdom played an important role in this process.

In contrast, the United Nations has had to face more complicated problems in Somalia and the Democratic Republic of the Congo, where there is a complex mix of parties to the conflicts. Regional countries are of several minds about these conflicts, and it has proved hard to forge consensus in the international community on these issues.

The success of the United Nations peacekeeping operations hinges on a combination of factors inside and outside the areas of operation. Under given circumstances, the proper resolution of external questions could become the key to progress in the peace process.

Sir Jeremy Greenstock took the Chair.

Secondly, peace in Sierra Leone cannot be separated from the regional environment of the Mano River Union. Security in Sierra Leone, Liberia and Guinea is closely related among the three, a fact recognized by all. Sanctions against Liberia have played an important role in the peace process for Sierra Leone in that they have led to the isolation and eventual collapse of RUF. If the situation in Liberia further deteriorates, it might produce a spillover effect into Sierra Leone, and even into Guinea. Right now there are differences of opinion between the Security Council and regional organizations regarding sanctions against Liberia. We need to consider seriously how the Security Council can strengthen coordination with regional organizations in this regard.

At the present time, there are a number of initiatives working towards a solution to the Liberian conflict. These initiatives are, among others, those of ECOWAS, the King of Morocco and the Mano River Union, with the latter having become increasingly active in the past two years. All of these efforts need to be coordinated in order for them to be effective.

The Secretary-General has just established an Office for West Africa and has appointed an experienced Special Representative who is well-versed in West African issues. We eagerly await his recommendations as to how the United Nations can support the initiatives to end the Liberian conflict, with a view to achieving lasting peace for the three countries in the Mano River Union.

The President: Baroness Amos apologizes, because she has just been called up to talk to the BBC for a few minutes. She will be coming straight back. She will be sorry to have missed your speech, Sir.

Mr. Gatilov (Russian Federation) (*spoke in Russian*): We would like to express our gratitude to the delegation of the United Kingdom for having organized this discussion, which gives us an excellent opportunity to exchange views about lessons learned and prospects for development in the peace process of the Mano River Union region.

Russia is deeply concerned at the complex situation that has emerged in this subregion, in particular the volatile situation in the border area

between Liberia, Guinea and Sierra Leone. We support the strengthening of coordination between the United Nations and the Economic Community of West African States (ECOWAS) to resolve the situation in West Africa, including conflict prevention and resolution. Here lies the growing importance of the work done by the Security Council's ad hoc Working Group on Africa, as the link between the Council and the subregional organizations.

Like other delegations, we commend the efforts of ECOWAS and those of His Majesty Mohammed VI of Morocco to help bring about a ceasefire and to reconcile the Liberian parties, and also to build confidence among the leaders of Guinea, Liberia and Sierra Leone.

The stabilization of the situation in the Mano River Union region is intrinsically linked to a successful conclusion of the peace process in Sierra Leone. We are pleased to note that the holding of elections on 14 May was an important landmark in the history of that country, bringing to an end the second stage of the implementation of the military concept of the United Nations Mission in Sierra Leone (UNAMSIL) for this year. The Government appointed by the newly elected President of the country, President Kabbah, has a fairly firm grip on the situation and is now getting down to resolving the priority tasks of establishing life in peace.

The activities of the United Nations and the Security Council in settling the crisis in Sierra Leone deserve the highest commendation. With the assistance of UNAMSIL, at present a total of almost 6,500 people, former members of armed groups, have been through the reintegration process. Another 20,000 people are participating in the process of reintegrating into peaceful civilian life.

The difficulties being experienced by the Government of Sierra Leone are well known when it comes to implementing disarmament, demobilization and reintegration programmes. This is why it is important that the international financial institutions and the donor community give the Government emergency targeted assistance. In this way, it could successfully carry out and conclude these programmes, and that, to a large extent, will determine the fate of post-conflict peace-building in that country. There is no doubt that providing security will, for the immediate future, remain a top priority for United Nations peacekeepers in Sierra Leone, until sufficient capacity is built up and the national security organs are guaranteed to be working reliably.

We think that when adjusting the further presence of UNAMSIL in that country, it will be essential to synchronize the future plans regarding the Sierra Leonean army and the recruitment and training of national police officers with plans to reduce UNAMSIL's strength, in order to prevent a security vacuum occurring after the Mission's withdrawal.

The most serious threat to stability and security in the Mano River Union region remains the ongoing bloody conflict in Liberia, where armed clashes continue between Charles Taylor's forces and the Liberians United for Reconciliation and Democracy (LURD). As a result, the uncontrolled flow of Liberian refugees into Sierra Leone is growing, and they include a large number of armed elements. An escalation of fighting in Liberia could lead to a destabilization of the situation in neighbouring States.

A direct consequence of the ongoing conflict in Liberia is the deepening humanitarian crisis in the border regions between Sierra Leone, Guinea and Liberia, as a result of which thousands of people have been forced to resettle and to become refugees. We note with gratitude that the Office of the United Nations High Commissioner for Refugees (UNHCR) and other international humanitarian organizations, despite the enormous difficulties they face, continue to assist refugees who are in dire circumstances by moving them from the dangerous border areas into camps that are far removed from the borders.

Against this backdrop, the top priority is now to provide free access for humanitarian aid workers to the places where the refugees are, to guarantee their security and to create the necessary conditions that will be conducive to their voluntary return.

What is of crucial importance for resolving conflicts in the Mano River Union region and preventing their escalation is that Liberia should fully comply with the demands of the Security Council. We take note of the Monrovia statements regarding its intention to continue cooperating with the Council in this area.

In the context of the implementation of resolution 1343 (2001), we call upon all States fully to comply with the resolution's demand that they prevent the use

of their territories by armed persons and groups to prepare for and commit attacks on neighbouring countries, and that they refrain from any action that could further destabilize the situation on the borders between Guinea, Liberia and Sierra Leone.

The President: The next speaker is the representative of Denmark. I invite her to take a seat at the Council table and to make her statement.

Ms. Løj (Denmark): Allow me to congratulate the presidency of the Council on convening this workshop on this important and timely topic. I would also like to thank you, Mr. President, for giving me the opportunity to participate in this discussion on behalf of the European Union.

I would like to touch upon two points in my brief intervention: first, the contribution of the European Union to the Mano River peace process and, secondly, some thoughts on the way forward. The engagement of the European Union in the efforts to promote peace and stability in the Mano River Union area is well known. Let me just mention a few examples. In July 2001, the European Union presidency appointed Mr. Hans Dahlgren of Sweden as its special representative to the Mano River Union countries. Furthermore, the European Union sent election observers to monitor the presidential and parliamentary elections in Sierra Leone in May 2002. The election and inauguration of President Kabbah marks another important milestone in Sierra Leone's return to democracy.

The European Union strongly supports the ongoing international efforts to promote stability in the region, including the initiative of the Kingdom of Morocco to ensure political dialogue among the Mano River Union countries, as well as the work of the Economic Community of West African States (ECOWAS) on conflict prevention and confidence-building. Looking forward, the European Union will continue its full support for the Mano River Union peace process. We share the point put forward in previous interventions that it is essential that the focus be maintained on finding a regional solution. In our view, there is also a need for improved coordination and dialogue among all international and regional actors involved in the process — not least between the European Union and the United Nations, but also with ECOWAS and others — in order to identify common objectives. In that context, we note the proposal to establish a contact group for the Mano River Union peace process. We should also explore ways of strengthening the support provided to ECOWAS, including through the United Nations system.

Another important element is full implementation and compliance with United Nations sanctions, which is essential in ensuring that rebel forces are deprived of the means to wage war. Furthermore, internal conflicts in Liberia and Guinea must not be allowed to destabilize the entire subregion by spilling over into neighbouring countries. Therefore, the need to create an inclusive political dialogue and a framework for free and fair elections in Liberia and Guinea cannot be underlined strongly enough.

Allow me to conclude by reaffirming the commitment of the European Union to the Mano River Union process. The outcome of this innovative and very useful workshop will help us to find new ways of strengthening international and regional efforts to promote peace and stability in the region. The European Union will cooperate fully in that endeavour.

Let me close by saying that just as the European Union will not hesitate to offer suggestions for action by other actors involved and interested in contributing to achieving these goals, we would also welcome suggestions from others as to the most constructive and helpful European Union action.

The President: I think one of the things that we in the European Union will also need to focus on is continuing, and perhaps enhancing, the support that we give to regional structures, and to the institutional side of the Economic Community of West African States (ECOWAS) in particular, because they must get resources from somewhere to build a further capacity to be able to do the things that General Diarra was talking about earlier. I think the European Union is a prime partner with ECOWAS for that purpose.

Mr. Ryan (Ireland): Ireland associates itself fully with the comments just made by the representative of Denmark on behalf of the European Union.

The work of United Nations Mission in Sierra Leone (UNAMSIL) cannot be completed until the interlocking violence and instability in the Mano River Union as a whole have been replaced by real peace and stability. I believe we all agree that the agenda followed by President Taylor of Liberia is now the critical contributing factor to the Mano River Union's profound problems. The imposition of targeted

sanctions against the Government of Liberia until it verifiably breaks its links with the Revolutionary United Front (RUF) has played a role in reducing chaos in the region. However, we must ask whether it is enough, given the failure hitherto of President Taylor and his Government to respond at all adequately to the clear agenda set out to him by the Council, by regional leaders and by the international community generally.

In truth, no single course of action will produce the solution. It will require linked-up, dogged and incremental action on the part of all the players — all of us. The United Nations must continue and, as necessary, strengthen its mechanisms and actions to achieve change in the behaviour of the Liberian authorities. I believe we are agreed that the regional and subregional organizations can also play their important part. I agree with Sir Kieran Prendergast's comment earlier: his call for our support for the efforts of the Economic Community of West African States (ECOWAS) and civil society representation. In that regard, we have heard from General Diarra regarding ECOWAS. We understand that this presents grave difficulties for some neighbours and players and, indeed, that courage is called for on the part of many in these circumstances. The new United Nations Office for West Africa must also make a strong effort to assist, as it is surely just for this sort of challenge that we have established it. Wider involvement is called for too, such as the highly commendable Rabat process.

Earlier, Foreign Minister Koroma covered the unique hybrid judicial process to address impunity, justice and reconciliation in Sierra Leone. I believe that this very balanced approach, which, of course, takes cultural values and practice also into account, is very well suited to the case of Sierra Leone. I am also sure that it could also have relevance elsewhere in the region and more widely, as developments unfold.

In our workshop, there has been a stress on staying the course, on tenacity. This clearly applies to the United Nations, in addition to lead States. In reality, this relies much less on voluntary contributions and much more on assessed funds. In reality, including for peace-building, we must be present on the basis of assessed funds. The support which has underpinned UNAMSIL in Sierra Leone and the United Nations Mission of Support in East Timor (UNMISET) are, I believe, clear examples of this conclusion.

Finally, on human rights, strong defence and promotion of women's rights is absolutely critical. The Special Rapporteur's briefing earlier this year and her report reconfirmed appalling levels of sexual abuse. Carolyn McAskie spoke with strength on this issue this morning, and I want to underpin her most important message and proposals.

The President: On that last point, I know that the Office for the Coordination of Humanitarian Affairs is beginning to distribute the report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, which is something — in terms of its peace and security aspects — which the Council may want to come back to, for instance, in our debate on conflict and gender on 25 July.

Mr. Kolby (Norway): First of all, Sir, I should like to commend you and your presidency for organizing this workshop. I think it is a very interesting format, and I think it has been a very good discussion so far. I thank those speakers that have made special contributions.

We believe that significant progress has been made towards a comprehensive and durable peace in Sierra Leone, and I should like to join those who have pointed to the integrated approach, careful consideration of the situation on the ground, careful planning, stamina and long-term commitment as explanations for this success.

The United Nations Mission in Sierra Leone (UNAMSIL) is the main guarantor of security in Sierra Leone, and, learning from past lessons, we must avoid a premature withdrawal. The downsizing of UNAMSIL must be tied to a corresponding capacity increase in the Leonean military police and justice system.

As has been mentioned, stability in Sierra Leone is fundamental to improving the humanitarian situation and to protecting refugees and internally displaced persons. A regional preventive strategy must take into account the serious forced-displacement situation.

Baroness Amos returned to the Chair.

The return of refugees and internally displaced persons is a heavy burden on West African countries. Humanitarian agencies need support in their resettlement and reintegration activities.

Norway is a strong supporter of a holistic approach to peace-building, with broad participation by all parties involved, including civil society, States and the international community. In West Africa, we see a constructive engagement of the United Nations and the Economic Community of West African States (ECOWAS), as well as other regional initiatives such as the Mano River Union Rabat process. This political dialogue must continue, and the United Nations Office for West Africa should take a leading role in coordinating various ongoing initiatives.

A main concern today is the danger of the conflict in Liberia spilling over into neighbouring countries. Sierra Leone must be supported in order to be capable of defending its own borders, and the sanctions on Liberia must be as effective as possible in order to prevent President Taylor from continuing his destabilizing activities and to minimize the negative humanitarian impact.

Liberia's problems are complex, involving political, economic and military aspects. The security situation is precarious, and humanitarian organizations have difficulties operating. This must be taken seriously by the international community.

In conclusion, I should like to express our appreciation for the efforts made by the United Nations, ECOWAS, the Governments in the Mano River region, the humanitarian non-governmental organizations, and countries contributing troops as well as financial means.

The President: My apologies for my short absence. Can I perhaps now ask principal speakers who opened this afternoon's session if they would like to make any brief responses to the comments which have been made? There were some direct questions to Sir Kieran, so I will ask him to start, and then I move on to Mr. Mar Dieye and then to General Diarra.

Mr. Prendergast: I should like to respond to the direct questions and also to make a couple of points that I think arise out of the discussion.

There was a question about the peace-building office in Liberia and where we are. I would say, first of all, that we are in discussions with the Liberian authorities about amending the term of reference to make them more apt to the current situation. We want to see changes in three areas: first of all, to expand the involvement of the office in national reconciliation in Liberia; secondly, a higher profile in terms of a public information effort, which we think would be useful; and thirdly, even more emphasis on human rights. We are waiting for the response of the Government on that.

In terms of who would be the next representative of the Secretary-General, all I can really say is that our discussions with the Liberians are at a delicate point, and I do not think that it would be helpful to expand on that.

More generally, I would say that we do need coherent and well-thought-out country-specific policies for Liberia. We have been hampered by the factors I have just mentioned, but we have also been hampered by a lack of funds.

Here, if I may, I should like to take up a point made by Ambassador Mahbubani and by others. I agree rather passionately with what he said about the way one goes from relative feast to relative famine when one moves from peacekeeping to post-conflict peace-building. He used the image of a sprinkler system. The image I have used in the Council, as Council members know — and I hope that they will forgive me for repeating it — is antibiotics. When one gets a fortnight's dose of antibiotics from the doctor, the doctors says, "If you start feeling better after a week, do not stop taking the antibiotics. You have to complete the course." But my feeling is that all too often the Council does not prescribe a fortnight's antibiotics. It can prescribe a week's antibiotics, occasionally five days' worth. The risk is that the investment made is allowed to slip away, because during the period of peacekeeping, the root causes of the problem have not been eliminated, and we do not give the follow-up mission the resources to do so.

I agree very much with what Ambassador Kolby said about staying the course. I think that is a very good and accurate way of putting it.

Apart from country-specific policies in countries such as Liberia and Sierra Leone, I think that we also need policies and a strategy to deal with the linkages between the individual component problems and between the other countries of the region. That is why the Secretary-General decided to propose a West African office. Mr. Ould-Abdallah has not taken up his duties yet. He is due to do so full-time on 1 September. I know that he is available if the Secretary-General wants to ask him to conduct particular missions.

Meanwhile, I think that we should let him get his feet under the desk before we prescribe what is his precise role in relation to Liberia. I think that more generally his role is to focus on the cracks and gaps between country-specific policies, and I would see his role as lying somewhere between a catalyst, a lubricant and a facilitator. I suspect that his role in relation to Liberia as well as to the other countries of the region will lie somewhere along that spectrum. He will not be interfering with the work being done directly, either by the Representative of the Secretary-General in Liberia or by the Special Representative of the Secretary-General in Sierra Leone, but he will be looking at the linkages.

Resources will undoubtedly be needed if we are to be successful in pursuing the policies that have been discussed today in the Mano River Union area. I think that we need to be careful not to suffer from bipolar disorder — that is to say, to prescribe a whole series of rather grand-sounding policies and then to deny the system the resources which will be necessary to carry out that policy.

Just one last word, which is a comment on a point made earlier on about moving from peacekeeping to peace-building. I do not think that this is an entirely linear or sequential process. I do not think that one has to wait until one is completely into a post-conflict phase before starting to try to do things about peace-building. It is really more like a relay race, and the next runner has to start running before the baton is handed over, otherwise the process is all too likely to come to a halt.

The President: I give the floor to Mr. Dieye.

Mr. Dieye: I just want to comment, Madam President, on your concurrence with the need to have the United Nations Office in West Africa play a lead role. In that regard, I must say that we have anticipated events by applying the lessons learned in Sierra Leone. The United Nations Development Programme (UNDP) is funding the number-two post of the Office. That shows that we will have two legs: a political leg and a development leg. Thus, in a way, we are upscaling the Sierra Leone model on the regional level. We are in a way anticipating the lessons learned in that regard.

I believe this will help us move forward. Not only will we be funding the number-two post; we will be providing resources for the Office to do what some speakers here have called vulnerability analysis and to, as the Secretary-General said this morning, anticipate crises. As I think the representative of Mauritius said, an increase in the number of internally displaced persons and refugees is a signal that a crisis is looming. We are trying to have a battery of indicators that will signal crises beforehand.

I am glad that you have focused on this issue, Madam President. UNDP pledges itself to support this process.

The President: I give the floor to Mr. Diarra.

Mr. Diarra (*spoke in French*): Among the comments that have been made in the course of this meeting, it was said that the various strategies that have been developed to deal with Sierra Leone were aimed at Sierra Leone. For instance, even the sanctions established in resolution 1343 (2001) were themselves aimed at strengthening the peace process in Sierra Leone. I believe that the Council must now try to develop a strategy specifically on Liberia, and I would like to draw the Council's attention to that matter.

Secondly, I would ask how we can coordinate the strategy to be developed by the Council with the strategy of the Economic Community of West African States (ECOWAS), with which the Council is familiar and which has been the subject of occasional reports to the Security Council.

Lastly, I wonder how we can support the strategy on the ground so as not to give the impression that we are speaking about two different things, that is to say, that there is a difference between the position of the Security Council and that of ECOWAS. It should be understood that we are acting on behalf and under the mandate of the Council, and in accordance with the Charter.

The President: Can I ask if Security Council members who did not speak this afternoon wish to do so now, or if anybody has any follow-up comments or questions before I attempt to sum up this afternoon's discussion? For the moment, there appear to be none, so I will now ask the two Foreign Ministers to take the floor.

Mr. Fall (Guinea) (*spoke in French*): Once again, I would like to thank you, Madam President, as we have had a very fruitful day devoted to the issue of the Mano River region. I would like to express my strong conviction that we have dealt with very important matters regarding stability and security in the Mano

River region. We spoke at length about Sierra Leone this morning, and this afternoon we extended our discussion to the entire region. I would like to take up two or three matters that have been raised and that we feel are important.

The first is the question of refugees. We believe that the refugee issue cannot be separated from the question of stability in the subregion. Of course, there is a very large number of refugees in the subregion as well as outside it. It is therefore important that the Council continue to devote particular attention to this matter. Since we are talking about refugees, I would also like to mention the matter of repatriation and, in particular, to refer to the conditions for the reintegration of refugees into their regions of origin. Not only would that encourage the return of refugees to their countries, it would, above all, ensure that they would be properly settled and that they would not return to the host country. We have seen a great deal of coming and going between Liberia and Guinea and between Sierra Leone and Guinea.

Very often, when refugees return home they are very often struck from the records of organizations that looked after them. When they return to the host countries, the problem fails again to the host country. Speaking of host countries, I am very grateful to my brother who spoke earlier about the support to be given to host countries, and about the special consultations with respect to Guinea. This issue was raised several years ago, and I would like to revisit it. I am very happy that the United Nations Development Programme (UNDP) is interested in this issue, for it is clear that countries that have agreed to host refugees on their territory and have borne the burden of hundreds of thousands of refugees also have the right to receive support from the international community to enable them to deal with the impact of those refugees on their territory.

The second point I wish to address is a new element, but a very important one. It is true that rebel attacks in the subregion have always been condemned both by the United Nations and by the Economic Community of West African States (ECOWAS). But a new element has appeared with regard to the atypical case of Liberia, one that ECOWAS itself has taken up. That element is the need for a dialogue to be organized within Liberia so that this country too can achieve national reconciliation and hold free elections next year. We believe that the timeline for those elections is very important. We said this over lunch, but I would like to return to it now. We do not think that peace can return to the Mano River basin unless the internal situation in Liberia is resolved. Whatever we can say around this table about finding a solution to Sierra Leone, about the fact that the Revolutionary United Front has become a political party, or about national reconciliation and all the other elements for consolidation having been fulfilled, the internal situation in Liberia continues to exist. I do not think General Diarra will disagree with me, as we discussed this at Durban, when I say that ECOWAS is intent on that dialogue taking place. That is why ECOWAS plans to organize a dialogue between the Government and the various movements. I hope the Council will support the efforts by of ECOWAS and the African Union: this is something that the Union also addressed at Durban.

Lastly, I would like to talk about the need to resume contacts among the three States. I believe initiatives are under way in that regard. What Morocco is doing in the region does not run counter to what ECOWAS is doing. It is a complementary effort. The Rabat meeting among the three heads of State was certainly the only such meeting possible at the time. I know that ECOWAS made a great effort to bring about reconciliation among the three States, but I do not think that at that time the conditions were right to bring the three heads of State to the table. I think that ECOWAS should welcome this Moroccan mediation. We should encourage it because the results of the Rabat meeting, and perhaps of a Rabat II, could then be taken up by ECOWAS so that we can speak the same language throughout our subregion.

In any case, I believe that talks are continuing; we are certain that in the coming weeks or months we may have a meeting of the three heads of State in order to continue what was begun at Rabat.

The President: I call on Mr. Koroma of Sierra Leone.

Mr. Koroma (Sierra Leone): My final intervention will focus on four basic areas. First, the United Nations intervention in Sierra Leone is clearly a success, but there are a few things that need to be done to ensure that that success can be sustainable. One of them is to ensure continued assistance for peace-building, bringing into focus some of the basic issues that need to be addressed quickly; the reintegration of ex-combatants, the recovery of the country and of its

institutions, and making sure that refugees in other countries return. That is the situation as far as Sierra Leone is concerned. But on Sierra Leone, the final issue is that any withdrawal by the United Nations Mission in Sierra Leone (UNAMSIL) must be phased, with a build-up of the security apparatus to ensure that there is a continuum and sustainability.

My second point is that the Security Council has a lot of resources at its disposal: resources from the Economic and Social Council, the General Assembly, the United Nations Development Programme and the new United Nations Office for West Africa. All this could be brought to bear on the process initiated to ensure that the lessons learned in Sierra Leone are applied in a regional dimension. This could probably lead to a General Assembly resolution that would bring into sharp focus some of the activities that need to be carried out to ensure that we do not have to go from country to country to country to have a regional solution in the West African subregion. By that I mean that we need a comprehensive solution; the United Nations has a lot of resources at its disposal to achieve that comprehensive regional solution.

Thirdly, on Liberia, there could be a Lomé-type conference, similar to the conference that was held for Sierra Leone between the Government and the Revolutionary United Front. But that conference must be backed by support from the United Nations, ECOWAS and the African Union. An attempt to hold a conference between the Government and Liberians United for Reconciliation and Democracy within Liberia might not yield the desired results without the necessary backing from regional and subregional organizations and the United Nations system.

Fourthly, a conference on Liberia would include provisions for a timetable that will tie in carefully with the 2003 elections in Liberia. This should be backed by strong United Nations and international support and presence, possibly with the involvement of United Nations observers or military observers from the international community.

Mr. Ryan (Ireland): So rich was the discussion this morning on the theme of lessons learned that it was not possible, as intended, to have a discussion and exchange of views. But there are a few moments remaining, and perhaps, although I touched on these points during our discussion at lunch, I might be permitted to register my points of concern on the theme of lessons learned in this more formal framework.

First, regarding the usefulness of Security Council missions on the ground in conflict regions generally: in recent years — including in Kosovo, East Timor, the Democratic Republic of the Congo and, of course, Sierra Leone — they have played an important part in galvanizing adequate response by the United Nations system, including the Security Council and the international community, to such conflicts.

Under-Secretary-General Guéhenno covered the question of mandates. The case of Sierra Leone, like that of East Timor, demonstrates the key importance of strong and very clear mandates. We have learned from Sierra Leone that troop-contributing countries must have the clearest picture of their mission in the interest of efficiency, transparency and accountability. Our healthily developing procedures in the Council for consultations with troop-contributing countries before mandates are adopted or renewed show that this key lesson is being learned, but I believe that we must continue to develop our thinking and good practice in this regard.

A third lesson certainly from Sierra Leone, and also, I believe, from East Timor, is that we must not be tempted, for budgetary reasons or for reasons of strain on capacity, to allow the components of relapse to reassemble themselves. I think that we now see more clearly from Sierra Leone, East Timor and other cases that transition from peacekeeping to peace-building and beyond is a continuum, as I think Sir Kieran was saying earlier, which includes capacity-building in the host State. Of course, that goes very far beyond the security and defence sectors alone.

The President: Are there any further comments? I will attempt to sum up the very rich discussion that we have had this afternoon.

I think that the first general point is that we are all agreed that we cannot look at the situation in Sierra Leone in isolation and that we need to address the instability that exists in the region as a whole.

Several key themes emerged. The first is the need to encourage regional efforts at reconciliation within Liberia and between Liberia and its neighbours. Absolutely critical to that is coordination between initiatives and that the Mano River Union, supported by ECOWAS, should continue its efforts to promote

greater security and confidence-building measures between the three countries.

The importance of the new United Nations Office for West Africa was recognized in terms of it being a focal point for United Nations support for regional efforts and indeed efforts within Liberia itself. I think that the strong feeling was that the physical presence of the United Nations on the ground was absolutely critical.

A third theme that emerged was the need to reinforce efforts to control the flow of small arms and to stop illegal exploitation of economic resources, which was also a theme that came out of this morning's discussion. It was recognized that sanctions have played a key role in bringing peace to Sierra Leone and that they must be applied, but, at the same time, that we need to reconcile possible differences that could open up between the Security Council and others on the future of sanctions, particularly in relation to Liberia.

It is important to strengthen the capacity of ECOWAS in terms of mediation and conflict prevention. There is a possible role for the European Union with respect to this.

The wider question arose on how it is best for the United Nations to mobilize resources for peace-building, as well as for peacekeeping. In that context, we had a discussion about development issues and how to create the right kind of environment to promote investment, which is very much the long-term strategy for the region.

There was a general view that despite the obvious difficulties, it is important for the international community to engage with Liberia. A policy of constructive engagement was discussed, as was the need to facilitate dialogue between the parties in Liberia and to look at other possibilities for dialogue. It is clear that we need some kind of comprehensive conflict-resolution strategy for Liberia. I think that that was agreed by everyone around the table.

I have three final points. One is the importance that we all attach to there being a sustained effort. We had two different analogies. We had our sprinkler/bucket system from our colleague from Singapore, and, from Sir Kieran, we had his antibiotic analogy. I am not sure which one I prefer. But I think we understand exactly what they both had in mind.

The issue of refugees was central to our discussion this morning, and has also come up this afternoon. In particular, it is not just a matter of looking at refugee flows, but looking at refugee flows at a very early stage as a possible indicator of problems in terms of different regions on the continent.

A final point, which I think is a very important point, is that the Security Council is good place to bring key players together — not just those within the Council but from the international financial institutions, other countries and other organizations, all of which have an important role to play, not just with respect to the Mano River Union, but in other areas of conflict throughout the world.

The United Kingdom delegation will produce a written summary of the conclusions of our discussions today based on the comments which have been made around the table, and these will then be made available for all of you.

All that remains is for me to thank all the participants very much indeed, in particular Ministers Fall and Koroma for being with us today, and to thank our speakers this morning and this afternoon and everyone around the table for your very active participation. I would also like to thank you for your very kind comments about the role that the United Kingdom has played in Sierra Leone and my own role in chairing this meeting today. I have to say that you all made it very easy indeed. It has been a very good meeting. I think there has been much food for thought and many good ideas, which really leave us with a kind of comprehensive action plan for a way forward which we can all take away.

There are no further speakers on my list. The Security Council has thus concluded the present stage of its consideration of the item on its agenda.

The meeting rose at 5.30 p.m.

ANNEX 9:

"Administration of justice, rule of law and democracy: Report of the sessional working group on the administration of justice", United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th session, 12 August 2003 (U.N. Doc. E/CN.4/Sub.2/2003/6.

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Fifty-fifth session
Agenda item 3

ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Report of the sessional working group on the administration of justice

Chairperson-Rapporteur: Ms. Iulia-Antoanella Motoc

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Introduction

1. By decision 2003/101 of 28 July 2003, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a sessional working group on the administration of justice. With the agreement of the Sub-Commission members, the Chairman appointed the following experts as members of the working group: Ms. Françoise Hampson (Western European and other States), Ms. Iulia-Antoanella Motoc (Eastern Europe), Ms. Florizelle O'Connor (Latin America), Mr. Soli Jehangir Sorabjee (Asia), Mr. Yozo Yokota (alternate) and Ms. Lalaina Rakotoarisoa (Africa).

2. The following members of the Sub-Commission also took part in the discussions of the working group: Mr. Emmanuel Decaux, Ms. Barbara Frey, Mr. El-Hadji Guissé, and Ms. Leïla Zerrougui.

3. The working group held two public meetings, on 28 and 30 July 2003. The present report was adopted by the working group on 7 August 2003.

4. A representative of the Office of the High Commissioner for Human Rights opened the session of the working group. The working group elected, by consensus, Ms. Motoc as Chairperson-Rapporteur for its 2003 session.

5. The members of the working group expressed their concern at the need to divide their time between the plenary session of the Sub-Commission and the public meetings of the working group.

6. Representatives of the following non-governmental organizations took the floor during the debate: Interfaith International, Japan Fellowship for Reconciliation, Association for World Education, Minnesota Advocates for Human Rights, Pax Romana, and Friends World Committee for Consultation - Quaker UN Office Geneva.

7. The working group had before it the following documents:

Report of the 2002 sessional working group on the administration of justice (E/CN.4/Sub.2/2002/7); and

Document de travail sur la difficulté de preuve en matière d'abus sexuel (E/CN.4/Sub.2/2003/WG.1/CRP.1).

8. The Chairperson-Rapporteur also pointed out that the important studies on the issue of the administration of justice through military tribunals by Mr. Decaux and discrimination in the criminal justice system by Ms. Zerrougui were initiated at the working group and would be discussed during the plenary session of the Sub-Commission.

Adoption of the agenda

9. At its first meeting, the working group considered the provisional agenda contained in document E/CN.4/Sub.2/2002/7. Following discussion among members of the working group, the title of item 3 was changed. On the proposal of Ms. Hampson, a new topic, "Question of a

need for guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies", was added to the agenda. With that addition, the agenda for the session was adopted as follows:

1. Issues relating to deprivation of the right to life, with special reference to the imposition of the death penalty.

2. Privatization of prisons.

3. Current trends in international penal justice.

4. The domestic implementation in practice of the obligation to provide domestic remedies.

5. Transitional justice: mechanisms of truth and reconciliation.

6. Witnesses and rules of evidence:

   (a) Medical secrecy;

   (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination;

   (c) Question of a need for guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies.

7. Provisional agenda for the next session.

8. Adoption of the report of the working group to the Sub-Commission.

I. ISSUES RELATING TO DEPRIVATION OF THE RIGHT TO LIFE, WITH SPECIAL REFERENCE TO THE IMPOSITION OF THE DEATH PENALTY

10. Mr. Guissé reported that the movement for the abolition of the death penalty has been on the rise and had made progress in some countries. However, in other countries, renewed executions were being carried out. Additionally, in some countries that had traditionally handed down the death penalty, executions were being carried out in record numbers. The death penalty was not socially useful and history had shown that it did not have an impact on reducing crime. In some cases, it led to punishment of the innocent in an irreversible manner. The media had played a negative role in publicizing executions, sometimes even encouraging people to commit crimes as a way of attracting attention. While some countries were de facto abolitionist, it would be preferable if they would also abolish the death penalty in their legislation (de jure abolition). In many countries, the death penalty had been abolished during peacetime but remained on the

books for use during wartime. The death penalty sometimes had a racial overtone, as in the United States. While the death penalty has been on the decline, it was alarming that summary executions had been on the rise in the last few years. The Sub-Commission should consider this negative development. Mr. Guissé also reminded the working group that vulnerable groups were often victims of injustice, with indigenous people, women and the poor being particularly vulnerable. Application of the death penalty to minors and to the mentally ill was in breach of international law. Mr. Guissé also noted that, when looking for an alternative punishment to the death penalty, both the State and the victim should be satisfied. Mr. Guissé appealed to the working group members to think about alternatives to the death penalty for those States that wanted to abolish it.

11. Ms. Hampson pointed out that the present meeting was taking place in a death penalty-free area. She welcomed the latest resolution of the Commission on Human Rights calling for the abolition of the death penalty. Ms. Hampson said that any State that retained the death penalty had to be able to at least guarantee a fair trial and the absence of discrimination in the imposition of the death penalty. Should there be any risk of finding an innocent person guilty, the death penalty should not be imposed. Any State claiming it could always avoid miscarriages of justice was claiming to be God. Ms. Hampson was particularly concerned about imposing the death penalty on juveniles and recalled Sub-Commission resolution 2000/17 which noted that the execution of people who were under the age of 18 at the time of the commission of the offence violated customary international law. Additionally, she was concerned about the imposition of the death penalty by military tribunals, particularly when trying civilians. In those scenarios, there was likely to be inadequate access to legal defence and irregular forms of appeal procedures. Ms. Hampson noted that she had a particular form of a military procedure in mind: the one that was to be used to try the detainees in Guantánamo Bay. Ms. Hampson also referred to a case involving a mentally ill person on death row in the United States. The state in which the execution was to take place attempted to force this person to take medication for the mental illness in order that the execution could proceed. She noted that that made no sense. Referring to Mr. Guissé's call for the elaboration of an alternative punishment to the death penalty for States that wanted to abolish it, Ms. Hampson said that she believed that the obvious alternative was life imprisonment without possibility of parole. Lastly, she put forth the view that the working group should take into consideration the recent rise of extrajudicial executions and targeted killings.

12. Mr. Decaux shared the pessimism of other members with regard to the increase in extrajudicial executions. On a positive note, Mr. Decaux reported that the Parliament of Turkey had authorized ratification of Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty in peacetime. While Armenia and the Russian Federation had signed the Protocol some time ago, they had yet to ratify it. The Parliamentary Assembly of the Council of Europe also called upon two observer States, Japan and the United States, to align themselves with the policy of seeking the abolition of the death penalty. Mr. Decaux also noted the problem of discrimination with regard to foreigners. According to the Vienna Convention on Consular Relations, there was a right to information about consular access for persons detained in a foreign country subject to the death penalty. Mexico brought the *Avena* case to the International Court of Justice which subsequently ordered provisional measures against the United States, requesting it not to execute any Mexican held on death row. Respect for the principles of the Vienna Convention should be ensured.

13. Ms. Frey said that she lived in the State of Minnesota, which did not have the death penalty. However, the United States Attorney-General's Office had initiated prosecution of a federal crime for a murder which took place in Minnesota and had indicated an interest in seeking the death penalty. Ms. Frey also commented on the issue of excessive force. Her analysis of the topic of small arms indicated that many problems arose from police forces not being properly trained in the use of force. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are not adequately taught to officials of law enforcement agencies. She was planning to discuss the issue with colleagues and would consider preparing a questionnaire to seek information regarding the experience of States with respect to training techniques for law enforcement personnel.

14. Ms. Hampson then commented on the issue of transfer of individuals and said that a State member of the Council of Europe would not transfer an individual to a State where that individual might face the death penalty. Generally, in the international arena, States would not extradite to places where individuals might be subject to torture or to cruel, inhuman or degrading treatment or punishment. It might be thus useful to remind States of those international principles as it seemed that, at present, some States did transfer individuals, to Guantánamo Bay, for example, in violation of these principles. Ms. Hampson then asked Ms. Frey whether there were any similar standards in the United States applicable either to transfers of individuals between states or transfers from the state level to the federal level, when such a transfer could result in the imposition of the death penalty in the receiving jurisdiction. She then asked whether it would be useful for the Sub-Commission to make a recommendation on the matter.

15. Ms. Frey believed that there was no prohibition on transfers of individuals between states but that the state's legislators could enact legislation to that effect. The issue of federal jurisdiction was more complex. When the Federal Government decided to prosecute a case, states must submit to its jurisdiction unless it agreed otherwise.

16. Mr. Guissé said that aside from the implementation of the death penalty, there was the issue of people condemned to death and their families being subjected to mental torture. He also observed that some heads of State had been complicit in extraditing individuals to countries where they would be subject to the death penalty. States must be clearly reminded that a person should not be extradited under those circumstances. Ms. Rakotoarisoa believed that the prohibition on extradition to a State where an individual might face the death penalty should be accompanied by a corresponding right to asylum in the State which is prohibited from carrying out the extradition.

17. Ms. Zerrougui agreed that there had been a regression in recent years towards an increase in summary and extrajudicial executions, carried out in many countries in the name of preventing terrorism and protecting State security. This year, the Sub-Commission must recall that this practice was a serious violation of international law and constituted a crime which could involve the authority of the International Criminal Court. With regard to judicial executions, she reminded the working group of the need to guarantee a fair trial.

18. The observer for Pax Romana welcomed the working group's undertaking on the issue of summary and extrajudicial executions.

19. The observer for the Friends World Committee for Consultation - Quaker UN Office Geneva informed the working group that a joint statement, together with the World Organization against Torture, had been prepared on the issue of juveniles detained in Guantánamo Bay and juveniles in the Democratic Republic of the Congo subject to the jurisdiction of military tribunals. She noted that many States had abolished the death penalty in peacetime and recognized the prohibition on the imposition of the death penalty on juveniles. However, some States might have overlooked the fact that their legislation allowed for imposing the death penalty in wartime and they might recruit individuals under the age of 18 into the military, whereby these minors would be subject to such a wartime penalty. This possible lacuna in national legislation should be brought to the attention of States. Ms. Hampson said that the lacuna might exist in national legislation but that international law clearly prohibited the imposition of the death penalty on juveniles.

II. PRIVATIZATION OF PRISONS

20. Mr. Alfonso Martínez was unable to make a presentation on this topic during the working group's session but offered to do so during the plenary, if authorized by the Sub-Commission.

21. Mr. Yokota recalled that the Sub-Commission had been dealing with the issue of the privatization of prisons for the past several years. Generally, the discussion had focused on the privatization of prisons as a whole. In Japan, there had recently been a discussion about the possibility of privatizing some prison functions, such as services providing food or cleaning, while other core prison functions would remain public. Mr. Yokota wanted the working group to consider whether such a partial privatization would be acceptable from the human rights point of view.

22. Mr. Sorabjee noted that when talking about privatization of quasi-governmental functions, the concern should be on whether the private agency was subject to the same judicial scrutiny as the Government. India had taken the view that, for that purpose, private agencies were subject to the same control as the State. It was essential that judicial control not be diluted. Mr. Sorabjee agreed that some prison functions but not the core ones could be privatized.

23. Ms. Hampson agreed that the focus should be on responsibility. States continued to have obligations to prevent and investigate human rights violations in private prisons as well as in public ones.

24. Mr. Guissé believed that the privatization of prison functions would not serve the purpose of protecting all individuals. Ms. Zerrougui said that the privatization of prisons sometimes had tragic consequences for the situation of detainees and for the respect for human rights. With the privatization of prisons, the first thing to be noticed is that more prisons were built. The prison became a profit-making industry and the logic of commerce governed. Ms. Zerrougui said that while she was not against new management systems, she was concerned about their impact on the rights of detainees.

25. Ms. Rakotoarisoa believed that the goal of the privatization of prisons was to improve conditions of detention. Generally, the private sector had a better reputation for the quality of its services. While some prison functions could be subcontracted, States should remain in charge of

others, such as security. As there were sometimes no clear guidelines as to who should be sent to a private or public prison, and because the conditions in those prisons differed significantly, the problem of discrimination could arise. Ms. Rakotoarisoa agreed that the privatization of prisons should not be governed by profit but believed that it could humanize the conditions of detention.

26. Ms. O'Connor noted several issues that the working group should look at: (a) whether private companies would be willing to stand by the 1977 Standard Minimum Rules for the Treatment of Prisoners; (b) whether individual States would be required to change their legislation to enable companies to become the implementing arm of the court; (c) which rules would apply to regulate the wage for working inmates; and (d) whether the privatization of prisons would provide the inmates with the possibility of learning new skills.

III. CURRENT TRENDS IN INTERNATIONAL PENAL JUSTICE

27. Mr. Guissé reported that following the Second World War, there had been initiatives to develop an international system of criminal justice with the establishment of the Tokyo and Nürnberg war crimes tribunals. Some had criticized the tribunals, which had hampered the establishment of such a system. Nevertheless, international criminal justice continued to evolve, with bilateral agreements being reached, international police forces being engaged in peacekeeping and ad hoc jurisdictions being created for the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Subsequently, the International Criminal Court was set up by the Rome Statute. The concept of universal jurisdiction had evolved and, until recently, could have continued evolving. Recent amendments to Belgian law had seriously weakened the concept of universal jurisdiction. Mr. Guissé reminded the working group that the International Criminal Court was not intended to replace national justice but to fill gaps that currently existed. Universal jurisdiction complemented national jurisdiction, so as not to allow perpetrators of offences to escape. When discussing international justice, the issue of reparations for victims should be also considered. Mr. Guissé offered to prepare a working paper for the next session of the working group on the current trends in international penal justice. Ms. Motoc suggested that the topic of current trends in international penal justice be given priority by the working group next year.

IV. DOMESTIC IMPLEMENTATION IN PRACTICE OF THE OBLIGATION TO PROVIDE DOMESTIC REMEDIES

28. Ms. Hampson reported that many States ratified treaties, made them part of their domestic law and admitted special rapporteurs. Nevertheless, serious allegations of widespread human rights violations continued to be made. It was necessary to examine systematically the causes of this problem. Ms. Hampson was principally concerned with the protection of civil and political rights. States had an obligation to implement treaties in good faith. The right to a remedy was closely linked with the issue of implementation. International monitoring mechanisms should only be subsidiary: it was primarily the responsibility of States to monitor implementation and to provide remedies. Ms. Hampson gave an example of a judgement by the European Court on Human Rights (ECHR) in *Akdivar and Others v. Turkey*, which addressed the issue of inadequate national remedies. Since then, ECHR had found violations of the right to a remedy in more than 50 cases. Ms. Hampson pointed out that implementation consisted of policies and effective enforcement of law. Unremedied violations were evidence of flawed

implementation. There was a need for formal, but also effective implementation. What was necessary for effective implementation depended on the issue. For example, in cases involving enforced disappearances, custody records and rules surrounding custody needed to be improved. Additionally, however, the situation could be improved if judges were required to examine records and visit the places of detention, including those of an irregular nature. The independence of the judiciary vis-à-vis the detaining authority should be also examined. Stringent rules on record-keeping had a twofold benefit, also providing protection to State officials against unfounded allegations of misconduct.

29. Ms. Hampson noted that the Human Rights Committee was in the process of revising a general comment on the implementation of human rights obligations and exploring what was meant by implementation. It is also important to recall that non-governmental organizations could play an important role in providing information about the failure of domestic remedies, so that the Human Rights Committee could explore the issues of implementation and provision of remedies and carry out more effective supervision. Ms. Hampson further said that some problems were created by a lack of training and resources. While some States had genuine resource problems, there could also be a lack of political will to give effect at the local level to protection of human rights.

30. Mr. Guissé agreed with the appeal made to NGOs as they were in a good position to make complaints and assist victims with bringing their cases to judicial and administrative bodies in order to seek a remedy. It was also important that illiterate populations be provided with assistance in pursuing their claims. With regard to unlawful detention, Mr. Guissé noted that those who had been illegally detained were often not aware that they were entitled to compensation.

31. Mr. Yokota found it problematic that judges were often not familiar with international human rights law and thus unable to reflect it in their judgements. Additionally, judges were not trained to understand international treaties ratified by their countries and did not follow the developments in United Nations treaty bodies.

32. Ms. Zerrougui shared concerns about the effectiveness of remedies, in particular at the national level. The question was not only about the existence of remedies but also about access to remedies. It should be determined to what extent all victims, regardless of their status, had access to existing remedies. The education and training of judges and law enforcement officials was not the only problem: the culture of impunity also had to be addressed.

33. Ms. Hampson agreed that there was a need to train judges about the international instruments, but believed that judicial ignorance was not the only problem. The victims often did not know that a right had been violated or where to turn for redress. In this regard, NGOs could be very effective.

34. The experts also discussed judicial and administrative remedies. Mr. Guissé believed that judicial remedies were more effective than administrative ones. Mr. Yokota said that administrative remedies were usually not sufficient and that judicial remedies were often necessary. Ms. Hampson noted that the right to a remedy did not always mean the right to a

judicial remedy and included administrative remedies as well. There was nothing inherently wrong with administrative remedies if they worked in practice and were independent. Mr. Decaux said that judicial and administrative remedies could be complementary. One should recognize the trend towards recourse to an independent administrative remedy.

35. Mr. Yokota enquired about the sources of the right to a remedy. Mr. Decaux noted that article 13 of the European Convention on Human Rights, which provided for a right to an effective remedy before a national authority, was assuming greater importance. A State had not only negative obligations but also positive duties to provide remedies. There had been an interesting series of judgements in which ECHR had introduced the notion of a positive duty to provide remedies. Ms. Hampson pointed out that the right to a remedy is clearly a part of treaty law, and of article 2 of the International Covenant on Civil and Political Rights specifically. The Human Rights Committee, in its general comment No. 24, asserted that it would not be possible to make a reservation with respect to article 2. One should also look to specific thematic areas, such as arbitrary detention, to determine whether a State had an obligation under customary law to provide a remedy for a particular violation; whether there was a right to a remedy in customary international law would depend on whether the State had ratified a treaty providing for it.

36. The observer for Interfaith International said that in many countries, victims of serious human rights abuses had no access to remedies. Reference was made to the trial in Chicago in the United States, of Jiang Zemin who was accused of carrying out a State policy aimed at total eradication of Falun Gong followers in China. While China had ratified various international human rights instruments, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, cases of torture in China continued to be reported.

37. The observer for the Association for World Education referred to a case which had been examined by the Working Group on Arbitrary Detention. In its opinion No. 1999/10, the Working Group determined the detention in that case to be arbitrary. Nevertheless, the individual in question continued to be detained. Ms. Zerrougui did not recall the specific case, but noted that when the Working Group considered a detention to be arbitrary, the State in question should act to remedy the situation.

V. TRANSITIONAL JUSTICE: MECHANISMS OF TRUTH AND RECONCILIATION

38. Ms. Motoc stated that international criminal justice and transitional justice were related. She discussed the historical developments of transitional justice mechanisms, including the establishment of the first truth and reconciliation commissions and subsequent efforts to combat impunity. She also discussed the meaning of transition and of justice after massive violations of human rights. There were various mechanisms of transitional justice to deal with human rights violations. Firstly, there were ad hoc international criminal tribunals such as ICTY and ICTR. Secondly, there were hybrid tribunals such as the ones established for Sierra Leone and Cambodia. Thirdly, there were the examples of Kosovo and Timor-Leste which had organized their domestic justice systems with international assistance. There was also the possibility of national solutions. For example, Eastern European countries adopted lustration laws which

excluded certain individuals from occupying high-level public posts. Ms. Motoc also noted that transitional justice mechanisms could face problems of conflict of norms and standards, of a lack of credibility, and of achieving goals and objectives. Another effective solution was the concept of universal jurisdiction and the working group could also consider that issue next year.

39. Ms. Hampson agreed that the working group should consider universal jurisdiction and the repeal of the Belgian law. States should be reminded that ratification of the Geneva Conventions obligated them to try suspected perpetrators of grave breaches of international law.

40. The observer for Minnesota Advocates for Human Rights informed the working group that the organization would read a statement during the plenary expressing their concern about certain aspects of transitional justice in Peru.

VI. WITNESSES AND RULES OF EVIDENCE

41. Sub-items (a) Medical secrecy and (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination, were taken together.

42. Ms. Rakotoarisoa presented her working paper on the problem of evidence in cases of sexual abuse (E/CN.4/Sub.2/2003/WG.1/CRP.1). While sex crimes were not a new phenomenon, the number of reported victims had been on the rise in recent years. The phenomenon of sexual abuse was still surrounded by confusion. Different definitions were used, depending on whether a psychological, legal or journalistic point of view was taken. Ms. Rakotoarisoa thus recalled certain definitions of conventional terms. With regard to direct and circumstantial evidence of sexual abuse, she noted that the difficulties encountered in the production of evidence were rarely confronted. The rules of evidence in cases of sexual abuse and exploitation were especially complex. The testimony of victims and expert examinations of the victims must be made with full informed consent. Experts looked at the closest intimate details of the victim. With regard to medical secrecy, she noted that doctors and social workers had dual obligations and might feel torn between professional ethics and their duty to society. As they could provide essential evidence, they should be absolved of the requirement of confidentiality for the purpose of disclosing human rights violations. Ms. Rakotoarisoa also noted that sexual abuse could be used as a weapon to intimidate or to obtain information during political turmoil, tension or conflict. The international law on armed conflict applied to armed conflicts of both an international and a non-international character and prohibited torture and cruel, inhuman or degrading treatment or punishment. With regard to testimony, Ms. Rakotoarisoa said that it was always difficult to ascertain how accurate and reliable a given witness's testimony was. In all proceedings, care should be taken to guard against the risk of false testimony. Witness protection was necessary when statements raised the possibility of serious harm to witnesses and those around them.

43. Ms. Rakotoarisoa also reported that the Internet was becoming one of the most potent means of promoting child exploitation and trafficking in child pornography. Interpol had emphasized the need for specialization of police officers. There needed to be international cooperation among specialists to strengthen the response to Internet sexual exploitation. Additionally, Ms. Rakotoarisoa reported that tourism-related businesses such as hotels had a role to play in preventing sexual abuse and in furnishing evidence. She noted that circumstantial evidence should be evaluated on a case-by-case basis. It was important to stress that

circumstantial evidence should not be a substitute for direct evidence. At the conclusion, Ms. Rakotoarisoa said that poverty and illiteracy were among the factors that contributed to sexual exploitation. The lives of thousands of women and children could be at risk from HIV/AIDS acquired by sexual exploitation. The challenge was to break with traditional practices that made sexual exploitation acceptable. Crimes often went unpunished because of a lack of evidence. In many countries, victims did not report crimes of sexual abuse and the culprits were never sought or could not be found. In the absence of corroborating evidence, victims who testified faced the risk of not being believed. The outcome, however, should not be a lack of measures to protect the victim, as it must be acknowledged that sexual assault was difficult to prove. The fear of punishment by an international tribunal could serve as a check on serious violations of human rights. Ms. Rakotoarisoa also noted that national laws prescribing severe penalties for sexual crimes were not effective enough. Owing to shortcomings in criminal investigations and the lack of corroborating evidence, the courts were reluctant to impose severe penalties. Extraterritorial criminal provisions, such as those in France providing for the prosecution of French nationals who had sexual relations abroad with children, were one aspect of efforts to prevent sexual tourism. However, such provisions were rarely enforced owing to the difficulty of collecting evidence and the lack of cooperation with local judicial authorities. Such approaches needed to be refined.

44. Mr. Guissé spoke about sexual abuse in the context of poverty. Sexual exploitation of children in the South by people from the North was a serious concern. He was concerned that the tourism environment made it possible for wealthy adults from the North to have contact with children in Africa. Even if there was proof of sexual misconduct, the perpetrators were not always punished. It was often corruption that allowed them to get away with misconduct. Mr. Guissé was very concerned about sexual abuse committed for the purpose of transmitting HIV. Such crimes violated human dignity and its perpetrators should be brought to international justice. Sometimes, State officials responsible for protecting people failed to prevent such crimes in their desire to attract tourism.

45. Ms. O'Connor noted that, in Jamaica, the incidence of HIV/AIDS had increased greatly, particularly in the coastal regions where tourism was prevalent. She also reflected on cultural beliefs that propagated the false notion that sexual relations with a virgin would cure sexually transmitted diseases. Since the appearance of HIV/AIDS, Jamaica had witnessed a dramatic increase in rapes and killings of very young girls, which was unusual for that society. With regard to bringing the perpetrators to justice, Ms. O'Connor noted various problems. For example, in cases of sexual abuse of children by a male family member, mothers tended not to want to believe the children. Even where the complaint reached the courts, it was frequently withdrawn as the child and mother responded to pressure from the rest of the family. With regard to the sexual exploitation of youth in tourism, Ms. O'Connor agreed that the perpetrators should be seen as international criminals and steps should be taken to bring them to justice.

46. Ms. Hampson said that many issues were involved in connection with this topic and that the working group should consider splitting them up into different areas. Other human rights mechanisms were already dealing with some of the issues. The question which appeared to be particularly suitable for the working group to consider was what happened, in terms of the judicial process, once an allegation of sexual abuse was made. Firstly, this entailed consideration of how police handled allegations and the need for forensic evidence. Secondly, the issue of what happened once the allegations reached a court should be considered. One

should distinguish between criminal courts and other forms of civil proceedings. The mandate extended beyond child sexual abuse and the focus was likely to be on criminal proceedings and problems of securing proof. The definition of crimes should be also examined: in many jurisdictions, there was a very narrow definition of rape while a broader definition had been used by ICTY. The general understanding of rape seemed to be that the requisite mens rea was a lack of consent. The issue was how to prove it. There was also a problem with the application of the normal rules of evidence, such as the exclusion of hearsay. In some countries, the testimony of four women had the same value as that of one man. Thus, the testimony of one woman must be corroborated by that of either one man or three other women in order to be accepted in court. Additional issues such as whether the jurisdiction required medical evidence and what should be done to protect the anonymity of victims and witnesses should be considered. Also, a line needed to be drawn between medical secrecy and providing information to judges and courts.

47. Ms. Hampson also pointed out the problem of civil proceedings being unavailable to many owing to financial constraints. Cases of people with recovered memory of sexual abuse constituted another problem as those individuals abused as children often recalled the abuse long after the statute of limitations had expired. There was also the problem of sexual offences, most notably torture, committed by State agents. That issue, however, came under the mandates of the Committee against Torture and the Human Rights Committee. In concluding, Ms. Hampson reiterated that the working group should focus on the issue of court rules regarding evidence in criminal proceedings that applied to sexual violence. The issue of sex tourism was also very important but the working group needed to consider to what extent the other components of the Sub-Commission were examining it.

48. Ms. Zerrougui discussed the discrimination against women and children in some criminal justice systems. For example, certain jurisdictions deemed that a medical certificate was insufficient to prove the violation and required the testimony of an eyewitness, which was virtually impossible to obtain if the violence or sex abuse took place in a private domain. Often, that requirement was not based on law but on the discretion of a judge. Ms. Zerrougui also noted the problem of obtaining evidence in cases of rape occurring during detention. She welcomed the fact that some countries had reversed the burden of proof in such cases, requiring that the detention authorities disprove allegations of rape. The Sub-Commission should consider highlighting best practices on this issue.

49. Mr. Sorabjee noted that there were two main reasons for the failure of a system to bring the perpetrators of sexual abuse to justice and that they needed to be addressed. The first reason was blatant discrimination such as requiring the testimony of four women to counter that of one man. The second reason was the failure of the investigative system, including ineffective prosecution and investigators often not being sensitive to the rights of women and children. The working group members further noted that it should not be assumed that women were safe guardians of other women and that female prison guards, investigators, prosecutors and judges also needed to be sensitized and properly trained.

50. Ms. O'Connor reported that in Jamaica, a Special Unit for the Investigation of Sexual Abuses had been established in the Police Force. Selected police personnel, both male and female, had been specially trained to deal with sexual abuses and domestic violence in order to lessen the deterrent effects of the pressures exerted on the abused and thus ensure that efforts to obtain justice were not thwarted. After training, an officer was assigned to each region. The

training was ongoing as the goal was to have these specially trained officers assigned to each station. The use of DNA in the investigations, the importance placed on ensuring that the dignity of victims was respected and the availability of counselling for the victims had lessened the burden on the victims. Since the establishment of the Unit, far more cases of rape and abuse had been reported and successfully investigated and prosecuted.

51. Several working group members also discussed the definition of rape. Some countries did not have a definition of rape in their domestic legislation. In others, the domestic law on the matter was outdated. Attention was drawn to the ICTY jurisprudence for examples of gender-neutral definitions.

52. At the conclusion, it was proposed that Ms. Rakotoarisoa should prepare an expanded background paper, examining procedural and evidential barriers that impacted upon victims of sexual abuse. Once such a paper was prepared, the Sub-Commission, at its next session, could consider requesting that the Commission on Human Rights appoint a special rapporteur on the issue of problems in prosecuting rape and sexual assault.

53. The observer from Pax Romana drew attention to the alarming situation of sexual abuse in schools perpetrated by teachers.

54. During the discussion on sub-item (c) Question of a need for guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies, Ms. Hampson drew attention to the Sub-Commission study on sexual violence in armed conflict prepared by Ms. Gay McDougall in 1998. There was clear evidence from the Democratic Republic of the Congo, Liberia and other conflicts that the problem of rape was not disappearing. Even though many of the acts concerned were within the jurisdiction of the International Criminal Court, many States had not criminalized various offences on the domestic level. Ms. Hampson thus suggested that the working group should engage in the operationalization of Ms. McDougall's study and the elaboration of guidelines, which should assist national legal systems. Ms. Frey expressed her support for this proposal.

55. The observer for the Japan Fellowship for Reconciliation informed the working group that his research had indicated that for at least 80 years, women's groups had demanded redress for sexual offences occurring during armed conflict. He supported Ms. Hampson's proposal that the working group elaborate guidelines on the matter.

VII. PROVISIONAL AGENDA FOR THE NEXT SESSION

56. During its second meeting, on 30 August 2003, the working group agreed to consolidate its agenda for next year and to consider the following topics on a biannual basis: "Issues relating to the deprivation of the right to life, with special reference to the imposition of the death penalty" and "Privatization of prisons". Ms. Motoc suggested that the working group should increasingly cooperate with academia and NGOs in its work.

57. The working group agreed that the provisional agenda for the next session would be as follows:

1. Election of officers.

2. Adoption of the agenda.

3. International criminal justice.

4. Witnesses and rules of evidence:

   (a) Medical secrecy;

   (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination;

   (c) Guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies.

5. The domestic implementation in practice of the obligation to provide domestic remedies.

6. Provisional agenda for the next session.

7. Adoption of the report.

VIII. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

58. On 7 August 2003, the working group unanimously adopted the present report to the Sub-Commission. The working group agreed to request that the Sub-Commission allocate two full meetings of three hours each, plus an additional session of one hour for adoption of the report, during its 2004 session.

ANNEX 10:

"Integration of the Human Rights of Women and the Gender Perspective—Violence Against Women", United Nations Economic and Social Council, Commission on Human Rights, 57th session, 23 January 2001 (U.N. Doc. E/CN.4/2001/73).

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INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE

VIOLENCE AGAINST WOMEN

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45

Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)

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Executive summary

Violence against women and girls continued unabated during the period covered by this report (1997-2000). Unimaginable brutality was perpetrated against women and girls in conflicts ranging from Afghanistan to Chechnya, from Sierra Leone to East Timor. The report illustrates how, since 1997, women and girls have been raped by government forces and non-State actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. They have been maimed or sexually mutilated, and often later killed or left to die. Women have been subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public, and to perform domestic chores while nude. Women and girls have been forced into "marriages" with soldiers, a euphemistic term for what is essentially repeated rape and sexual slavery, and they and their children have suffered disabilities as a result of exposure to chemical weapons.

The Special Rapporteur gives special attention in the report to the specific risks faced by girl children during armed conflict and the specific gaps in protection and assistance to women who are internally displaced. She also underscores her growing alarm about women being trafficked from refugee camps and other shelters set up for their protection, as well as being trafficked to service United Nations peacekeepers in countries where such peacekeepers are located. In particular, the Special Rapporteur expresses concern about the growing number of reports of rape and other sexual abuse committed by United Nations peacekeeping forces and staff, and by soldiers and staff associated with military bases around the world, and emphasizes the particular responsibility that the Organization has for taking appropriate steps to prevent such abuse.

The Special Rapporteur also highlights the ongoing violence and discrimination that women face in the rehabilitation and reconstruction process, and notes that although women make up the majority of heads of household in most post-conflict situations, their families and their needs are rarely adequately factored into international donor and reconstruction programmes, or the distribution of humanitarian aid. The Special Rapporteur stresses that women must be brought into all levels of the United Nations, including in peacekeeping and civilian police units, and those with gender-specific expertises must be included in senior management throughout the Organization if the United Nations is to develop appropriate and effective policies to protect and assist women and girls during and after armed conflict. What is more, women must have a greater role in the peace process, during which time the framework for future government structures and administration are set in place, and a concerted effort must be made to involve women in society's efforts to address the past.

The report also documents the positive jurisprudential and structural developments that have taken place during the past four years; the international community has begun to develop precise legal standards to make clear, once and for all, that rape and other gender-based violence can be war crimes, crimes against humanity, and components of the crime of genocide, as well as torture or other cruel, inhuman and degrading treatment and enslavement. The report reviews the important work of the International Tribunals for the Former Yugoslavia and Rwanda that have set jurisprudential benchmarks for the prosecution of wartime sexual violence. In addition to the work of the ad hoc tribunals, the report discusses the single greatest development since the Special Rapporteur's last report - the approval on 17 July 1998 of the Statute of the International

Criminal Court (ICC), known as the Rome Statute, which specifically defines rape and other gender-based violence as constituent acts of crimes against humanity and war crimes. The Rome Statute also addresses numerous structural issues - including the need to hire judges and prosecutors with special expertise in violence against women and children and the establishment of a Victim and Witness Unit - that are critical if the Court is to function as a progressive mechanism for justice for victims of gender-based violence.

The Special Rapporteur wishes to emphasize that there remains a significant gap between the international community's recognition that those who commit rape and other gender-based violence are legally liable and must be punished, and the political will of Member States to enforce international humanitarian and human rights law and insist that those who violate it are held accountable. The ongoing impunity of those who perpetrated Japan's system of military slavery during the Second World War is only one of many examples of an ongoing failure by Member States to investigate, prosecute and punish those found responsible for past acts of rape and sexual violence. This failure has contributed to an environment of impunity that perpetuates violence against women today. Whether the violence described in this report is investigated and punished, and whether such acts are prevented in the future depends ultimately on the firm commitment of the States Members of the United Nations.

I. INTRODUCTION

1. The Commission on Human Rights, at its fifty-sixth session, in its resolution 2000/45, welcomed the report of the Special Rapporteur on violence against women, its causes and consequences (E/CN.4/2000/68 and Add.1-5) and encouraged her in her future work. In the same resolution, the Commission decided that the mandate of the Special Rapporteur should be renewed for a further three years and requested the Special Rapporteur to report annually to the Commission on Human Rights, beginning at its fifty-seventh session, on activities relating to her mandate.

2. In follow up to her previous report on violence against women as perpetrated and/or condoned by the State (E/CN.4/1998/54)[1], the present report focuses on violence against women in armed conflict, specifically in terms of the recommendations made in the Special Rapporteur's report to the Commission on Human Rights in 1998. The report also documents emerging legal standards on armed conflict and violence against women, reflects upon future directions and unresolved issues, and includes a general consideration relating to violence against women and armed conflict (1997-2000) including a number of country case studies.

Working methods

3. In an attempt to provide a systematic review of States' compliance with their international obligations with respect to State-perpetrated and/or -condoned violence against women during armed conflict, the Special Rapporteur requested Governments to provide her with written accounts on how State practice and policy have been brought into compliance with recommendations made to the Commission on Human Rights in 1998.

4. The Special Rapporteur also constituted a research team from experts around the world to assist her in reporting to the Commission on matters relating to violence against women during times of armed conflict for the period 1997-2000. The results of such research are included in the present report.[2]

Country visits

5. The Special Rapporteur would like to draw the attention of the Commission on Human Rights to the report of her mission to Bangladesh, Nepal and India (28 October-15 November 2000) on the issue of trafficking of women and girls (E/CN.4/2001/73/Add.2).

6. The Special Rapporteur would like to take this opportunity to express her appreciation to the Governments of Bangladesh, Nepal and India for facilitating her visit and enabling her to meet with all relevant interlocutors, both governmental and non-governmental, in the three countries. The Special Rapporteur regrets that her visit to Sierra Leone, scheduled for August 2000, had to be postponed and hopes that the visit will take place in 2001.

7. By letter dated 27 April 2000, the Special Rapporteur inquired whether the Russian Federation would consider the possibility of inviting her and the Special Rapporteur on torture, to undertake a joint visit to that country with respect to the situation in the Republic of

Chechnya. By letter dated 11 September 2000, the Government addressed an invitation only to the Special Rapporteur to visit Russia, including the North Caucasus region. By letter dated 27 September 2000, the Special Rapporteurs reiterated their request to undertake a joint mission.

8. The Special Rapporteur regrets that the Government has not seen fit to invite both herself and the Special Rapporteur on torture to visit the area of Chechnya, after they specifically requested a joint visit in April.

II. EMERGING LEGAL STANDARDS ON ARMED CONFLICT AND VIOLENCE AGAINST WOMEN

9. Since the Special Rapporteur's last report on violence against women during armed conflict, wartime violence against women has continued unabated. However, in the last few years there has been growing international recognition of the seriousness of these crimes and an international commitment to setting up a mechanism of accountability.

10. As the Special Rapporteur has noted in previous reports, rape and other gender-based violence during wartime has long been prohibited, although often ignored and rarely prosecuted. Only in recent years, following the systematic rape and sexual violence associated with the conflicts in Bosnia and Rwanda, has the international community begun to develop precise legal standards to make clear once and for all that such practices can be war crimes, crimes against humanity, and components of the crime of genocide, as well as torture or other cruel, inhuman and degrading treatment, and enslavement. Similarly, the mechanisms have only recently been created to facilitate the investigation and prosecution of such crimes, through the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, and more recently the International Criminal Court (ICC).

A. The International Criminal Court

11. The single greatest development since the Special Rapporteur's previous report (hereinafter the "1998 report") was the approval on 17 July 1998 of the Statute of the ICC, known as the Rome Statute. As of November 2000, 116 countries had signed and 23 had ratified the treaty, over one third of the number of ratifications necessary for the treaty to enter into force.

12. The Rome Statute makes explicit that rape and other gender[3] violence are among the most serious crimes of concern to the international community by specifically defining them as constituent acts of crimes against humanity and war crimes. According to the Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention (in international armed conflict)[4] or constituting a serious violation of article 3 common to four Geneva Conventions (in a non-international conflict)[5] are war crimes. Similarly, the Statute defines crimes against humanity to include torture, as well as "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" when committed as part of a widespread or systematic attack directed against any civilian population.[6] Furthermore, the Statute defines "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the

exercise of such power in the course of trafficking in persons, in particular women and children".[7] The Statute also provides that persecution on the basis of gender - as well as on political, racial, national, ethnic, cultural, religious or other grounds - may constitute a crime against humanity.[8]

13. Although the Statute does not make specific reference to rape or other sexual violence in its article on genocide, following instead the language in the Convention on the Prevention and Punishment of the Crime of Genocide, its provisions can be used to prosecute rape and other sexual violence (see for example the *Akayesu* case cited below). The Statute provides that constituent acts of genocide include "causing serious bodily or mental harm to members of the group" and "imposing measures intended to prevent births within the group".[9]

14. Also of importance, the treaty includes a non-discrimination clause, which requires that the application and interpretation of the law by the ICC:

> "[M]ust be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender ..."[10]

15. Significantly, the Rome Statute gives specific recognition to the concerns of child soldiers, making the "conscripting or enlisting [of] children under the age of 15 years into the national armed forces or using them to participate actively in hostilities" a war crime.[11]

16. In addition to its substantive legal provisions, the Rome Statute deals with a number of structural issues that women's rights activists viewed as critical if the Court were to function as a progressive mechanism for justice for victims of gender-based violence. In the selection of judges, the States parties must take into account the need for "a fair representation of female and male judges", as well as appoint "judges with legal expertise on specific issues, including ... violence against women or children".[12] The Office of the Prosecutor (OTP) is similarly required to appoint advisers with expertise on "sexual and gender violence and violence against children".[13]

17. The Statute also makes specific provision for a Victim and Witness Unit, which will "provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims and others who are at risk on account of [their] testimony. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."[14]

18. Although many features of the ICC are sensitive to the issues raised by violence against women during wartime, the Rome Statute also has certain drawbacks with regard to the international human rights of women. The Statute defines "forced pregnancy" in article 7 (2) (f), as requiring the perpetrator to have "the intent" of affecting the ethnic composition of any population. This definition raises serious concerns as to why forced pregnancy of any kind should not be an offence. In addition, it seems to endorse prejudices with regard to ethnic purity by making certain kinds of forced pregnancy more offensive than others.

19. In addition, the Rome Statute defines "gender" in article 7 (3) as referring to "the two sexes, male and female, within the context of society". This definition, by re-emphasizing the biological differentiation between men and women, prevents approaches that rely on the social construction of gender.

20. Finally the Rome Statute does not provide for witness incognito provisions with regard to the defendant once the case goes to trial. Though there are witness incognito provisions in the Statute, the drafters have preferred to place emphasis on the rights of the defendants over the safety of individual witnesses.

B. Case law of the International Criminal Tribunal for the Former Yugoslavia

21. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has played a critical role in setting jurisprudential benchmarks for the prosecution of wartime sexual violence. The Office of the Prosecutor (OTP) has recognized that sexual violence not only constitutes a range of international crimes, such as war crimes, crimes against humanity and war crimes, but can also constitute torture, enslavement, serious bodily injury, and other relevant acts as long as the elements constituting these crimes are present in the act of sexual violence. To date, ICTY public indictments for crimes committed during the war in the former Yugoslavia have charged crimes of sexual assault as grave breaches of the Geneva Conventions, crimes against humanity, war crimes, and genocide. Moreover, the ICTY has publicly charged a number of alleged war criminals with command responsibility for crimes of sexual assault under article 7 (3) of the Statute.

The Tadic case

22. Dusko Tadic, a member of the Bosnian Serb forces operating in the municipality of Prijedor, was convicted by the Tribunal on 7 May 1997 for crimes against humanity and war crimes committed during the war in the former Yugoslavia.[15] Tadic, a low-level official at the notorious Omarska camp, was not convicted for directly committing an act of sexual assault,[16] but for his participation in a general, widespread and systematic campaign of terror that included beatings, torture, sexual assaults, and other physical and psychological abuse directed at the non-Serb population in the Prijedor region.[17]

23. It is particularly significant that in the *Tadic* case the Tribunal found the accused guilty of crimes against humanity for criminal acts of persecution that included crimes of sexual violence. Instead of falling back on the often heard claim that rape is a random or arbitrary act perpetrated by soldiers in search of an outlet for sexual energy, the Tadic decision states categorically that rape and sexual violence can be considered constituent elements of a widespread or systematic campaign of terror against a civilian population. It is not necessary to prove that rape itself was widespread or systematic but that rape was one of perhaps many types of crimes - the *spectrum* of which was committed on a widespread or systematic basis and comprised an aggressor's campaign of terror.[18]

The Blaskic case

24. Tihomir Blaskic, a colonel in the armed forces of the Croatian Defence Council (HVO) and Chief of the Central Bosnia Operative Zone of the HVO armed forces during the events for which he was indicted by the ICTY, was charged with both direct criminal responsibility and command responsibility for crimes against humanity, including rapes committed at detention centres. On 3 March 2000, Blaskic was convicted for a range of humanitarian law violations, including war crimes, grave breaches and crimes against humanity against the Bosnian Muslim population of central Bosnia.[19] He was not convicted for directly committing the crimes enumerated in the indictment but on the basis that he "ordered, planned, instigated or otherwise aided and abetted in the planning, preparation, or execution of those crimes".[20]

25. The judgement is important, among other things for its extended discussion of what constitutes a crime against humanity. The court lists four elements that comprise "a systematic attack", including "the perpetration of a criminal act on a very large scale against a group of civilians or *the repeated and continuous commission of inhuman acts linked to one another*" (emphasis added).[21] The court's discussion of crimes against humanity is a positive contribution to the development of rape as a war crime. Under both the *Tadic* and *Blaskic* interpretations of crimes against humanity, the rape and sexual assault of women need not in and of itself be widespread or systematic but sexual violence can be a constituent element of a widespread or systematic campaign involving other criminal acts.

The Celebici case

26. On 16 November 1998, the ICTY issued its first decision convicting a Bosnian war criminal specifically for crimes of sexual violence, among other war crimes. The court found Hazim Delic, a Bosnian Muslim and deputy camp commander at the Celebici prison camp, guilty of raping and sexually assaulting two Bosnian Serb women held prisoner in the camp in 1992, and convicted him of, among other things, a grave breach (torture) and war crimes (torture) for the rapes.[22] The court also found Zdravko Mucic, a Bosnian Croat camp commander, to have command responsibility for the abuses committed against detainees in the Celebici camp, including killings, torture, sexual assaults, beatings, and other forms of cruel and inhuman treatment.

27. The judgement confirms that rape and sexual violence can be acts of torture; the Trial Chamber underscored that a prohibited purpose of torture is "for discrimination of any kind", including gender discrimination;[23] the court found a camp commander responsible for the sexual violence committed by his subordinates; the court adopted the broad and progressive definition of rape articulated by the *Akayesu* court (see below); and the court emphasized that rape and sexual violence result not only in physical but also psychological harm.

28. Hazim Delic was sentenced to 20 years' imprisonment for crimes committed at the Celebici camp, despite the prosecution's request for a life sentence. Delic was found not guilty for command responsibility for any crimes committed by his subordinates, although he was the deputy camp commander under Mucic and evidence of his de facto control over camp guards is littered throughout the judgement.[24] The prosecution has appealed both Delic's sentence and the verdict. Mucic, Delic and Landzo have all appealed their convictions.

The Furundzija case

29. Anto Furundzija, a local commander in Vitez in a special HVO military police unit, was convicted on 10 December 1998 of torture as a co-perpetrator in the rape of a Bosnian Muslim woman during interrogation, as well as of aiding and abetting in the rape.[25] The case was the first ever prosecuted exclusively on crimes of sexual violence before an international tribunal and contains a number of progressive contributions to the jurisprudence of rape as a war crime. The court confirmed, among other things, the status of rape as a war crime, particularly under common article 3 of the Geneva Conventions dealing with internal armed conflicts;[26] accepted the *Akayesu* definition of rape but formulated a set of elements that expressly prohibits forced oral sex;[27] and stated that the elements of torture in armed conflicts include that at least one of the persons involved in the torture be a public official or from "any other authority-wielding entity",[28] thus opening the door for a range of actors, including paramilitaries and other "irregulars" who raped and sexually assaulted women in the war in the former Yugoslavia with the tacit approval and support of the various militaries, as potential torturers.[29]

30. Unfortunately, the court also made a number of procedural decisions that raise concern. In a controversial ruling, the court subpoenaed records from a women's counselling centre in Bosnia concerning psychological treatment that Witness A. had received in the aftermath of her rapes. After an in camera review to "determine its relevance and whether it should be disclosed to the parties"[30] the Chamber decided that the counselling documents should be disclosed to the defence and the prosecution.[31] Although Furundzija was ultimately convicted, and his conviction upheld on appeal,[32] the procedural decisions taken by the court, particularly with respect to the disclosure of Witness A.'s personal counselling records, must be of concern especially for the possible negative impact on other women coming forward to cooperate with the Tribunal.

The Foca case

31. In June 1996, the ICTY issued an indictment against eight Bosnian Serbs for a range of sexual offences committed against women in Foca.[33] As the ICTY noted, the indictment was of major legal significance because it was "the first time that sexual assaults had been diligently investigated for the purpose of prosecution under the rubric of torture and enslavement as crimes against humanity".[34] The *Foca* case can be distinguished from the *Tadic* and *Blaskic* cases in that the accused are charged with crimes against humanity for a widespread or systematic campaign of sexual violence against women. Thus, rape and sexual assault in and of themselves were systematic, constituting "the perpetration of a criminal act on a very large scale against a group of civilians" required for a charge under crimes against humanity.[35] The trial is currently under way and a judgement is anticipated before the end of the year.

32. The ICTY has indicted a number of individuals for command (or superior) responsibility[36] for crimes of sexual violence. As noted above, in the *Celebici* case, defendants were convicted not because they were physical perpetrators, but because of the rape and sexual violence of those under their command. Others, including Radovan Karadzic, have been indicted for crimes, including rape and sexual violence, committed by those under his leadership.

33. On 27 May 1998, the ICTY indicted a sitting Head of State, Yugoslav President Slobodan Milosevic, then President of Yugoslavia, for violations of the laws or customs of war and crimes against humanity by military and police units operating in Kosovo during the first five months of 1999.[37] Milosevic is charged for his own acts, as well as his superior responsibility. Although the indictment did not include charges related to sexual violence, representatives of the ICTY have stated publicly that they intend "to investigate, and where appropriate indict and prosecute perpetrators" of sexual violence in the province.[38]

C. Case law of the International Criminal Tribunal for Rwanda

34. As of December 2000, the International Criminal Tribunal for Rwanda (ICTR) has publicly indicted 45 persons, of which five indictments include charges of sexual violence. Forty-three accused are in custody either on trial, awaiting trial or serving a sentence.

The Akayesu case

35. The ICTR decision in *Prosecutor v. Akayesu*,[39] issued on 2 September 1998, recognized for the first time that acts of sexual violence can be prosecuted as constituent elements of a genocidal campaign. Jean-Paul Akayesu, then Mayor of Taba commune, was charged with genocide, crimes against humanity, and war crimes[40] and with having known that acts of sexual violence were being committed and having facilitated the commission of such acts by permitting them to be carried out on commune premises.[41] Akayesu was also charged with being present during the commission of crimes of sexual violence and thus of encouraging these crimes.[42]

36. The *Akayesu* judgement is unequivocal in its pronunciation that the crimes of sexual violence committed in the Taba commune and throughout Rwanda constituted acts of genocide:

> "[R]ape and sexual violence ... constitute genocide in the same way as any other act as long as they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such ... Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[43]

37. The Trial Chamber convicted Akayesu of the crime of genocide finding "beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the *bureau communal* and that women were being taken away from the *bureau communal* and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence. In fact, there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence."[44]

38. The *Akayesu* court made a significant contribution to the evolving jurisprudence of rape as a war crime by articulating a broad definition that squarely places rape on an equal footing with other crimes against humanity. The *Akayesu* definition reconceptualizes rape as an attack on an individual woman's security of person, not on the abstract notion of virtue and not as a taint on an entire family's or village's honour. Also of significance, the court defined sexual violence to include forced nudity, firmly establishing that acts of sexual violence are not limited to those involving penetration or even sexual contact.[45] The judgement states clearly that

"The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts." The "Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances that are coercive."[46] The *Akayesu* definitions of rape and sexual violence have been embraced by the ICTY and have served as the internationally accepted definition for crimes of sexual violence in all of the ICTY cases to date (see *Celebici* and *Furundzija* cases discussed above).

The Musema case

39. On 27 January 2000, the ICTR held that Alfred Musema, director of the Tea Factory in Gisovu, had himself attacked Tutsis, and had incited his employees at the factory to attack Tutsis, during violent attacks in April and May 1994. Musema was also found to have raped a young Tutsi woman named Nyiramusugi, as four other men held her down,[47] then to have left, while the four also raped her and left her for dead. The court held that Musema had individual responsibility both for his own act of rape, as well as for aiding and abetting the other rapists. The court found that the evidence presented - considering both the murders as well as acts of serious bodily and mental harm, including rape and other forms of sexual violence - amounted to genocide. With regard to sexual violence, the court stated: "acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such."[48] Significantly, the court also found that "the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack", and therefore found Musema guilty of crime against humanity (rape).[49] Musema was sentenced to life imprisonment.

40. In addition to the cases above, a number of cases dealing with sexual violence are currently pending. Arsène Shalom Ntahobali, a local store manager, was indicted along with his mother Pauline Nyiramashuhuko, the former Minister for Women's Development and Family Welfare, on charges of genocide, crimes against humanity and violations of common article 3. He is accused, among other things, of having set up a roadblock where members of the Tutsi ethnic group were kidnapped, abused and killed. Ntahobali is also charged with raping Tutsi women, and both he and his mother are charged with forcing Tutsi women to undress in public.[50] The amended indictment against Laurent Semanza also includes charges of sexual violence; the Prosecutor will present evidence at trial that the accused encouraged paramilitaries to rape Tutsi women. His trial began on 16 October 2000, and is continuing.[51] Similarly, in the amended indictment against Ignace Bagilishema, the bourgmestre of Mabanza from 1980 to 1994, the Prosecutor alleges that the defendant incited Hutus to rape Tutsi women before killing them.[52]

III. FUTURE DIRECTIONS AND UNRESOLVED ISSUES

41. The ICTY has made significant progress in the indictment and prosecution of alleged perpetrators of crimes of sexual violence. However, only a little over half of those publicly indicted are now in custody. Numerous Bosnian women have told international human rights groups that they fear testifying at the ICTY and then returning to their pre-war homes because most of the alleged perpetrators still live in these areas and wield power as politicians, municipal

officials, police officers and businessmen. Efforts must be intensified to arrest those who have been indicted. Similarly, women's rights activists from Rwanda have warned that lack of information about the ICTR and lack of "trust that the court will actually take the measures necessary to protect them from being publicly identified" are reasons that women victims of sexual violence do not come forward to speak to ICTR investigators.[53]

42. The fact that war criminals continue to live freely in close proximity to potential witnesses and that witnesses still fear public exposure has serious implications for the work of the Tribunals and makes the need for aggressive witness protection programmes essential. Particularly during pre- and post-trial phases, there need to be more adequate protective and support measures for witnesses and their families. Long-term protective measures - in the form of resettlement, anonymity, asylum - have been extremely rare and offered only in the most exceptional circumstances. While significant progress has been made on the jurisprudential front with respect to war crimes prosecutions for sexual violence, that progress must be reinforced by a concerted effort to implement witness protection mechanisms that instil confidence and provide personal security for women who want to testify.

43. The ICTY should revise its rules of procedure to include a privilege for medical or rape counselling records that would prohibit their disclosure unless the court is convinced, after in camera review, of the defence's contention that the records are not only relevant but exculpatory.

IV. GENERAL ISSUES RELATING TO VIOLENCE AGAINST WOMEN AND ARMED CONFLICT (1997-2000)

A. Unimaginable brutality

44. Violence against women during wartime continues to involve horrendous crimes that must shock the conscience of humanity. Despite the significant progress that has been made in recent years to strengthen legal prohibitions against rape and other sexual violence, women and girls throughout the world continue to be the victims of unimaginable brutality. As the case studies illustrate, gender-based violence can take a variety of forms. Since 1997, women and girls have been raped - vaginally, anally and orally - sometimes with burning wood, knives or other objects. They have been raped by government forces and non-State actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. They have been maimed or sexually mutilated, and often later killed or left to die. Women have been subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public, and to perform domestic chores while nude.

45. Women and girls have also been abducted or held captive, forced to do domestic work - cleaning, cooking, serving - or other labour, in addition to any sexual "services" that may be demanded of them.[54] Sometimes women and girls are forced into "marriage"; a soldier will identify a woman as his "wife", sometimes forcing her to go with him from region to region and other times passing her on to others; all the while she is raped and otherwise mistreated. Such forced marriages are enslavement as defined by the ICC (see above), and may also be torture or other cruel, inhuman and degrading treatment.

B. Chemical weapons

46. Modern warfare has often entailed the deployment of chemical weapons, the use of which is now clearly banned by the Rome Statute of the ICC. Use of such weapons is a war crime and a crime against humanity. The Special Rapporteur has recently received a number of testimonies of victims of the use of chemical weapons, especially from Viet Nam. The victims have suffered disabilities related to their reproductive organs and have given birth to children with severe disabilities. The consequences resulting from the use of chemical weapons can be devastating, not only for the victim concerned but also for the next generation, unborn at the time of the armed conflict.

C. Role of non-State actors

47. The impunity of non-State actors for violations of human rights and humanitarian law is an issue that deserves serious international consideration. The large majority of conflicts today are internal ones involving armed opposition forces fighting against government units.[55] Although rape and sexual violence are often committed by government forces, non-State actors also commit serious abuses against women and girls and often target the civilian population, including in particular women and children, as a tactic of war. Rebel forces are also responsible for the vast majority of abductions of children, including girls, for sexual slavery and/or to use as child soldiers. In some conflicts, rebel soldiers engage in forced marriage and abduction of young girls living in villages near their camps. The provisions of common article 3 of the Geneva Conventions regulate the conduct of all belligerents to a conflict, including armed opposition forces. Non-State actors, just as government forces, can be held accountable for violations of international humanitarian law and will be subject to the jurisdiction of the ICC, once it is established. There are, however, particular difficulties in enforcing international standards with regard to non-State actors. In particular, there are often limited means of exerting pressure on non-State actors. Additional efforts need to be made in this area to increase pressure on non-State actors to abide by international humanitarian law and to exert political, economic and other pressure on the friendly Governments that finance, arm or otherwise support abusive rebel forces.

D. The female child

48. In recent years, the international community has focused increasing attention on the problem of child soldiers and children in conflict. It is now widely recognized that armed conflict has a different and more damaging long-term impact on children, and that female children may face specific risks that are different from those of boys. As is reflected throughout the case studies below, girls face many if not all of the risks that are experienced by women during armed conflict. They are often victims of rape and other sexual violence, and may be abducted and forced to serve a number of distinct and overlapping roles, such as porters, cooks, combatants and sexual slaves. Girls who are orphaned or separated from their families during armed conflict are also particularly vulnerable to sexual violence and exploitation, including trafficking into forced prostitution. And while they may find themselves responsible for the shelter and feeding of younger siblings, they encounter numerous obstacles that make these tasks difficult because of their age and gender.

49. While women and girls often experience similar types of violence, the physical and mental impact on girls can be much more damaging. Girls who are raped or abducted and forced to provide sexual services for male combatants are at great risk of contracting sexually transmitted diseases, HIV/AIDS, as well as numerous complications related to pregnancy and abortion. This is particularly true for those who are not yet sexually mature. And girls may find it particularly difficult to reintegrate into their families and communities once the conflict is over. The extreme suffering that armed conflict inflicts on girls and the many roles girls are often forced to play during conflict and long after has been recognized by the Secretary-General, in his historic report on children in armed conflict.[56]

50. Girls also participate, either voluntarily or by force, in government armies, paramilitaries and militias, or armed opposition groups in over 30 countries in the world.[57] While these girls often face all of the dangers associated with being a child soldier, they may also be forced to provide sexual services or face other gender-specific abuse. There has been growing international condemnation of the use of child soldiers,[58] culminating, on 25 May 2000, in the adoption by the General Assembly of a new Optional Protocol to the Convention on the Rights of the Child that bans forced recruitment and conscription under the minimum age of 18, and requires States to raise their minimum age for voluntary recruitment to at least 16.[59] By year's end, 70 countries had already signed the treaty and 3 had ratified it.

51. As has been noted above, girls may find it more difficult to reintegrate into their families and communities after the end of a conflict because they have been sexually abused or forced to be wives of enemy forces, and they may face other obstacles to rehabilitation that are both gender and age specific. Girls may, for example, find it difficult to feed and shelter themselves or others because of discrimination in laws, such as inheritance laws. As the Special Representative for Children and Armed Conflict has noted, in post-genocidal Rwanda, an estimated 40,500 households are headed by girls. However, at the time of his visit to Rwanda in February 1999, Rwandese law did not allow women or girls to inherit land, including farm land necessary for their very subsistence.[60] As a result of Special Representative Otunnu's efforts, the Government of Rwanda enacted legislation in March 2000 allowing women and girls to inherit property.[61]

52. Despite the specific needs and experiences of girls in armed conflict, girls are often the last priority when it comes to the distribution of humanitarian aid and their needs are often neglected in the formulation of demobilization and reintegration programmes. There is growing recognition that the specific needs of girls require special protective measures, both during armed conflicts and in post-conflict situations. Following an open debate on 25 August 1999, the Security Council adopted a landmark resolution urging "all parties to armed conflicts to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance".[62]

E. Trafficking of women in and out of conflict zones

53. During wartime, women are often trafficked across borders to sexually service combatants to the armed conflict. Armed conflict increases the risk of women and girls being abducted and forced into sexual slavery and/or forced prostitution. Although most conflicts are now internal ones, women and girls may be transported across international borders, often to camps of soldiers or rebels located in the territory of a neighbouring State. At least some of these abductions result in women and girls being sold to others and trafficked to other regions or countries. The Governments which host and support the rebel forces also assume a specific obligation to stop the trafficking in human beings and to hold accountable those found responsible for such crimes. The Special Rapporteur has received reports of women being trafficked from refugee camps and other places of shelter given for their protection. She has also received reports of women being trafficked to service United Nations peacekeepers in countries where such peacekeepers are located. The trafficking of women in the context of armed conflict is now seen as a war crime and a crime against humanity. It is important that such trafficking be curtailed, exposed and the perpetrators punished, even if such punishments involve United Nations personnel.

F. Internally displaced women

54. Women and children face rape and other gender-based violence and abduction, not only during armed conflict but in flight, as well as once they have fled the conflict area. In her 1998 report, the Special Rapporteur discussed in detail the particular concerns of refugee women and the factors that impact their security differently from that of men.[63] However, since 1997, the Special Rapporteur has become increasingly concerned with the problem of women who are internally displaced. With the epidemic of internal conflicts around the world, it has become abundantly clear that internally displaced persons (IDPs) - the majority of whom are women and children[64] - are particularly vulnerable to violence and abuse. Unlike refugees, IDPs do not have access to legally binding international standards that are specifically designed for their protection and assistance,[65] nor is there an international monitoring agency specifically mandated to provide protection and assistance to IDPs in the same way that UNHCR does for refugees.

55. There has been growing international recognition of the particular problems of IDPs, culminating in the Guiding Principles on Internal Displacement submitted by Mr. Francis Deng, Representative of the Secretary-General, to the Commission on Human Rights. The Guiding Principles specifically recognize the particular concerns of IDP women and children, call for IDP women to be included in all phases of planning and distribution of humanitarian assistance, and for IDPs to be protected from all forms of violence including rape and other gender-specific violence, including forced prostitution.[66] Although essentially a restatement of existing international human rights and international humanitarian law, the Guiding Principles represent a significant achievement. Nevertheless, many IDPs still do not have access to humanitarian assistance or international protection. Although a State is obliged to protect its citizens, it is often the perpetrator of the very violence that causes displacement as well as the obstacle to international efforts to protect and provide humanitarian assistance to IDPs. Women and children, who make up the vast majority of IDPs, cannot hope to have adequate protection and

assistance until States abide by their obligations under international human rights and humanitarian law pertaining to IDPs, and the international community develops a more consistent and coherent protection-oriented response to the problem of internal displacement.[67]

56. There has been growing recognition that the failure to include women in the design and construction of refugee camps, as well as in decisions about the distribution of humanitarian assistance, has unwittingly placed refugee women in ongoing danger. Recent calls for the mainstreaming of a gender perspective in all aspects of conflict and post-conflict responses, including in the design and construction of shelter and programmes for the distribution of humanitarian assistance, apply with equal force to the internally displaced.

G. Militarization

57. Evidence from around the world seems to suggest that armed conflict in a region leads to an increased tolerance of violence in the society. A growing body of evidence indicates that the militarization process, including the ready availability of small weapons, that occurs leading up to and during conflicts, as well as the process of demobilization of often frustrated and aggressive soldiers after a conflict, may also result in increased violence against women and girls. When a peace agreement has been reached and the conflict brought to an end, women often face an escalation in certain gender-based violence, including domestic violence, rape, and trafficking into forced prostitution.[68] The correlation between domestic violence and violence during war has concerned many scholars and activists in conflict-ridden areas. A report on violence against women in the IDP/refugee camps in West Timor shows very high incidence of domestic violence and sexual harassment in the camps.[69] Unfortunately many of the peace agreements and the processes of reconstruction after the conflict do not take note of these considerations.

H. United Nations peacekeepers/military bases

58. Women may also be exposed to violence by the international authorities or forces assigned to protect them. There have been a growing number of reports of rape and other sexual abuse being committed by United Nations peacekeeping forces and staff, most notably the 1999 murder of an 11-year-old Albanian girl in Kosovo by an American soldier.[70] Similarly, although clearing the Italian army of widespread abuse during its 1992-1995 peacekeeping operation in Somalia, an Italian investigative commission did conclude that the peacekeepers had committed abuses, such as the rape of a Somali woman with a stick of explosives. Reports of torture, rape and murder or other serious abuses by peacekeeping units have also been reported in Mozambique, Angola, Cambodia and Bosnia.

59. Some commentators have also noted that military contractors linked to peacekeeping forces and United Nations Police typically increase the demand for prostitution and may even participate in the trafficking of women into forced prostitution. A report prepared by the High Commissioner for Human Rights and the United Nations Mission to Bosnia and Herzegovina (UNMIBH) found widespread complicity by local police, as well as by some international police

and members of the Stabilization Force (SFOR), in the trafficking of women into Bosnia.[71] The report discussed one case in which an SFOR civilian paid 7,000 deutsche mark (US$ 3,057) to purchase two women from a brothel owner and notes that "NATO declined to waive the SFOR member's diplomatic immunity; he left Bosnia without legal repercussions."[72]

60. The problem of abuse in children by peacekeepers has been recognized by, among others, Graça Machel. In her September 2000 report on the impact of armed conflict on children, Ms. Machel stated that "the arrival of peacekeeping troops has been associated with a rapid rise in child prostitution. These and other acts of violence committed by peacekeeping personnel against women and children are rarely reported or investigated. Even though the United Nations has taken some action to control the behaviour of peacekeeping personnel, it is still relatively rare for disciplinary measures to be taken."[73]

61. Women in Japan (Okinawa), the Philippines and the Republic of Korea have also expressed concern that United States military bases and forces present in their countries create increased risk of rape and other sexual violence.[74] On 8 November 2000, for example, a United States soldier was sentenced by the Seoul High Court to six years in prison for the strangling death of a 31-year-old waitress who refused to have sex with him.[75] The presence of army bases near civilian populations increases risks of certain kinds of violence. It is important that the host Government and the Government in command of the armed forces take the necessary precautions to prevent such violence and act speedily to prosecute and punish the perpetrator once the violence is committed.

62. Peacekeeping forces and international police are often not sufficiently responsive to women's protection needs or fail to make it a priority to solve rape and other crimes of sexual violence, thereby perpetuating an atmosphere of impunity in areas under their control. In recognition of this problem, on 17 September 1999, the Security Council adopted a resolution in which it noted "the importance of including in the mandates of peacemaking, peacekeeping and peace-building operations special protection and assistance provisions for groups requiring particular attention, including women and children", and requested the Secretary-General to ensure that United Nations personnel involved in such activities "have appropriate training in international humanitarian, human rights and refugee law, including child and gender-related provisions ...".[76] Furthermore, there is growing recognition that greater efforts must be made to place women in peacekeeping and civilian police units, and to ensure that a senior staff person is assigned specific responsibility for gender-based violence.

I. Reconstruction programmes

63. Women also often face violence, discrimination and indifference to their needs in the rehabilitation and reconstruction process, ensuring that their security and subsistence concerns will go unanswered. Although in post-conflict situations the majority of heads of households are often women, women face discrimination at every turn in trying to feed and house their families, and their needs are rarely adequately factored into international donor and reconstruction programmes, or the distribution of humanitarian aid. Women in Rwanda were hindered in their efforts to feed and shelter their families by discriminatory inheritance laws that have only recently been changed. What is more, reconstruction programmes often ignore the special needs of these female-headed households, directing their attention and resources to work projects for

the male population. The absence of adequate attention to the special problems that female heads of household, many of them war widows or orphaned, face in trying to feed their families, the failure to take these concerns into account in the distribution of humanitarian assistance, and the lack of initiatives by the donor community to support work projects that specifically include women compound historical discrimination in many societies and can ultimately force women to turn to prostitution as the only means of supporting their family.

J. Women in the peace process

64. In recent times, women's groups have pointed to the lack of involvement of women at the highest levels of most peace processes. Many post-conflict concerns can only be addressed if women have a greater role in the peace process, during which time the framework for future government structures and administration are set in place. The Security Council has recently reaffirmed the "important role of women in the prevention and resolution of conflicts and in peace-building", and has stressed "the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security ...".[77] It is incumbent upon the international community to insist on the full participation of women to ensure that any peace agreement and post-conflict structure reflects the specific experiences of women and girls, and that special steps are taken to address their specific concerns.[78] In this regard, it is important to note and place on record the important role played by women's groups in the Northern Ireland and Sierra Leone peace processes. Women's groups in Burundi, Sri Lanka and Jerusalem have also been very active in struggling for peace and reconciliation.

K. Accountability/truth and reconciliation

65. Because women and girls have different experiences during armed conflict, often suffering violence and other abuse that is specific to their gender, it is evident that women must be fully involved in society's efforts to address the past. Without a gender-sensitive approach and a conscious effort to bring women into the process women's voices and experiences are often lost. This was the experience of the South African Truth and Reconciliation Commission (TRC), for example, which found that women often viewed themselves as the "wives, mothers, sisters and daughters of the active (mainly male) players on the public political stage" and downplayed or remained silent about their own suffering.[79] Women were particularly likely to remain silent about the sexual violence they had experienced. Owing to strong advocacy by women's and human rights groups, the TRC decided to take special steps to encourage women to testify, including by holding three special women's hearings in Cape Town, Durban and Johannesburg.[80] "These hearings brought to light the particularly gendered ways in which women experienced human rights violations and furthered the process by which the commissioners distinguished less and less between what were originally perceived as primary and secondary victims."[81]

L. Impunity/accountability

66. The failure to investigate, prosecute and punish those found responsible for rape and sexual violence has contributed to an environment of impunity that perpetuates violence against women today. One can only hope that, with regard to rape and other sexual violence, the important work of the ICTY and ICTR, as well as the relevant language in the Rome Statute of

the ICC, indicate an end to international tolerance for violence against women. However, the failure to enforce international humanitarian law and to hold accountable those who violate it has not been and is not now primarily a problem of legal definitions and sufficient legal precedent. It will ultimately depend on the firm commitment of the States Members of the United Nations whether the violence described below is investigated and punished, and whether future such acts are prevented.

V. CASES OF VIOLENCE AGAINST WOMEN IN TIMES OF ARMED CONFLICT (1997-2000)

67. The following are cases of violence against women during times of armed conflict as reported by independent fact finders; their stories have been corroborated by more than one source. The list is neither exhaustive nor representative, but it serves to point to the nature and degree of violence perpetrated against women during times of armed conflict. Some of the case studies were given to the Special Rapporteur in direct testimony, some from official sources including multilateral and international agencies, others are drawn from the reporting of international non-governmental human rights organizations that have been independently corroborated.

A. Afghanistan

68. The Taliban continues severely to restrict the rights of women throughout the territory under its control (an estimated 90 per cent of the country). During her September 1999 visit to Afghanistan, the Special Rapporteur found that "in Taliban-controlled areas of Afghanistan, discrimination against women is officially sanctioned and pervades every aspect of the lives of women. They are subject to grave indignities in the areas of physical security and the rights to education, health, freedom of movement and freedom of association."[82]

69. Women are reportedly subjected to a wide range of human rights abuses, including instances of rape, sexual assault, forced prostitution and forced marriage. During the Taliban's August 1998 capture of Mazar-I-Sharif in north-western Afghanistan, there were reports that "young women were abducted by the Taliban from a number of neighbourhoods in Mazar-I-Sharif and that their whereabouts were unknown. While such abductions do not appear to have been widespread, certain neighbourhoods appear to have been targeted."[83] Similarly, during a new round of fighting in mid-1999 in the Shamali Plains, as well as in renewed fighting in mid-2000, there were reports that Taliban abducted and raped women. The Special Rapporteur on the situation of human rights in Afghanistan has also received reports that "many Hazara and Tajik women and girls were abducted in the villages and taken directly from houses by force".[84] Although it has been extremely difficult to confirm these reports through eyewitness or victim testimonies, they are of a serious nature requiring further independent investigation.[85]

70. The Special Rapporteur on the situation of human rights in Afghanistan also received many reports of the families of young girls and women being forced "to conclude a Nikah (marriage contract) and thus marry them to Taliban members or to give them a large sum of money instead. When families refuse, they take the women and girls away by force".[86]

71. The Special Rapporteur also noted the "rise in violence against women among the refugee population, including child abuse, prostitution and trafficking".[87] She has received a number of reports of sexual abuse of Afghan refugee women and girls, including in the Pakistani village of Saranan, situated 106 km from Quetta, as well as in Surkhab, G. Minera and Pir Alizi.

B. Burundi

72. Despite a peace agreement in late October 1999, all sides to the conflict in Burundi continued to commit serious violations of humanitarian and human rights law: in the last year over 1,000 civilians were massacred and "thousands more maimed, raped, or otherwise injured".[88] Civilians were collected into so-called "regroupment camps" around the capital. In some camps, where soldiers were charged with protecting the residents, soldiers raped and coerced sexual favours from women and girls.[89] Because of increased international pressure demanding the closure of the camps, the Government of Burundi has dismantled the regroupment camps in Bujumbura and ceased using regroupment as a counter-insurgency tactic in the countryside. Although the situation for women and girls has much improved in the provinces where regroupment was practised, they still remain vulnerable to violence by soldiers and rebels.

73. Many women who fled the country have been confronted with more violence in the refugee camps in the United Republic of Tanzania. Women living in the camps have been subjected to extremely high levels of sexual and domestic violence by other refugees and/or men living near the refugee camps.[90] Growing tensions between the refugee population and the local Tanzanians in the region have also led to women's increased vulnerability. "In one particularly serious incident in May 1999, a group of some 50 refugee women were alleged to have been raped by a group of Tanzanian men [in Kasulu district], apparently in reprisal for the death of a local schoolteacher. More than a hundred Tanzanian men were believed to have taken part in the rapes, though only eleven were subsequently arrested."[91]

C. Colombia

74. There have been a number of reports of rape and sexual abuse, especially by paramilitary groups linked to Colombia's armed forces. For example, on 18 February, some 300 armed men belonging to the paramilitary Peasant Self-Defence Force of Córdoba and Urabá (Autodefensas Campesinas de Córdoba y Urabá, ACCU) set up a kangaroo court in the village of El Salado, Bolívar. For the next two days, they tortured, garrotted, stabbed, decapitated and shot residents. Witnesses told investigators that they tied one six-year-old girl to a pole and suffocated her with a plastic bag. One woman was reportedly gang-raped. Authorities later confirmed 36 dead. Thirty other villagers were missing.[92] Similarly, paramilitaries who entered the village of Pueblo Nuevo Mejia on 2 June 2000 abducted Andis Villalobos Galán and her son when they were unable to find her husband and brother-in-law. International human rights groups reported that Andis Villalobos had been forced to cook for the paramilitaries, ill-treated and threatened with sexual abuse.[93]

75. Guerrilla forces have also reportedly been responsible for widespread abuses during the armed conflict. In the town of Barrancabermeja, guerrilla forces and groups linked to them have been responsible for numerous deliberate and arbitrary executions of people they consider to be military or paramilitary collaborators or sympathizers, including young women associating with members of the security forces.[94]

D. Democratic Republic of the Congo

76. All of the armed forces[95] fighting in the three-year war in the Democratic Republic of the Congo have committed serious abuses against women and frequently targeted women for rape and other sexual violence. Armed groups, in particular Hutu rebels, have used rape systematically against civilians. Some women and girls are held as sexual slaves. There have also been reports that detained men, women and children have been subjected to sexual violence.

77. The Special Rapporteur received reports of dozens of cases of rape and other human rights violations against women in areas controlled by the Goma-based Congolese Rally for Democracy (Rassemblement congolais pour la démocratie, RCD) and its Rwandan allies. In one particularly gruesome incident, in September 1999, RCD soldiers reportedly beat, stripped and raped five women in the village of Mwenga who had been detained reportedly because an RCD soldier's wife accused them of sorcery. The soldiers then put hot pepper in the women's vaginas, put them in a pit and buried them alive.[96] Between April and July 1999, 115 rapes by combatants were registered in just the two regions of Katana and Kalehe in South Kivu. Thirty rapes were reported during the 5 April 1999 attack on Bulindi and Maitu.[97] Since April 2000, over 40 women have been held hostage by Mai Mai armed groups in Shabunda, South Kivu, and are believed to be at great risk of sexual violence.

78. The Special Rapporteur on the human rights situation in the Democratic Republic of the Congo also reported that he had received many reports that rape, even of girls, still occurs in prisons and during military operations in the country. The Special Rapporteur noted specific charges of rape by Congolese Armed Forces soldiers as they fled from Equateur in the beginning of 1999.[98] He also received reports of rape of women in Kabamba, Katana, Lwege, Karinsimbi and Kalehe, and by Ugandan soldiers in towns in Orientale province.[99]

E. East Timor

79. Militia forces backed and trained by the Indonesian military carried out a systematic campaign of violence during the lead-up to the August 1999 referendum on East Timorese independence, which was organized and administered by the United Nations. When East Timorese nevertheless opted for independence from Indonesia, pro-Indonesian militia and Indonesian soldiers initiated a scorched earth policy, terrorizing the population and committing widespread abuses, including the rape of women and girls. Some women were also reportedly held in sexual slavery.[100]

80. The Special Rapporteur, during a joint fact-finding mission in November 1999 together with the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the question of torture, found evidence of widespread violence against women in

East Timor during the period [from January 1999] ... the highest level of the military command in East Timor knew, or had reason to know, that there was widespread violence against women in East Timor.[101]

81. After the violence ended and the United Nations Transitional Administration in East Timor (UNTAET) was in place, several initiatives were begun to investigate and hold accountable those responsible for the most serious abuses committed during the violence. Numerous obstacles, including lack of proper training and absence of appropriate infrastructure, caused significant delays in the UNTAET investigations. This was particularly true for investigations into rape cases.[102] The International Commission of Inquiry appointed by the Secretary-General pursuant to Commission resolution S-4/1 adopted at its special session on East Timor, found a pattern of serious violations in East Timor after January 1999, including sexual abuse, rape, stripping and sexual slavery of women, noted the need for further investigations and called on the United Nations to establish an independent and international body charged with conducting systematic investigations, identifying and prosecuting perpetrators, and ensuring reparations to victims of the violence in East Timor.[103]

F. Federal Republic of Yugoslavia (Kosovo)

82. There were many credible reports of rape and sexual violence against Kosovar women during the armed conflict between Yugoslav armed forces and the Kosovo Liberation Army (KLA) in early 1998, and especially during the period from March to June 1999, when the NATO bombing campaign against Yugoslavia was under way.[104] During that period, Serb paramilitaries reportedly dragged women and girls out of their homes, off buses, or from other public areas. Many women were raped, some were held in sexual slavery, and an unknown number were killed. Others were forced to undress and subject themselves to humiliating searches, or were threatened with rape or death if they did not pay money. Serbian paramilitaries committed the large majority of sexual assaults that took place in Kosovo during this period, but there were also a number of reports of rape by regular Serb soldiers.[105] Many of the rapes were by multiple perpetrators and there were also numerous reports of victims having been covered with bites.

The case of V.B.

83. A group of 27 women and children were held for days by soldiers believed to have been from the Yugoslav army. Women reported being stripped of their clothes, of being sexually abused, and of some being taken out one at a time and raped. Six young women were reportedly raped repeatedly. On one final occasion, the six young women and three older women were all taken out. Only one of the nine, in fact, survived; the remains of the others were discovered three months later in a well located on the property.[106]

84. After the NATO-led international security force in Kosovo (KFOR) entered Kosovo in June 1999, ethnic Albanians displaced by the war began to return in droves. Rape of ethnic Serbs, Roma and Albanians perceived as having supported the Government of Yugoslavia were reported during this period.[107] The European Roma Rights Center (ERRC) documented three cases of rape of Roma women by persons in KLA uniform.[108]

G. India

85. Rape and sexual abuse have been reported in areas where there are armed conflicts in India such as Jammu, Kashmir, Assam and Manipur, among other regions. Torture, including rape and other sexual violence, is also reportedly used by the police and security forces. In certain reports that the Special Rapporteur has received with regard to custodial violence outside the armed conflict areas, women from certain castes and ethnic or religious minorities appear to be at risk of being targeted by the police.[109]

86. As fighting escalated in Jammu and Kashmir, all parties to the conflict committed serious abuses against the civilian population. The Special Rapporteur has received reports that the Indian security forces have raped women and girls in certain search operations. The following cases were highlighted during this period.

Case of S.

87. On 5 October 1998, the Eighth Rashtriya Rifles took S., a woman from Ludna, Doda, her husband, and grandson from their house to the military base in Charote. There, it is reported that the soldiers tortured the woman with electric shocks, stripped off her clothes, and the captain raped her.[110]

Case of 14-year-old Gulshan

88. "In the night of 22 to 23 April 1997, during a raid of Wavoosa village near Srinagar, at least four security personnel are said to have raped 14-year-old Gulshan, her 15-year-old sister Kilsuma and her 16-year-old sister Rifat. In a neighbouring house they raped 17-year-old Naza and at least three adult women. Army and civilian authorities made inquiries into the incident but no steps appear to have been taken to bring those responsible to justice."[111]

H. Indonesia/West Timor

89. Mob violence directed primarily against ethnic Chinese citizens of Indonesia erupted on 13 May 1998, following the shooting death of four students by army or police officers the day before. Indonesian security forces reportedly stood by over the course of the next three days as mobs killed an estimated 1,198 persons, torched houses and businesses, and sexually assaulted Chinese women. Although there has been controversy over the exact number of victims raped during the violence, there is little doubt that many ethnic Chinese women were subjected to sexual violence during this period. Following her mission to Indonesia in November 1998, the Special Rapporteur concluded that "[a]lthough she [could not] provide a definite number, the pattern of violence that was described by victims, witnesses and human rights defenders clearly indicted that such rape was widespread".[112]

90. Over one year after violence erupted in East Timor (see East Timor, above), over 100,000 East Timorese refugees remain in West Timor, most under pro-Indonesian militia control, where violence, including sexual assault, by militia is common. There have also been numerous, credible reports that women are used as forced labourers and sex slaves. "According to refugees who have returned from West Timor, women are regularly taken from the camps and

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raped by soldiers and militia members. An Indonesian soldier reportedly held a number of refugee women captive in his house. One of the women said to have been held there was Filomena Barbosa", a prominent activist in the pro-independence campaign in East Timor.[113] The Government of Indonesia has failed to disarm and disband the militia, or to investigate reports of sexual assault and hold the perpetrators accountable.

91. Rape has also been reported during armed conflicts in other areas of Indonesia as well, including in Irian Jaya and Aceh. For example, in March 2000, women were reportedly raped in the village of Alue Lhok in the North Aceh district.[114]

I. Japan: developments with regard to justice for comfort women

92. Although the Government of Japan has acknowledged moral responsibility for the system of organizing sexual slaves euphemistically called "comfort women" during the Second World War, it has refused to accept legal liability or to pay compensation to the victims.[115] There has been no attempt to implement the set of recommendations the Special Rapporteur made in her 1996 report,[116] or those outlined by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights in the appendix to her final report on systematic rape, sexual slavery and slavery-like practices during armed conflict.[117]

93. According to the December 2000 report of The Asian Women's Fund, the private fund set up to compensate the victims and to carry out projects to assist them, the project of atonement from the Japanese people involves recipients receiving a letter from the Prime Minister of Japan expressing apology and remorse and compensation of 2 million yen. To date 170 former comfort women have received atonement money. In addition, the Fund conducts many other laudable activities to assist women and elderly people affected by the Second World War and violence against women.

94. In recent years, several of the victims of sexual slavery have brought lawsuits in Japanese courts; a number of these cases are still pending. Of those that have been decided, the results are decidedly mixed. Three "comfort women" were each awarded 300,000 yen (US$ 2,300) by the Shimonoseki Branch of the Yamaguchi District Court on 27 April 1998, after the court found that the women had been held in sexual slavery and that their human rights had been violated. The court essentially held that there was a legal obligation for the Government of Japan to compensate the women, holding that the failure of the Diet to pass legislation compensating the women for their suffering "constituted a violation of Japanese constitutional and statutory law".[118] Both the plaintiffs and the Government filed an appeal at the Hiroshima Higher Court, which is currently pending.

95. By contrast, the Tokyo District Court rejected the lawsuit of 46 former "comfort women" from the Philippines on 9 October 1998,[119] as well as the claim of a Dutch former "comfort woman" on 30 November 1998.[120] An appeal filed by the plaintiffs in the Filipino women's case was rejected by the Tokyo Higher Court on 6 December 2000. An appeal in the case of the Dutch woman is pending before the Tokyo Higher Court. Similarly, the Japanese High Court of Justice rejected the appeal of a former Korean "comfort woman" on 30 November 2000, acknowledging her suffering but ruling that she - as an individual - did not have the right under international law to bring an action against a State for compensation. The Court also held that

the statute of limitations for Koreans living in Japan to claim compensation for war damages ended in 1985.[121] In September 2000, a group of 15 former "comfort women" filed a class action suit in the Washington District Court demanding compensation for the crimes committed against them.[122]

96. In December 2000, women's groups held a Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Tokyo Tribunal 2000), to highlight the ongoing denial of compensation to the victims of Japan's system of "comfort women" by the Government and the impunity that continues for its perpetrators. Evidence from "comfort women" living in the two Koreas, the Philippines, Indonesia, East Timor, China and the Netherlands were gathered in detail and were now finally available as a matter of record. The evidence was presented by an international prosecutor before an eminent panel of international judges. The findings of the judges to the Tribunal reiterated the legal liability of the Government of Japan and the need to set up a process to punish the perpetrators of the crimes. The Government was, however, not represented at the Tribunal.

J. Myanmar

97. The rape and sexual abuse of women and girls by government forces has been "a regular feature in the mode of operation of the army in its campaign of incursions into the insurgency zones or else in the relocation sites".[123] The Special Rapporteur has received many credible reports of women and girls being raped and sexually abused or threatened with abuse by government troops to intimidate the local population, to extract information from female detainees, and to extract bribes. Women and girls have also been abducted, used as forced labour and forced into "marriages".

Case of Nang Zarm Hawm

98. Nang Zarm Hawm, a 14-year-old girl, was reportedly raped and burned alive at a farm about 3-4 miles east of Lai-Kha on 11 May 1998. On that day, a Maj. Myint Than and approximately 90 troops went to a rice farm where Nang Zarm Hawm and her parents had been working. At the time they arrived, Nang Zarm Hawm was alone. "Myint Than asked her about her parents and ordered his soldiers to wait at the edge of the farm and arrest anyone who came to the farm. He then raped Nang Zarm Hawm in the hut several times during the day and at about 4 a.m. burned Nang Zarm Hawm in the hut, and left the place with his troops".[124]

Violence in Ta Hpo Hkee

99. The Special Rapporteur on the situation of human rights in Myanmar received information that, "on 31 July 1999, a group of 43 soldiers led by company commander Mo Kyaw and his assistant, Ka Htay, from Fourth Company, Infantry Battalion 101, went to Ta Hpo Hkee, a village near the Kawei and Hpway Plaw massacre sites, where they captured a group of seven Karen civilians, including a nine-year-old girl and a pregnant woman, and killed them. Both single women and the nine-year-old girl were reported to have been gang-raped by the soldiers before they were slaughtered. The pregnant woman was killed by a shot fired at the abdominal region".[125]

K. The Russian Federation (Chechnya)

100. In renewed fighting in Chechnya in late 1999 and throughout 2000, both Russian government forces and Chechen rebels committed humanitarian law violations, but Russian forces committed the vast majority of the violations. Russian soldiers brutally tortured, beat and raped women, as well as some men, in the areas under their control. Sexual violence was particularly prevalent during so-called "mop up" operations, when Russian soldiers entered towns and villages for the first time after the rebel fighters had fled. There were reports of rape in Alkhan Yurt, Novye Aldy, Shali, and Tagi Chu.[126] The following are but two of the many accounts.

The Case of "Fira"

101. Russian soldiers reportedly raped and killed 23-year-old "Fira" (not her real name) and her mother-in-law on 19 December 1999, after capturing the town of Shali. Fira was approximately six months' pregnant at the time of her death. Neighbours heard screams and gunshots coming from the house and later discovered the bodies of the two women. One neighbour, "Malika" (not her real name), saw the victims bodies:

> "On her breasts, there were dark blue bruises. There was a strangely square bruise on her shoulder. Near her liver, there were also dark bruises. On her neck, there were teeth marks, and her lips also had teeth marks, like someone had bitten her. She had a little [bullet] hole on the right side of her head, and a big wound on the left side of her head."[127]

The case of X. and three other women

102. On 5 February 2000, four women were seized by Russian soldiers who came to their houses in the upper part of Aldi, a suburb of the capital, Grozny. There were 12 soldiers and "many" of them reportedly raped the women, some both vaginally and orally. One woman allegedly suffocated to death when a soldier sat on her head. Two other victims were strangled when they screamed. A fourth woman lost consciousness when she was orally raped.[128]

103. Despite strong evidence of rape and other sexual violence committed by Russian forces in Chechnya, the Government of the Russian Federation has failed to conduct the necessary investigations or to hold anyone accountable for the vast majority of cases. To date, only one of the alleged perpetrators, a Russian tank commander, has been arrested and charged with sexual assault.

L. Sierra Leone

104. Systematic and widespread rape and other sexual violence has been a hallmark of the nine-year conflict in Sierra Leone. Thousands of cases of sexual violence have been reported, including individual and gang rapes, sexual assault with objects such as firewood, umbrellas and sticks, and sexual slavery.[129] During the January 1999 rebel offensive against Freetown by

the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), there were hundreds of reports of women and girls being rounded up and brutally raped. "A 14-year-old girl was stabbed in the vagina with a knife because she had refused to have sex with the rebel combatant who abducted her. Another women had small pieces of burning firewood put into her vagina. One 16-year-old girl was so badly injured after repeated rape that, following her escape, she required a hysterectomy."[130] The rebel forces also abducted several thousand civilians from Freetown during this period. Of those women and girls who were abducted, "more than 90 per cent ... were believed to have been raped: many were forced to submit to rape or be killed. Many girls subsequently released were pregnant, had given birth or had contracted sexually transmitted diseases".[131]

105. The Lomé Peace Accord, which was signed on 7 July 1999, brought about a relative reduction in many of the worst abuses, except for sexual assault against women and girls, which continued unabated. As the peace process collapsed and fighting escalated once again in May 2000, all sides in the conflict - the RUF and rebel militias, and increasingly pro-Government forces - committed horrific crimes against the civilian population, including systematic and widespread sexual assault, rape and mutilation of women.

106. Many of the rapes took place when victims were abducted and forced to become sexual partners or "wives" of their captors. Girls, some as young as 10 years old, were abducted by rebel forces and forced to be sexual slaves.[132]

107. The Lomé Peace Accord granted a general amnesty for all crimes committed during the conflict, including sexual violence. The Special Representatives of the Secretary-General added a reservation to the peace agreement indicating that the United Nations did not recognize the amnesty as applicable to crimes of genocide, crimes against humanity, war crimes and other serious violations of human rights and humanitarian law. On 14 August 2000, the Security Council adopted resolution 1315 (2000) in which it requested the Secretary-General "to negotiate an agreement with the Government of Sierra Leone to create an independent special court" and recommended "that the subject matter jurisdiction of the court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law ...". On 5 October 2000, the Secretary-General submitted a report with recommendations and proposals for the establishment of the Special Court (S/2000/915), which was at this writing under consideration by the Security Council.[133]

108. Having suffered unbelievably at the hands of armed groups in their home country, refugees from Sierra Leone (as well as from Liberia) who sought refuge in Guinea have also been victims of violence. Following a statement by the President of Guinea in September 2000 blaming refugees for sheltering armed rebels who had allegedly carried out attacks on Guinea from Sierra Leone and Liberia, mobs attacked thousands of refugees in the capital, Conakry. Many refugees were forced out of their homes and beaten. There were also credible reports of rape and sexual abuse of women and girl refugees by Guinean police, soldiers and civilians, many by multiple attackers. Non-governmental organizations collected numerous testimonies of victims, including that of a 14-year-old girl and a mother with a three-month-old baby, both of whom had been brutally raped.[134]

M. Sri Lanka

109. The Sri Lankan security forces have continued to commit serious human rights abuses, including sexual violence, in the context of the 17-year armed conflict against the Liberation Tigers of Tamil Eelam (LLTE). Sri Lankan police have also reportedly committed rape and other sexual abuse in the course of the fighting. Following are some of the cases that have been received since 1997.

Case of Sarathambal Saravanbavananthatkurukal

110. Twenty-nine-year old Sarathambal Saravanbavananthatkurukal, a daughter of a temple priest, was reportedly gang-raped and murdered by members of the Sri Lankan navy on 29 December 1999 in Pungudutivu, near Jaffna. Despite orders from the President to investigate the case, to date no one has been held accountable.

Case of Ida Caremelitta

111. "Ida Caremelitta was allegedly gang-raped by five soldiers and then killed during the night of 12 July 1999 in Pallimunai village on Mannar Island. Five masked and heavily armed men reportedly entered the house where she and her family were sleeping, took Ms. Caremelitta outside and violently raped and then killed her. The post mortem report indicates that Ms. Caremelitta had been repeatedly raped and that her body had been sexually mutilated."[135] The Government is proceeding with the investigations and a case has been filed against some of the soldiers.

112. In addition to the security forces, certain armed groups are allowed to operate with considerable impunity in the north and the east as they are allies of the Government in the conduct of the war. In the Eastern Province and the Vauniya district, there are allegations of rape and extrajudicial killings being conducted by these groups. The case of Noor Lebai Sithi Umma in Eravur, a 28-year-old girl who was raped and murdered allegedly by an armed group, is a case in point. Another case reported to the Special Rapporteur involved Ali Muhammath Athabia from Eravur, who was tortured and sexually assaulted in front of her daughters by members of an armed group.

113. LLTE are also responsible for committing serious human rights abuses in conducting the war. In addition, the Special Rapporteur has received reports that they routinely recruit and sometimes abduct children, including girls, for use as child soldiers. In a report from July 2000, an organization called The University Teachers for Human Rights reported that 20 girls had recently been recruited by the LLTE from a school. Five of the girls - aged 14 and 15 - told the camp officials that they did not want to stay. According to the report, "These girls were then isolated, taken to a room, stripped, mercilessly assaulted and pushed onto the ground. They were then trampled on."[136]

VI. RECOMMENDATIONS

A. International

114. Following on the recommendations contained in the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations, as well as numerous statements, resolutions and decisions by the United Nations, the Organization should take immediate steps to ensure that the representation of women is increased in all institutions of the United Nations and at all levels of decision-making, including as military observers, police, peacekeepers, human rights and humanitarian personnel in United Nations field-base operations, and as special representatives and envoys of the Secretary-General. Important measures should include:

(a) The creation of a Gender Unit and the appointment of senior gender advisers within the Department for Peacekeeping Operations, as well as the appointment of senior gender advisers and child protection advisers with gender-sensitive training to all field missions;

(b) An increase in the number of women appointed as special representatives to conflict areas, in key posts responsible for peacekeeping missions and the distribution of humanitarian assistance;

(c) The inclusion of gender advisers in the Integrated Mission Task Forces proposed in the report of the Panel on United Nations Peace Operations (the Brahimi report) (A/55/305-S/2000/809).

115. The Organization should take concrete steps to mainstream a gender perspective in all United Nations activities, most urgently in those areas that affect the physical security of women and girls, including in field operations, in peacekeeping, and in military and police forces. Not only will gender mainstreaming ensure greater participation of women in the key operations of the organization, it will improve the responsiveness of the United Nations to the special concerns of women and girls that are outlined in this report. These steps should include:

(a) The establishment of a clear mandate for all peacekeeping missions to prevent, monitor and report on violence against women and girls, including all sexual violence, abduction, forced prostitution and trafficking;

(b) The establishment of comprehensive training on gender issues for all peacekeeping staff in the field, as well as staff of the Department for Peacekeeping Operations based in New York;

(c) The elaboration of uniform procedures and disciplinary measures for peacekeeping personnel who violate international standards, in particular those related to violence against women and girls. Special ad hoc tribunals to try peacekeepers for war crimes and crimes against humanity should also be considered in the areas where peacekeepers operate.

116. The Organization should take specific steps to ensure that peacekeeping personnel who commit abuses in violation of human rights and humanitarian law, including those against women and girls, are held accountable. Member States who contribute troops to peacekeeping operations should not only abide by a code of conduct, but should investigate all allegations of such violations and prosecute those found responsible. All such investigations and their outcome should be made public, including in regular reports to the Secretary-General. Following on the recommendation by Graça Machel in her September 2000 report on children in armed conflict, the Special Rapporteur also urges that an ombudsperson or other disciplinary and oversight mechanism be created within all peace support operations.

117. The United Nations should ensure that women are represented in all ceasefire and peace negotiations, and that gender issues are an integral part of these processes. Special efforts should be made to engage local women's NGOs in the peace negotiations.

118. The wartime experiences and post-conflict needs of women and girls must be fully taken into account in the formulation of repatriation and resettlement plans, as well as demobilization, rehabilitation, reintegration and post-conflict reconstruction programmes. In addition:

(a) Rehabilitation programmes must take into account the often widespread nature of sexual assault and rape and formulate programmes to address the specific needs of survivors of sexual assault;

(b) Programmes must be developed to address the special needs of female ex-combatants;

(c) Special initiatives must also be developed to ensure that the security and subsistence concerns of war widows and other female heads of household are adequately addressed.

119. A full-scale assessment of the impact of armed conflict on women, as called for by Security Council resolution 1325 (2000), is urgently needed so as to provide the information necessary for the formulation of more effective programmes for the protection and assistance to women and girls.

120. Taking note of the important recommendations made by the Secretary-General in his July 2000 report to the Security Council on Children and armed conflict (A/55/163-S/2000/712), additional research and monitoring should be conducted regarding the impact of conflict on girls, as well as on the impact of international programmes intended to protect girls in wartime and to respond to their needs, so as to improve programming and protection.

121. The international community should work towards the creation of an international body, similar to the Office of the United Nations High Commissioner for Refugees (UNHCR), that would be specifically mandated to protect and assist IDPs, or at least a centralized coordinating mechanism so that there can be a quick and uniform international response to situations of internal displacement, as has been outlined by the Representative of the Secretary-General.

122. Although already under way, greater efforts must be made to ensure the participation of women and girls in the design of refugee and IDP camps and the distribution of humanitarian aid. Appropriate steps must also be taken to improve lighting, change camp layout, increase security patrols, address provision of firewood, locate water sources and latrines in safe areas, and employ women guards.

123. The United Nations should initiate programmes to inform non-State actors of their obligations under international humanitarian law and the specific impact that the establishment of the ICC may have on them.

B. National

124. All States should ratify the relevant international instruments, including the Rome Statute of the ICC, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the ILO Worst Forms of Child Labour Convention (No. 182), and the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination, and ensure that the legal standards created therein are fully respected and that those who violate these instruments are held accountable.

125. All Governments and non-State actors should abide by and ensure enforcement of the Guiding Principles on Internal Displacement. States should provide protection and assistance to those displaced within their territory and should guarantee unconditional and unhindered access of international and domestic humanitarian agencies to the displaced.

126. States must ensure the safety of camps for refugees and IDPs, especially against infiltration by armed groups, and must adopt effective measures to guarantee the particular security concerns of women and children displaced by conflict, including measures against rape and other gender-based violence.

127. States should refuse to provide arms, or financial or political support for Governments or non-State actors who violate international humanitarian law, including by committing rape or other sexual violence against women and children. States must also take extra precautions to ensure that armed groups do not use their territory to hold abducted women and girls or to traffic them into forced prostitution or forced labour.

128. States should create gender-sensitized training and education programmes for their armed forces and civilian police and peacekeeping units that include instructions on their responsibilities towards the civilian population, particularly women and children. In this regard, States should elaborate and enforce a code of conduct for their military and civilian personnel based abroad and should hold those who violate the code accountable.

129. Member States should make sure that the representation of women is increased in lists of nationals available for secondment as military observers, police, peacekeepers, human rights and humanitarian personnel and special representatives.

130. Member States should provide the financial and political support to ensure adequate gender-sensitive training and sufficient numbers of senior gender advisers, as well as child protection officers, for key United Nations agencies working with peacekeeping, humanitarian assistance and post-conflict rehabilitation and reconstruction.

131. Governments that are involved in funding reconstruction programmes should make sure that these programmes take into consideration the special needs and wartime experiences of women and girls in formulating programmes. In particular, States should develop gender-sensitive programmes, including health care and trauma counselling, to deal with the special needs of young girls and women who have been sexually abused and raped during armed conflicts.

132. Governments that are currently faced with conflict and/or a post-conflict situation should include women in all reconciliation and reconstruction activities, and ensure that all repatriation and resettlement programmes, as well as rehabilitation, reintegration and post-conflict reconstruction, address the special needs of women and take into account their specific wartime experiences in formulating programmes.

133. States should develop and improve national systems for the collection of comprehensive and data disaggregated by gender.

134. In countries where there is armed conflict. Women and women's groups should be fully involved in the peace process and special efforts should be taken to ensure that women's needs and interests are included in the political negotiations.

135. Mechanisms for accountability with regard to war crimes and human rights abuses should ensure that cases involving violence against women are prosecuted and the perpetrators brought to justice. Compensation for the victims should also be considered. All peace negotiations should include such provisions.

Notes

[1] Report of the Special Rapporteur on violence against women, its causes and consequences, submitted by Ms. Radhika Coomaraswamy in accordance with Commission resolution 1997/44 (E/CN.4/1998/54), 26 January 1998 (hereinafter referred to as the "1998 report").

[2] The Special Rapporteur would like to especially thank Holly Cartner for her input, as well as Julia Hall from Human Rights Watch for her research on the work of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and the Asia Pacific Forum on Women, Law and Development for the submissions on armed conflict from throughout the Asian region.

[3] "Gender" for the purposes of the Statute is defined as "the two sexes, male and female, within the context of society". Rome Statute of the ICC, article 7 (3).

[4] Ibid., article 8 (2) (b) (xxii).

[5] Ibid., article 8 (2) (e) (vi).

[6] Ibid., article 7 (1) and (1) (g).

[7] Ibid., article 7 (2) (c).

[8] Ibid., article 7 (1) (h).

[9] Ibid., article 6 (b) and (d).

[10] Ibid., article 21 (3).

[11] Ibid., article 8 (2) (b) (xxvi).

[12] Ibid., article 36 (8) (a) (iii) and (b).

[13] Ibid., article 42 (9).

[14] Ibid., article 43 (6).

[15] On 11 November 1999, Tadic was sentenced to 25 years' imprisonment. That sentence was later reduced by the Appeals Chamber to a maximum of 20 years. International Criminal Tribunal of the Former Yugoslavia, Fact Sheet on ICTY Proceedings, November 2000.

[16] The original indictment in the *Tadic* case charged Tadic with the rape of a woman detainee, Witness F. As the trial drew near, Witness F. withdrew and refused to testify. Some observers claimed that the witness withdrew because she was too frightened to testify and many viewed her retreat as emblematic of the Tribunal's failure to provide adequate witness protection, particularly to women survivors of sexual assault. Witness F.'s refusal to participate forced the Prosecutor to amend the indictment, withdrawing the rape charges against Tadic. The Tribunal thus turned to a consideration of the broader setting in which Tadic operated an environment characterized, in part, by brutal sexual violence. See for example, Kelly Askin, Sexual Violence in ICTY and ICTR Indictments and Decisions: The Current Status of Prosecutions Based on Gender-Based Crimes Before the ICTY and ICTR: Developments in the Protection of Women in International Humanitarian Law, *American Journal of International Law*.

[17] *Prosecutor v. Tadic*, Indictment, para. 2.6.

[18] The *Tadic* court stated that the crime of persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to a targeted group. *Prosecutor v. Tadic*, Judgement, 7 May 1997, para. 704. In important dicta, the court also addresses the issue of whether a single act can constitute a crime against humanity: clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of

requiring that the acts be directed against a civilian population and thus even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution. Ibid., para. 649 quoting Henri Meyerowitz in the report of Special Rapporteur D. Thiam of the International Law Commission (A/CN.4/466), para. 89.

[19] *Prosecutor v. Blaskic*, No. IT-95-14, Judgement, 3 March 2000. Blaskic was acquitted on charges of committing genocide.

[20] ICTY Statute, article 7 (1).

[21] *Prosecutor v. Blaskic*, Judgement, para. 203. The other three elements were: (a) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; (b) the perpetration and use of significant public and private resources, whether military or other; and (c) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

[22] *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-A, 16 November 1998. For other acts, Delic was also convicted of wilful killing and murder, torture, inhuman and cruel treatment, causing great suffering or serious injury, and the unlawful confinement of civilians.

[23] The *Celebici* court further notes that the United Nations has recognized that violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Thus, the court supported the view that gender discrimination can provide a basis for prosecuting rape as torture. *Delalic, et al.*, Judgement, para. 493.

[24] For example, numerous witnesses testified that Delic was a commander with all the requisite power the position implies. Ibid., para. 798.

[25] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998.

[26] Ibid., paras. 165-171.

[27] The objective elements of rape include:

(i) the sexual penetration, however, slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

Ibid., para. 185. The court states that forced oral sex can be just as humiliating and traumatic for the victim as vaginal or anal penetration and that a broad definition of what constitutes a rape comports with the fundamental principle of protecting human dignity. Ibid., para. 184.

[28] Ibid., para. 162.

[29] Ibid.

[30] Ibid., para. 26.

[31] The ICTY rules do not include a special privilege for medical or counselling records. Many critics of the *Furundzija* court's actions have called on the ICTY to amend the Rules of Procedure and Evidence to include a privilege for medical or rape counselling records that would prohibit their disclosure unless the court is convinced, after in camera review, of the defence's contention that the records are not only relevant but exculpatory. The final version of the Rules of Procedure and Evidence of the ICC does recognize as privileged those communications between a person and his or her medical doctor, psychiatrist, psychologist or counsellor under rule 73 (3). Preparatory Commission for the International Criminal Court, report of the Working Group on Rules of Procedure and Evidence (PCNICC/2000/WGRPE/L.8), 27 June 2000, p. 5.

[32] *Furundzija*, Case No. IT-95-17/1-A, Appeals Judgement, 21 July 2000.

[33] Between July 1992 (April 1992 for Vukovic) and February 1993, the accused are charged with raping women in detention facilities; taking women out of detention centres to houses, apartments and hotels to rape them; forcing women to undress and dance nude before groups of soldiers and police; engaging in gang rape and public rapes; detaining women in houses and apartments used as brothels; forcing women to perform domestic chores in houses and apartments, as well as forcing them to submit to sexual assaults; and selling women in exchange for money. The rapes included vaginal, anal and oral penetration and fellatio. Kunarac is charged with command responsibility for the acts of sexual violence committed by his subordinates. Many of the victims were children; one girl was 12 and one 15 at the time they were raped and serially sexually abused at Foca. Many of the women were serially raped over long periods of time. Many suffered permanent gynaecological damage as a result of the abuse, including one woman who can no longer conceive as a result of such damage. The indictments also recount the rape of a woman seven months pregnant.

[34] ICTY press release, 27 June 1996.

[35] *Blaskic*, Judgement, note 179.

[36] The doctrine of command responsibility holds those in positions of superior authority liable for the acts of their subordinates. See ICTY Statute, article 7 (3).

[37] In addition to Milosevic, Milan Milutinovic, the President of Serbia, Nikola Sainovic, Deputy Prime Minister of the Federal Republic of Yugoslavia, Dragoljub Ojdanic, Chief of Staff of the Yugoslav Army, and Vlajko Stojiljkovic, Minister of Internal Affairs of Serbia, were also indicted.

[38] ICTY press release, "ICTY Prosecutor, Carla Del Ponte, releases background paper on sexual violence investigation and prosecution". The Hague, 8 December 1999.

[39] *Prosecutor v. Akayesu*, ICTR-96-4, 13 February 1996, amended ICTR-96-4-I, 17 June 1997.

[40] The indictment defines acts of sexual violence to include "forcible sexual penetration ... and sexual abuse, such as forced nudity". Ibid., para. 10A. The original *Akayesu* indictment did not include any charges for crimes of sexual violence despite overwhelming evidence of mass rapes at Taba commune. A lack of political will among some high-ranking Tribunal officials as well as deficient investigative methodologies employed by some of the investigative and prosecutorial staff of the ICTR accounted for this omission. The indictment was amended after numerous Tutsi women testified and spoke out publicly about sexual violence in Taba commune. See also Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, September 1996, detailing the massive amount and systematic nature of sexual violence during the Rwandan genocide. In June 1997, the *Akayesu* indictment was amended to reflect the pivotal role that sexual violence played in the genocide of Tutsis in Taba commune.

[41] During the *Akayesu* trial, several Tutsi women testified that they were subjected to repeated collective rape by militia in and around the commune office, including in view of Akayesu. They spoke of witnessing other women being gang-raped and murdered while Akayesu stood by. In one instance, Akayesu was present during such a rape/murder and reportedly told the rapists, "[n]ever ask me again what a Tutsi woman tastes like". *Prosecutor v. Jean Paul Akayesu*, Prosecution's Closing Brief, volume I, 29 April 1998, para. 165. In addition, victims and witnesses at trial described other acts of sexual violence including public rape, rape with objects such as machetes and sticks, sexual slavery, forced nudity, and the rape of girl children.

[42] *Akayesu*, Amended Indictment, para. 12B.

[43] *Akayesu*, Judgement, 2 September 1998, para. 31 (under sect. 7.8, Count 1 - Genocide, Count 2 - Complicity in Genocide).

[44] Ibid., para. 52.

[45] *Akayesu*, Amended Indictment, para. 10A.

[46] *Akayesu*, Judgement, paras. 596-598, sect. 6.4, Crimes against Humanity.

[47] *Prosecutor v. Musema*, ICTR-96-13-I Judgement, 27 January 2000, para. 907.

[48] Ibid., para. 933.

[49] Ibid., para. 966.

[50] *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-I, 26 May 1997.

[51] *Prosecutor v. Semanza*, Case No. ICTY-97-20-I, Amended Indictment, 23 June 1999.

[52] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-I, Amended Indictment, 17 September 1999.

[53] Human Rights Watch, *World Report 2001*, p. 457.

[54] In the indictment of Dragoljub Kunarac, the defendant is alleged to have held women in the military headquarters and forced them to provide sexual and domestic services. The defendant was charged with the crime of enslavement. *Prosecutor v. Gagovic and Others* ("Foca" case), Case No. IT-96-23, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 October 1998.

[55] In addition, in many conflicts Governments use paramilitaries, either officially or informally linked to the Government. For purposes of this discussion, such paramilitary units are considered State agents, for whose conduct the State is accountable.

[56] *Children in armed conflict: report by the Secretary-General*, A/55/163-S/2000/712, 19 July 2000, para. 34.

[57] In case studies from El Salvador, Ethiopia and Uganda, it was found that reportedly a third of child soldiers were girls. Coalition to Stop the Use of Child Soldiers, *Girls With Guns: An Agenda On Child Soldiers For Beijing Plus Five* (http://www.child-soldiers.org/themed_reports/beijing_plus.html), p. 1. See also Susan McKay and Dyan Maurana, "Girls in militaries, paramilitaries, and armed opposition groups", unpublished, p. 5.

[58] The International Labour Organization (ILO) Worst Forms of Child Labour Convention, 1999, came into force on 19 November 2000, prohibiting forced or compulsory labour, including the forced recruitment of child soldiers (ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999). The Commission on Human Rights in resolution 1999/80 called upon all States, among other things, to take effective action against violations of girls' human rights and fundamental freedoms (para. 7). The special situation of child soldiers was also addressed in the Rome Statute of the ICC, which identified the conscription, enlistment or active use in hostilities of child soldiers under the age of 15 as a war crime (art. 8 (2) (b) (xxvi)).

[59] General Assembly resolution 54/263 of 26 June 2000, annex I, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The Optional Protocol also calls on non-State actors to stop the recruitment and use of children under 18.

[60] Additional report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr. Olara Otunnu, submitted in accordance with General Assembly resolution 53/128 (E/CN.4/2000/71 of 9 February 2000), para. 45.

[61] "Special Representative for Children and Armed Conflict welcomes Rwandan law allowing girls to inherit property", press release HR/4465, 20 March 2000.

[62] Security Council resolution 1261 (1999) of 25 August 1999, para. 10. Similarly, on 11 August 2000, the Security Council underlined:

> "the importance of giving consideration to the special needs and particular vulnerabilities of girls affected by armed conflict, including, inter alia, those heading households, orphaned, sexually exploited and used as combatants, and urges that their human rights, protection and welfare be incorporated in the development of policies and programmes, including those for prevention, disarmament, demobilization and reintegration". Security Council resolution 1314 (2000) of 11 August 2000, para. 13.

[63] For a detailed discussion of the factors that affect refugee women, see the 1998 report (E/CN.4/1998/54), paras. 166-178.

[64] Women and children make up the overwhelming majority of refugees and internally displaced persons around the world - most estimates indicate that women and children make up at least 80 per cent of all displaced persons worldwide. For example, in Colombia women and children make up approximately 80 per cent of all internally displaced. Some 58 per cent of the internally displaced are women while 55 per cent are under 18 years of age. Report of the Representative of the Secretary-General on internally displaced persons submitted in accordance with Commission resolution 1999/47, addendum. Profiles in displacement: follow-up mission to Colombia (E/CN.4/2000/83/Add.1 of 11 January 2000), para. 32.

[65] The treatment of IDPs is governed, however, by international human rights and humanitarian law.

[66] Document E/CN.4/1998/53/Add.2 of 11 February 1998, principle 11. See also principle 4. The Guiding Principles are also available on the OHCHR Web site (www.unhchr.ch) in 16 languages.

[67] Internally displaced persons: report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1999/47 (E/CN.4/2000/83), paras. 35-37.

[68] A recent UNIFEM study on violence against women in post-conflict Kosovo concluded that, while domestic violence existed before the war, "it appears to have increased since the conflict. Possible explanations ... [include] increased acceptability of violence as a way to solve problems, the breakdown of tight family and social structures, a general rise in instability and uncertainty, the increased sense of powerlessness amongst the community ...". *No Safe Place: Results of an Assessment on Violence against Women in Kosovo* (sect. 6 on domestic violence - First Incidence of Violence), UNIFEM, Prishtina, April 2000.

[69] Tim Kemanusian, Timor Barat Sekretariat, Report of VAW Investigations in IDP/Refugee Camps in West Timor, Kupang-ntt, Indonesia, August 2000.

[70] See, for example, George Boehmer, Tragedy in Kosovo (www.abcnews.go.com/sections/world/DailyNews/kosovo000412.html), 12 April 2000.

[71] UNMIBH/OHCHR, "Report on Joint Trafficking Project of UNMIBH/OHCHR", May 2000. Between March 1999 and March 2000, UNMIBH and OHCHR intervened in 40 cases of trafficking and possible trafficking in persons, involving 182 women. The report states that, "In approximately 14 cases ... there was compelling evidence of complicity by police, primarily local officers but also some international police, as well as foreign military (SFOR troops)."

[72] Ibid., p. 7.

[73] Graça Machel, The Impact of Armed Conflict on Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children, report presented at the International Conference on War-Affected Children, Winnipeg, Canada, 10-17 September 2000, p. 19.

[74] Japan NGO Report Preparatory Committee, Women 2000: Japan NGO Alternative Report, 13 August 1999 (http://www.jca.apc.org/fem/bpfa/NGOreport/E_en_Conflict.html). Report prepared for the "Beijing + 5" Special Session of the General Assembly in June 2000.

[75] "U.S. soldier sentenced to 6 years in prison for murdering barmaid", The Korea Herald, 8 November 2000.

[76] Security Council resolution 1265 (1999) of 17 September 1999, paras. 13 and 14.

[77] Security Council resolution 1325 (2000) of 31 October 2000, preamble.

[78] One positive example: women's and human rights groups in Burundi have been striving for greater participation of women in the peace process. Ultimately the women's groups were granted Permanent Observer Status at the talks. On 16 August 2000, all negotiating parties to the Burundi peace negotiations agreed to accept many recommendations that had been put forward by Burundi women's groups representing all 19 negotiating political parties. The recommendations include: the establishment of mechanisms to punish and put an end to war crimes such as rape and sexual violence; guarantees for women's rights to property, land and inheritance; measures to ensure women's security and safe return; and guarantees that girls have the same rights as boys to all levels of education. UNIFEM press release, "Consensus reached on women's centrality to a new Burundi", 16 August 2000.

[79] Truth and Reconciliation Commission Final Report, vol. 4, chap. 10, Special Hearing: Women, p. 1. Available at (http://www.polity.org.za/govdocs/commissions/1998/trc/4chap10.htm).

[80] Ibid.

[81] Donna Ramsey Marshall, *Women in War and Peace*, United States Institute of Peace, August 2000, p. 21, quoting the Truth and Reconciliation Commission Final Report.

[82] Report of the Special Rapporteur on violence against women, its causes and consequences, addendum: mission to Pakistan and Afghanistan (1-13 September 1999) (E/CN.4/2000/68/Add.4), para. 13.

[83] Human Rights Watch, "The massacre in Mazar-I-Sharif", November 1998, p. 12.

[84] Report on the situation of human rights in Afghanistan, submitted by Mr. Kamal Houssain, Special Rapporteur, in accordance with Commission resolution 1999/9 (E/CN.4/2000/33), para. 44.

[85] At the time of its investigation into humanitarian law violations in Mazar-I-Sharif, Human Rights Watch noted that it "was not able to locate witnesses" who were willing or able to describe specific incidents in detail, but nevertheless believed that "the allegations are serious enough to warrant special attention in any formal investigation into assaults on civilians during the takeover of Mazar-I-Sharif". Human Rights Watch, "The massacre in Mazar-I-Sharif", p. 12.

[86] Report on the situation of human rights in Afghanistan, op. cit., para. 45.

[87] Report of the Special Rapporteur on violence against women, mission to Pakistan and Afghanistan, op. cit., para. 44.

[88] Human Rights Watch, World Report 2001, p. 35.

[89] Ibid., p. 37.

[90] The International Rescue Committee, a United States-based humanitarian organization working in the Burundian refugee camps, documented 122 cases of rape and 613 cases of domestic violence in four camps in 1998. There were 111 rapes and 764 cases of domestic violence reported in the same camps in 1999, as cited in Human Rights Watch, Seeking Protection: Addressing Sexual and Domestic Violence in Tanzania's Refugee Camps, October 2000, p. 2.

[91] Ibid., p. 5.

[92] Human Rights Watch, World Report 2001, p. 114.

[93] Amnesty International, *Urgent Action: Colombia*, AI Index: AMR 23/50/00, 21 June 2000.

[94] Amnesty International, *Colombia: Barrancabermeja: A City Under Siege*, AI Index: AMR 23/036/1999, 1 May 1999.

[95] These include the government forces of President Laurent Désiré Kabila together with forces from Angola, Zimbabwe and Namibia against the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) together with forces from Rwanda, Uganda and Burundi, as well as a number of traditional militia groups.

[96] Human Rights Watch, World Report 2001, p. 449. See also Human Rights Watch, Eastern Congo Ravaged, May 2000.

[97] Information from the Goma-based NGO, Promotion et appui aux initiatives féminines.

[98] Report on the situation of human rights in the Democratic Republic of the Congo submitted by Mr. Roberto Garretón, Special Rapporteur, in accordance with Commission resolution 1999/56 (E/CN.4/2000/42), para. 111.

[99] Ibid., para. 117.

[100] Amnesty International, Annual Report 2000, p. 129.

[101] Note by the Secretary-General transmitting the report of the joint mission to East Timor (A/54/660 of 10 December 1999), para. 48. For cases, see also paras. 50 and 51. See also Report of the High Commissioner for Human Rights on the situation of human rights in East Timor submitted to the Commission on Human Rights at its fourth special session (E/CN.4/2000/44, annex, of 24 March 2000), paras. 35 and 36.

[102] Serious investigations into rape as an element of crimes against humanity only began in July; before then only two rape cases from 1999 were under active investigation. One factor was the lack of women investigators. Less than 4 per cent of the civpol force overall was female, and of the handful of women investigators, only one had special training in investigating sexual crimes. Human Rights Watch, World Report 2001, p. 192.

[103] Identical letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights transmitting the report of the International Commission of Inquiry on East Timor (S/2000/59).

[104] Human Rights Watch, Kosovo: Rape as a Weapon of Ethnic Cleansing, March 2000, p. 10.

[105] Human Rights Watch, World Report 2000, p. 439.

[106] Human Rights Watch, Kosovo, op. cit., p. 18.

[107] See UNHCR/OSCE, Assessment of the Situation of Ethnic Minorities in Kosovo, (Period covering November 1999 through January 2000), 12 July 2000.

[108] The ERRC interviewed an eyewitness who reported that his sister and wife had been raped by four men in Djakovica on 29 June. They also interviewed the relative of a woman from Kosovska Mitrovica who had been raped on 20 June by six men in KLA uniforms.

European Roma Rights Center, "Press statement: the current situation of Roma in Kosovo", 9 July 1999, p. 1. See also Human Rights Watch, Abuses against Serbs and Roma in the New Kosovo, August 1999.

[109] Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Fifty-fifth session, supplement No. 38 (A/55/38), paras. 30-90.

[110] Human Rights Watch, Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue, July 1999, p. 12.

[111] Amnesty International, Children in South Asia: Securing their rights, Amnesty International Index: ASA 04/01/98, p. 41.

[112] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, addendum: mission to Indonesia and East Timor on the issue of violence against women (E/CN.4/1999/68/Add.3), para. 71.

[113] Amnesty International Canada, "Refugees at risk: continued attacks on East Timorese" at www.amnesty.ca/women/freedom5b.html, updated 17 June 2000.

[114] Amnesty International, "Indonesia: The impact of impunity on women in Aceh", ASA 21/060/2000, 23 November 2000, p. 3.

[115] The Asian Women's Fund, which was set up by the Government of Japan in 1995, was intended to collect private sources of money for former comfort women and to fund the work of NGOs that are working with these victims. However, many victims have refused to accept the money offered by the Fund, considering it insulting and primarily an effort by the Government to evade actual responsibility. These victims have demanded instead real compensation and an official apology for the crimes committed against them.

[116] Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime (E/CN.4/1996/53/Add.1 and Corr.1), sect. IX.

[117] An analysis of the legal liability of the Government of Japan for "comfort women stations" established during the Second World War (E/CN.4/Sub.2/1998/13), appendix.

[118] Cited in the update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict (E/CN.4/Sub.2/2000/21), para. 75.

[119] Cited in ibid., para. 76.

[120] Ibid.

[121] "Japanese court rejects Korean comfort woman's appeal", Korea Times, 1 December 2000.

[122] Soh Ji-young, "Civil tribunal to convene on wartime sex slavery crimes of Japan", Korea Times, 9 November 2000.

[123] Situation of human rights in Myanmar: report of the Special Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights resolution 1999/17 (E/CN.4/2000/38), para. 50.

[124] Interim report on the situation of human rights in Myanmar prepared by the Special Rapporteur of the Commission on Human Rights in accordance with Economic and Social Council decision 1998/261 of 30 July 1998 (A/53/364, annex), para. 51.

[125] Interim report on the situation of human rights in Myanmar, prepared by the Special Rapporteur of the Commission on Human Rights in accordance with Economic and Social Council decision 1999/231 of 27 July 1999 (A/54/440, annex), para. 36.

[126] Human Rights Watch, World Report 2001, p. 316.

[127] Human Rights Watch, "Rape allegations surface in Chechnya", 20 January 2000.

[128] Human Rights Watch, February 5: A Day of Slaughter in Novye Aldi (June 2000), vol. 12, No. 9 (D), p. 28.

[129] Human Rights Watch, "Sexual violence in the Sierra Leone conflict", 26 September 2000, unpublished.

[130] Amnesty International, Sierra Leone: Rape and Other Forms of Sexual Violence Against Girls and Women, AI Index: AFR 51/35/00, 29 June 2000, p. 2.

[131] Amnesty International, Annual Report 2000, Sierra Leone, p. 209. See also, Human Rights Watch, Getting Away with Murder, Mutilation, and Rape: New Testimony from Sierra Leone, June 1999 and Otunnu, op. cit. (E/CN.4/2000/71), para. 11.

[132] McDougall, op. cit. (E/CN.4/Sub.2/2000/21), paras. 16 and 17.

[133] The report proposes that the Court be a hybrid, using both international and Sierra Leonean law, judges and prosecutors.

[134] Human Rights Watch, press release, "Refugee women in Guinea raped: Government incites attacks on Sierra Leonean and Liberian refugees; UNHCR must act", 13 September 2000.

[135] United Nations press release, 14 March 2000.

[136] The University Teachers for Human Rights, information bulletin No. 23, 11 July 2000.

ANNEX 11:

Corriero, "The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone", (2002) 18 NYLSJHR 337.

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Articles

*337 THE INVOLVEMENT AND PROTECTION OF CHILDREN IN TRUTH AND JUSTICE-SEEKING PROCESSES: THE SPECIAL COURT FOR SIERRA LEONE [FNa1]

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Corriero

Sierra Leone is at a critical point in its history as it emerges from a ten year civil war. The country is struggling to come to terms with its violent past while simultaneously grappling with the enormous social, political and economic upheaval which accompanied the civil strife.

One of the significant challenges confronting Sierra Leone in the aftermath of the war is the problem of reintegrating into society former child soldiers used by all sides in the civil war. It is estimated that over 5,000 children between the ages of 7 and 18 were conscripted into the warring armies during the ten year period since 1991. [FN1]

Conditions in Sierra Leone

Abass Bundu, Former Foreign Minister of Sierra Leone, in his book, Democracy by Force? [FN2] states:
Sierra Leone has been at war with itself since March 1991. . . .Today, most of the country lies in ruins, a mere shadow of its former self. The physical destruction of life and property aside, the citizens were made to see their next door neighbors as their worst enemy, routinely tearing each other apart and making the environment *338 probably the worst place for children. In ways that are unprecedented in the history of the country, the conflict has fostered a culture of blame, not of accountability; of hate not of harmony; and of dependency not of self-esteem. A mosaic of thirteen different ethnic groups that once lived in harmony, interweaving with each other through marriage, has been rent apart, and it will take years to heal the wounds and mend the rifts. . . ." [FN3]

Estimates vary, but it may not be an exaggeration to put the casualty figure at 50,000 dead, more than one half of the entire population displaced internally and more than half a million turned into refugees. [FN4]

Unashamedly, abuses of human rights and international humanitarian law were rampant bordering on the cruelest of conduct. [FN5] They ranged from extra- judicial killings to mutilations of civilians of all ages to torture, rape and hostage taking. [FN6] To a degree, they disconnected Sierra Leone from modern civilization and reconnected her to a dark age of anarchy.

No belligerent party is immune. Unarmed civilians became their targets, viewing their protection as less than sacred. [FN7] Accused of collaborating with the enemy, they almost routinely became soft targets for reprisals. [FN8] Women and children, in particular, fared worst. While the former were pressed into service as porters and

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sex slaves, the latter were almost invariably conscripted as fighters and forced to commit horrendous atrocities against even their own families. Not surprising that most of them ended up being severely traumatized." [FN9]

*339 The Children

Children have been the worst hit by this war. Deprived of childhood, thousands of them were recruited--many through abduction and conscription--as front-line combatants. In November 1998, UNICEF estimated that there were at least 4,000 child soldiers, some as young as seven years old. Other estimates have put the figure at over 5,000, divided between pro-Government forces and RUF rebels. They were used as porters, messengers and spies, but more alarmingly as combatants and sex slaves. Prized by commanders for their fearlessness and bloodlust, the warring parties found them to be more obedient, unquestioning and easier to manipulate than adults. Patrick Zangalaywah, a kamajor field commando, for example, admitted that: 'In Kailahun District alone, we have 3,000 child kamajors. These kids are very brave on the frontline.' They were also found to be "unadulterated" and extremely obedient to rules. 'We don't trust adults quite as much because many have breached the rules governing our militia and so they get killed by the enemy,' he added. In other words, child soldiers were cheap, less careful about their own safety and follow orders more readily than adults and children from poorer homes were by far the most vulnerable. [FN10]

Two other Sierra Leone authors described the involvement of children in this manner:
The insurgency against the Sierra Leone state, characterized by guerrilla warfare, has inevitably resulted in substantial civilian deaths and injuries, extensive damage to health and education systems, and substantial movement of refugees and displaced persons. Like child soldiers in other war-ravaged countries, those in Sierra Leone have personally experienced or witnessed extremes of violence including summary executions, torture, and the like. Some have been coerced into joining an armed group, or have volunteered to join *340 out of desperation. Orphans, the displaced, and young heads of households have been forced to join as a way of surviving. In other words, the young are susceptible to recruitment by rebel factions because of the promise of future rewards and the belief that "those with guns can eat." Forcible conscription of the very poor and young, indoctrination, and drugging are the preferred strategies of Sankoh's RUF. Some argue that in the absence of formal state education, conscription offers the young an alternative 'bush education' which teaches many survival skills." [FN11]

Olara Otunnu, The Special Representative of the United Nations Secretary- General for Children and Armed Conflict, visited Sierra Leone from May 26 to 29, 1998; Abass Bundu quotes Otunnu, who said at that time: "that it was part of the objective of warfare (to target unarmed civilians), not just a lack of discipline on the part of fighters. Their aim was to humiliate, wreak suffering, teach them a lesson and to demoralize as a tool of war." [FN12]

Rationale for the Special Court

In a report prepared for the Security Council, 56th Session of the General Assembly, United Nations Secretary General, Kofi Anan presented the rationale for a Special Court to adjudicate cases of children involved as participants in war crimes:
Member States, the UN system, and many international NGOs now explicitly agree that, to help construct a foundation for post-conflict peace and stability, and to begin to redress the suffering of the victims, those responsible for war crimes and other grave abuses must be exposed, held individually accountable, and if possible or appropriate punished for their actions. Moreover, mechanisms intended to reveal truth and impart justice should contribute to the design of reparations programs for victims and structural reforms to ensure that such events do not recur. The international community and concerned States must *341 consider which processes or mechanisms might be best suited to achieve these outcomes. When children are involved as victims, witnesses or perpetrators of these terrible crimes, very special consideration must be given to the manner in which such experiences are documented and portrayed; whether the children themselves might be involved in truth and justice-seeking processes; and what redress these processes will bring for traumatised children, their families and societies.

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The Security Council's commitment to combating impunity for egregious child rights abuse in the context of armed conflict has been most visible this past year in the case of Sierra Leone. At the request of the Security Council, a Special Court for Sierra Leone, which will seek to prosecute those bearing the greatest responsibility for crimes against humanity and war crimes, including those involving children, is being established by agreement between the UN and the Government of Sierra Leone. . . . . A Truth and Reconciliation Commission (TRC), called for by the Lome peace agreement of 1999, is in the process of formation and will seek to establish a historical record of egregious human rights violations during the conflict, and pay particular attention to the experiences of children. Previous and existing truth commissions or war crimes tribunals have not directly addressed these experiences.

In August 2000, as drafting got underway on an agreement with the Government of Sierra Leone to create the Special Court, it became apparent that the way in which the Court's statute would address gross abuses perpetrated against and by children would be a matter of contention and international concern. The Security Council strongly endorsed the proposal that the Court be empowered to prosecute the war crime of child recruitment or use, under age fifteen, by armed forces or groups. Hence, the Special Court should help to consolidate consensus around the definition of the war crime of recruitment in international criminal law. Moreover, the prosecution of child recruiters should *342 highlight the complexities of the issues around the use of children as soldiers and, ideally, deter such criminal conduct in the future.

International organisations, child rights advocates and NGOs disagreed, however, on whether, and how, children who participated in the commitment of war crimes while serving with armed groups should be dealt with in judicial proceedings. The possible prosecution of children, and young adults who were children at the time of the crime, brought the issues of culpability, justice and impunity, and individual and social healing, into focus for the national and international community and compelled an important debate.

The Security Council, after much deliberation and consultation, agreed that should any person who was between 15 and 18 years of age at the time of the alleged commission of the crime come before the Court, he or she shall be treated with dignity and a sense of worth, and in accordance with international human rights standards. In the disposition of his or her case, imprisonment shall not be an option, but rather the Court shall determine which alternative programme or service is most appropriate. The parameters of juvenile justice have thus been retained . . .

The TRC and the Special Court have distinct but mutually supporting functions and both should help to achieve accountability, and shed light on the context in which the most serious crimes have been perpetrated against, and sometimes by, children in Sierra Leone. Recent events have revealed, however, that little is known at the international level about the ways in which juvenile justice or truth-telling procedures can help heal children exposed to or involved in armed conflict.The Office of my Special Representative for Children and Armed Conflict, UNICEF, NGOs and individual experts are joining forces to address the outstanding questions in need of urgent attention if the positive potential of truth commissions and war crimes *343 tribunals is to be harnessed for the benefit of war-affected children in Sierra Leone and elsewhere. [FN13]

In May of 2001, I was invited by the Office of the Special Representative of the United Nations Secretary-General for Children and Armed conflict to participate in an informal discussion focusing on the role of truth and justice-seeking processes in the lives of young children who had committed very serious crimes in armed conflict settings. [FN14] The aim of the meeting was to explore the lessons learned at local and national levels regarding interventions intended to promote young offenders' rehabilitation and reintegration into society, and to examine similar unprecedented efforts taking shape at the international level. [FN15] Consideration was to be given to the proposed extension of personal jurisdiction over persons who were juveniles, under the age of 18 at the time of the commission of serious violent crimes, as part of a special International War Crimes Tribunal for Sierra Leone. [FN16] That meeting provided the genesis for this report. The invitation prompted me to learn more about Sierra Leone and the application of international law to child combatants. In preparation for the meeting, I thought about how my experience presiding in New York City's Youth Part--a special court for children accused of serious crimes--may be of value.

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The Youth Part

New York State is a jurisdiction that prosecutes children as young as 13, 14 and 15 years of age for their participation in serious crimes in the adult Criminal and Supreme Court. [FN17] Since 1992, I have presided over the "Youth Part" in the borough of Manhattan in New York City. The Youth Part is a court within the Criminal Term of the New York State Supreme Court. The Part was created to adjudicate all cases involving 13, 14 and 15 years old charged as *344 adults pursuant to New York's "Juvenile Offender" law, [FN18] due to the serious violent nature of the charges.

For the past nine years, I have had the opportunity to grapple with many issues affecting children accused of violent crimes. Many of these children come from the poorest neighborhoods in New York City. These are children born into dysfunctional families and into neighborhoods saturated with drugs and guns.

Professor Jeffrey Fagen, a professor of criminology at Columbia University, has interviewed many children from New York's toughest neighborhoods. He states that these children often describe their existence in terms of living in "war zones," where life and death confrontations occur daily with "strangers," who most children assume are armed.

A significant number of cases I see involve acts of calculated, random and even ritual violence; for example, children accused of murdering a homeless man by dousing him with gasoline and setting him on fire while he was sleeping on a park bench [FN19]; two fifteen year old children accused of murdering their fourteen year old mentally handicapped friend by torturing and mutilating him and then throwing him down an elevator shaft [FN20] ; a 14 year old slashing another youth with a razor from ear to chin as part of a gang initiation. [FN21] However, the vast majority of cases are robberies involving multiple defendants, multiple levels of maturity and multiple levels of involvement. [FN22]

Children accused of a "Juvenile Offender" offense, such as murder, rape, robbery, kidnapping, assault and other serious crimes, are automatically prosecuted in the adult court in the identical fashion as adults. [FN23] They are accorded the same due process rights of adult criminal defendants, including the right to a jury trial. [FN24] Upon conviction of a juvenile offender offense, a child is *345 subject to mandatory imprisonment and a criminal record as a felon. [FN25] A judge does have circumscribed discretion to adjudicate a child a "youthful offender." [FN26] A youthful offender adjudication is a special classification. [FN27] It permits the court to impose a sentence of probation instead of mandatory imprisonment and it does not constitute a criminal conviction. [FN28] Furthermore, all records of a youthful offender adjudication are deemed confidential. [FN29] Therefore, the determination of whether an eligible youth is to be granted youthful offender status as opposed to letting the conviction stand as a felony conviction has serious, lifelong implications. For example, a convicted felon loses specific civil rights such as the right to vote and hold public office. [FN30] A felony conviction can also severely restrict employment opportunities. [FN31]

If a youth is not otherwise precluded from youthful offender eligibility by statutory criteria such as age or a prior record, the court has an affirmative duty to exercise its discretion, that is, to proceed to a consideration of whether youthful offender adjudication is appropriate in a given case, and to announce that determination at the time of sentence. [FN32] While there is no specific statutory formula which a judge must follow in exercising that discretion, factors to be considered include the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior involvement with the law, defendant's attitude toward society and respect for the law, and the prospect for rehabilitation and a future constructive life. [FN33]

Consequently, in order to determine whether or not youthful offender treatment is appropriate in any given case, a judge is required to carefully analyze the nature of the crime and the offender, *346 to evaluate the potential of the child and the appropriate effective judicial response. [FN34]

In the Youth Part we developed a process to assist us in making that decision. The process is carried out in stages: When the case first appears in the Part, we gather as much information as possible about the youth. [FN35]

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A pre-pleading report as well as a mental health evaluation is usually ordered from the Probation Department. These reports document a youth's family, school and social history, and any history of psychiatric or emotional problems. [FN36] The youth's background and support network are carefully evaluated. An assessment is made concerning the extent of the youth's involvement in the underlying crime. [FN37] When a juvenile's background and involvement in the crime permit the court to consider an alternative to incarceration, a plan is developed to test the willingness of the youth to modify his behavior. [FN38] For example, a child will be permitted to plead guilty to the charges with certain conditions, such as compliance with a curfew and participation in an Alternative to Incarceration program. [FN39] The ultimate sentence will be deferred while the youth participates in the program. [FN40] Successful completion of the program will result in a sentence of youthful offender treatment and probation. [FN41] Failure to comply may mean a sentence of imprisonment and denial of youthful offender status, resulting in a felony record. [FN42]

Validation of the youth's compliance with the terms of his plea agreement is an important part of the process. In the Youth Part, the child's performance is carefully monitored. [FN43] Youth Part staff (the Judge's Law Clerks and private secretary) are in weekly contact with the child's program counselor, and every three weeks the child must appear in the Part for a formal program report. [FN44]

Since 1991, we have resolved the cases of approximately 1,200 juvenile offenders. [FN45] Approximately sixty percent of the children *347 have been placed in Alternative to Incarceration programs. [FN46] The overwhelming majority of those placed have successfully completed the program and received youthful offender treatment. [FN47]

The decision to give a child an opportunity to earn youthful offender treatment is a difficult one. The reports submitted to document a child's background are, of course, helpful, but in the final analysis, the decision rests on the judge's impression of the child and the nature of the offense.

I have sought guidance in making these decisions from the example of an American judge who lived at the turn of the century and who presided over one of the first juvenile courts in America--Judge Ben Lindsey of Colorado. He set the quintessential style for judges dealing with children. He behaved and acted in such a manner as to create a rapport and intimacy with the children who came before him, so that he could act as a catalyst for change in their behavior. He stated: "This should be accomplished as a wise and loving parent would accomplish it, not with leniency on the one hand or brutality on the other, but with charity, patience, interest and what is most important of all, a firmness that commands respect, love and obedience, and does not produce hate or ill-will." [FN48]

One hundred years later, these words and the sentiments they represent may seem out of place when the brutality of juvenile crime and the extent of atrocities allegedly committed by children as combatants has shocked the international community. On the other hand, the concept of the judge as a formidable force in shaping the lives of the children appearing before him is perhaps even more compelling now than it was a century ago.

While the issues confronting us in the Youth Part do not precisely parallel those facing the proposed Special Court for Sierra Leone, the community of Sierra Leone has sought to bring its adolescent soldiers to the courts. [FN49] The community thus expects that *348 the court will deal with these children swiftly, effectively and constructively. [FN50] I believe that certain aspects of the approach we take in the Youth Part can be adapted to the administration of the Special Court. If we agree that children deserve to be treated differently from adults, that because of their youth they are malleable, and therefore less committed to their misconduct and more susceptible to positive influence, then a judge can act as a formidable force in their lives, provided that the judge functions in a system that is designed to provide him with the tools necessary to craft a sentence that will aid in the development of a child's character and rehabilitation.

Looking at the proposal for the establishment of the Special Court from my perspective, I must confess to a certain ambivalence. On the one hand, the concept of a quasi-international juvenile justice tribunal, whose goal is rehabilitation of child soldiers rather than punishment, is intriguing. On the other hand, the idea of prosecuting children under 18 as war criminals seems repugnant to principles of justice that require children to be treated

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differently from adults. Moreover, the citizens of Sierra Leone, if possible, should be primarily responsible for "judging" the behaviour of its children. Childhood and adolescence are essentially stages of cultural assimilation and reaction by children. [FN51] Evaluation of a child's culpability and maturity are matters best left to those familiar with a child's social context. Only those who grew up in Sierra Leone could know first hand the effect of such an experience. Outside jurists would be at a great disadvantage in evaluating the culpability of children born into a society torn apart by civil and political strife.

The proposal also raises other questions. Why implement a judicial mechanism for "prosecuting" children in the first place, if the goal is to identify, heal and reintegrate these children into society? What is the value of assigning "legal culpability," if such assignment would lead only to educational and rehabilitative measures, which the government of Sierra Leone and NGO's seem already willing to *349 provide? Wouldn't a less formal "civil" process designed to "identify" children in need of services be more productive? [FN52] Why risk stigmatizing these children with prosecution in a War Crimes Tribunal? [FN53] Furthermore, wouldn't the creation of a Truth and Reconciliation Commission (TRC) suffice to address the needs of the society to heal? [FN54]

Shouldn't the full weight of the resources of the War Crimes Tribunal, however limited, be brought to bear on those adults most responsible for recruiting and leading these children? Wouldn't this position send a clear and powerful message that the very act of recruiting children for war is a greater threat to international standards of humanity than the acts of those children who were used as "tools" to commit atrocities?

Olara Otunnu, in an informal briefing note submitted to the Security Council, acknowledged the dilemma posed by the Special Court's treatment of child combatants:
Moral dilemmas instinctively attach to the idea of prosecuting young people for egregious acts that they were often forced, or compelled by circumstances, to commit. But upon closer examination of the particular circumstances of Sierra Leone and the role of young people in the armed conflict there. These dilemmas appear less acute. The court's statute very appropriately promotes rehabilitation and rejects punishment as an objective for young offenders. Former child combatants will not be imprisoned or rounded up from rehabilitation centers or demobilization sites. The rehabilitation and reintegration of the youngsters is the first priority and will not be jeopardized. While some young people--still children as defined by the Convention on the Rights of the Child--were among those *350 who committed the worst crimes, they are first and foremost victims. [FN55]

In support of the establishment of the Special Court Otunnu posits three arguments:

First: It is reasonable to presume that some young people failed to exercise their evolving capacity to determine right from wrong, and were among those individually responsible for the worst acts of brutality in Sierra Leone;

Second: The special court will help to ensure that the most recalcitrant and feared young offenders, those perhaps least likely to seek programmatic and therapeutic support, are brought into a credible system of justice that will result in guided, supervised access to rehabilitation and ensure opportunities for reinsertion into productive civilian life;

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Third: Public opinion in Sierra Leone supports a process of judicial accountability for child combatants. [FN56]

Consequently, accepting the establishment of the court as a fait accompli, I submit this report in the hope of calling attention to issues raised concerning the legal culpability and responsibility of child soldiers, and to suggest techniques that the Court can employ to achieve its goal. Perhaps if the Court is properly structured, staffed and implemented, it can serve as a model for future tribunals, setting international standards and codes of conduct with respect to children in conflict. The experiences gained from the work of the Special Court could lay a foundation for an effective system of decriminalizing the conduct of child soldiers, and bring a sense of order, fairness and dignity to those aggrieved. The existence of the Court could also represent an explicit acknowledgement that "trying" children accused of serious atrocities is a better option than "vengeance."

*351 The Task of Assessing Cuplability

The proposal for the Sierra Leone Juvenile War Crimes Tribunal raises some significant questions of culpability. Specifically, how should one assign, or, for that matter assess responsibility for acts committed by children, not of their own initiative, but under the direction of adults?

The purpose of the Special Court, as stated in the Secretary General's Report to the Security Council, supra, is to prosecute those bearing "the greatest responsibility for crimes against humanity." [FN57]

Who bears the greatest responsibility? The adult leaders who gave orders, or the child soldiers who followed the orders? Perhaps recognition of children's diminished capacity to understand the full import of their behavior, especially under combat situations, provides the key to understanding why rehabilitation should be the overriding rationale in addressing the problems created by a child's involvement in the atrocities of war.

In determining a child's culpability, we must also inquire as to precisely what we can expect of children, who have been used as combatants, subjected to psychological and physical abuse, that has literally transformed them from victims into perpetrators. How can we, in the true sense of justice, hold them accountable, blameworthy under these circumstances? The principle of justice presupposes that the party to be punished has an undiminished capacity to exercise his free will to choose between right and wrong. [FN58] This, in turn, presupposes that the party to be punished has a fair opportunity to learn and be exposed to accepted standards of behavior and the morality of his culture. [FN59] Putting aside issues of criminal responsibility for a moment, addressing a larger issue that emphasizes moral questions over empirical ones: How do you exact conformity with a specific moral code of a society, when children may be unaware of its existence, such as in Sierra Leone, where the fabric of a society has broken down? Sierra Leone was at war for ten years. During that time, very young children were conscripted into warring armies. It can be reasonably argued they never had an opportunity *352 to learn a positive moral code; the code with which they were indoctrinated was that of a combatant, a soldier whose responsibility was to follow orders. Disobedience was often at the risk of death. How can you rehabilitate children who have never been "habilitated" ? How can you reintegrate children into a society who were never "integrated" into that society to begin with? In this context, what is the viability of a standard suggested by Olara Otunnu, that purports to hold children accountable for their failure "to exercise their evolving capacity to determine right from wrong" ? [FN60]

Notwithstanding the above concerns, the arguments for establishment of the court represent a pragmatic solution to a difficult problem; in that sense they are persuasive. Assuming Sierra Leone public opinion is as it is represented, the very existence of the court might promote a sense of healing. [FN61] Certainly it is in the interest of promoting civil order that those children who are resisting efforts to give up the life style of a child combatant be brought under the jurisdiction of the Court. The issue of culpability, however, remains complex and problematic.

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The Challenge

Sierra Leone's efforts to socialize its children were interrupted by a brutal ten-year civil war. [FN62] The challenge facing Sierra Leone today is that of absorbing back into the community a large number of children who have witnessed or caused death, destruction and despair. How can the United Nations and Sierra Leone, through a Special Court, develop a system of juvenile accountability that would meet that challenge?

I believe that the answer lies with education, and with the development of a process of accountability that nurtures a sense of humanity. The French philosopher Andre Compte-Sponville, in his book, A Small Treatise on the Great Virtues, [FN63] reexamines *353 the classical human values to help us understand "what we should do, who we should be, and how we should live." He states:
Now a principle of Kantian ethics is that one cannot deduce what one should do from what is done. Yet the child in his early years is obliged to do just that, and it is only in this way that he becomes human. Kant himself concedes as much. "Man can only become man by education," he writes. "He is merely what education makes him, and that process begins with discipline, which changes animal nature into human nature." [FN64]

However, before one can "educate" children involved in atrocities, one must "identify" the children, the conduct, and the extent of culpability. [FN65] This must be done by a fair process; the adjudication process itself must incorporate the theses of rehabilitation and reconciliation.

The Composition of the Special Court

The Special Court for Sierra Leone will be created by treaty between the United Nations and the Sierra Leone government. [FN66] It will be under joint UN-Sierra Leone jurisdiction.[FN67] The Special Court will neither be a UN body along the lines of the International Criminal Tribunals established for the former Yugoslavia and Rwanda, nor a Domestic Tribunal. [FN68] Rather, it will be a hybrid court jointly administered by the United Nations and the Sierra Leone government. [FN69] Significantly, it will apply local and international justice. As such, it represents an entirely new model for bringing war criminals to justice. [FN70]

*354 Security Council Resolution 1315 sets forth the essential characteristics of the Special Court that the Secretary General was asked to negotiate into existence with the government of Sierra Leone. [FN71]

The text of Article 7 of the proposed statute for the creation of the court reads as follows:
(1) The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was, at the time of the alleged commission of the crime, between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

(2) In the Trial of a juvenile offender the Court shall, in the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies. [FN72]

The Special Court will be staffed with both local and international judges and prosecutors. [FN73] The Secretary-General will appoint a Chief Prosecutor, while the Sierra Leone government, in *355 consultation with the UN, will appoint a Deputy. [FN74] Although the Deputy will have some input in deciding whether to indict in a particular case, the Chief Prosecutor will make the final decision. [FN75] Security permitting, the Court will be located in Sierra Leone. [FN76]

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A Suggested Model for the Special Court

The Special Court should strike a balance between the community's sense of justice, the child's culpability, and the best interests of the child.

There are three broad steps in this effort:

First, the enabling statute should develop and implement a prosecution strategy that accurately and precisely identifies those children who engaged in the most egregious atrocities and who are most resistant to rehabilitative measures, as opposed to those who have been exploited by war and are solely in need of social services and rehabilitation. This strategy can be accomplished by way of a hearing, preliminary to a determination as to whether a child is to be prosecuted by the Special Tribunal. A judge at such preliminary hearing should determine whether a child combatant is: (a) suitable for further prosecution in the Special Court; or (b) suitable for referral to the Truth and Reconciliation Commission; or (c) suitable for court direction to receive continued outside educational and rehabilitation services without judicial intervention.

The court as presently constructed grants the prosecutor wide discretion in determining which cases should be brought before the Special Juvenile Tribunal and which referred to the Special Commission on Truth and Reconciliation. [FN77] Theoretically, only the most egregious cases of brutality would be referred to the Special Court; the remainder would be referred to the Truth and Reconciliation Commission.

In my view, the question of referral should fall within the judicial, not prosecutorial realm. That is, it should not be a unilateral decision of a prosecutor. The decision regarding referral should be a judicial decision, made after a hearing where the child is afforded the full panoply of due process rights, including the right to counsel. This would be a fair and precise way of identifying children most in *356 need of formal prosecution in the court. [FN78] If it is ultimately determined that such a child should be prosecuted in a more formal setting because the child is considered a danger to the community or because the allegations concerning the conduct are so serious that a decision not to prosecute the child in the formal court would undermine public confidence in the Tribunal, then formal prosecution should proceed. The process of determining suitability for formal prosecution should be flexible enough to recognize and accommodate those juveniles who have the capacity to change their behavior without formal prosecution by entering or continuing to participate with a rehabilitative agency. The Court should be invested with wide discretion in determining who is to be formally prosecuted. The rehabilitation of the child soldier is the paramount consideration, and the court should be a body independent of any political agenda, recognizing, of course, that the community must believe and observe that justice is served.

Second, an infrastructure of high quality, adequately staffed rehabilitation and reintegration programs must be in place. The development of an effective court is an important goal for Sierra Leone. To accomplish this, the Special Court must have the capacity to educate and rehabilitate the children coming before it. [FN79] The provision of adequate resources for such programming is crucial and should be in place before the Court convenes. [FN80] One of the advantages of locating this quasi-international court in Sierra Leone is that it enhances the capacity of the court to work with the local community. Its proximity to societal and cultural institutions, although considerably destabilized by the civil war, will provide an opportunity to rebuild such institutions around the work of the court. [FN81] The court can become a focal point for cohesion and coordination of the social services needed to reintegrate these children into society. The court can play a supervisory role in insuring that social services agencies provide the child with education and the necessary skills and services to become a contributing member of society. An additional advantage of locating the Court in Sierra Leone is that citizens will have access to proceedings, where appropriate. *357[FN82] The Court's location will also facilitate the exchange of legal knowledge between international and local judicial officials, which will assist in rebuilding the country's judicial system.

Third, for those child combatants who are ultimately prosecuted in the court, there must be a mechanism to remove the stigma that will attach to such prosecutions. [FN83] One way in which this can be accomplished is to use participation in the Truth and Reconciliation Commission as the final stage of a child's rehabilitation plan. For

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such youth, reconciliation with his community can be facilitated by voluntarily appearing before the Commission. In this way the TRC can serve as a mechanism to publicly permit the child to express remorse for his conduct and seek reconciliation with those harmed by his acts. An appearance before the TRC can constitute the final phase in a child's rehabilitation program. [FN84] Caution, however, should be exercised to emphasize that such an appearance by the child would be strictly voluntary. Truth telling experiences for children who witnessed, suffered as victims, or participated in acts of brutality should be a very delicate undertaking. Children should not be cavalierly required to divulge the identities of others with whom they may have acted. Such requirement could further traumatize an otherwise willing participant prepared to divulge his own conduct, but not that of others. [FN85] In many cultures, the role of the informer causes as much shame as adheres to one who has himself performed brutal acts. [FN86]

In addition to appearance before the TRC, there should be other ways of absolving and welcoming children back into the society. Perhaps there should be a formal declaration by the court upon the child's successful completion of a rehabilitation program, that he is restored to full status as a member of society and that no impediment to his success will flow from his appearance before the Special Court.

*358 The Formal Adjudication Process

The formal adjudication process that I envision will be composed of two phases: a fact finding phase before an impartial panel and a dispositional phase.

In the fact finding phase, the prosecutor will present evidence of conduct that violates humane standards of behavior. The prosecutor should be prepared to specifically identify the child alleged to have participated in that conduct. [FN87] Once the identification of the specific child and the conduct has been established by due process standards, guidelines for which can be found in the United Nations Convention on the Rights of the Child, [FN88] the Court should then proceed to a dispositional hearing.

The Dispositional Hearning

Not long ago, I wrote an article entitled Sentencing Children Tried and Convicted as Adults. Some of my comments are relevant to this discussion:
All judicial sentences are based on cultural and individual assumptions about the nature of life and the values of our society. Even though retribution has gained favor as the dominant sentencing rationale for adults in recent years, and "accountability" is a familiar refrain for youthful miscreants, the pragmatic realization that children convicted of serious crimes will return to society as still relatively young men and women, lends critical support to the goal of rehabilitation as the underlying rationale for juvenile sentences. There are many critics of the "rehabilitative ideal", however, who argue that it is an unattainable illusion, given the present state of our knowledge about criminal behavior. I do not agree that rehabilitation is unattainable. The idea that the ultimate goal of sentencing juveniles ought to be rehabilitation is surely a value preference. The law speaks of rehabilitation of children because it is desirable to proceed as if it were possible. The rehabilitative approach, however, is not merely a theoretical preference. Rather, it is based on the common *359 sense belief that children are developmentally different than adults. Children are malleable and less committed to their misconduct and more susceptible to the impact of positive influence than are adults. Consequently, in my view, it is possible for a judge to influencea child's behavior. If we consider rehabilitation, therefore, not as "curing" an illness, or "changing" character but instead, as a process that enables a child to "develop" character, then we will be able to craft a juvenile sentence in a constructive way. It is, therefore, appropriate for a judge to maximize his interaction with the youths who appear before him as a means of deterrence and rehabilitation. For this reason, the juvenile sentencing proceeding, as an interactive process, may acquire greater emotional and dramatic overtones than an adult sentence proceeding. [FN89]

If we analyze the process of creating a special court from the perspective of rehabilitation --i.e., establishing a

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process that helps a child "develop" character and fosters reintegration into society- then I envision such a dispositional proceeding as a dynamic, interactive process which serves as a guide for the child's rehabilitation. It should be educational and motivational.

The judge's role, in addition to presiding over a process that identifies the conduct of the child with precision and accuracy, should be to help the child understand the behavior that brought him to this moment in his life, and to give him the opportunity to explain any mitigating circumstances regarding his behavior. [FN90] It should be used as an opportunity to advise the youth of his responsibilities to society. The hearing should reflect the judge's attempt to initiate change in the child's behavior by assisting that child to recognize and understand the claims of society. A youth should be told what is expected of him to regain his status in the community at the moment of sentence, or in the future. [FN91] The proceeding ***360** should be designed to give the youth encouragement and strength to begin his maturity. [FN92]

In sum, the dispositional phase should be a restorative process--a process of reconciliation of the child with society, a process of soul awakening instead of soul debasing. It should be consciously designed to create an atmosphere that permits an assessment of the child's moral character, demonstrating the values of truth and integrity within the justice system.

For those children who are ultimately tried and convicted, or admit their involvement, the court must be able to monitor their progress toward rehabilitation and reintegration, such as by periodic appearances before the court for the purpose of validating their progress. In the absence of the threat of imprisonment, this will be a difficult undertaking. What leverage would the Court have to insure compliance with a rehabilitative program?

I suggest that the only leverage available in the context of the dispositional phase is the influence of the court (judge) over the child. This influence will be contingent upon the ability of the judge to develop a rapport with the child which fosters a relationship such that the child will want to please the court and by doing so, conform his behavior to law and society's expectations.

This involves a willingness on the part of the judiciary to engage in a proactive problem solving approach to the resolution of these cases. The ideal judge for such a court would be one raised in the culture of Sierra Leone. If this is not feasible, then the court should be permitted to consult with lay advisors, who would perform a role similar to that of South African Lay Advisors. These individuals sit with the court as representatives of the community, advising the court on local tribal customs, norms and sanctions. These lay advisors, in appropriate cases, can play a unique role in the development and administration of imaginative, productive, non-incarceratory sanctions for child misconduct, that promote the healing process and social reintegration. They can serve as a valuable link to the community, a link that provides insight into the pulse of life beneath the official version of events. Indeed, they can help answer the question of how can we heal these children and welcome them back into society.

[FNa1]. For an excellent discussion on the Proposal for a Special Court, see Ilene Cohn, The Protection of Children and the Quest for Truth and Justice in Sierra Leone, 55 J. Int'l Aff., (Fall 2001).

[FNaa1]. Special thanks to my staff, Mollie Faber, Valerie Pels, and Ludwina Normil for their assistance in the preparation of this report.

[FN1]. See Danna Harman, Aid Agencies Help to Rid **Child** Soldiers of War's Scars, Christian Sci. Monitor, Oct. 30, 2001, at 7.

[FN2]. Abass Bundu, Democracy by Force?: A Study of International Military Intervention in the Conflict in

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Sierra Leone From 1991-2000 (2001).

[FN3]. Id at xii.

[FN4]. AMNESTY INTERNATIONAL, REPORT 1999: SIERRA LEONE, available at http://www.amnesty.org/ailib/aireport/ar99/afr51.html (last visited Mar. 11, 2002).

[FN5]. See Press Release SC/6613, United Nations, Security Council Meets In Open Session to Consider Situation in Sierra Leone (Dec. 18, 1998).

[FN6]. Id.

[FN7]. See AMNESTY INTERNATIONAL, SIERRA LEONE: CIVILIANS CONTINUE TO BE MUTILATED AND KILLED DESPITE THE PEACE ACCORD, available at http:// web.amnesty.org802568F7005C (last visited Mar. 11, 2002).

[FN8]. Id.

[FN9]. See Bundu, supra note 2, at 198.

[FN10]. See Bundu, supra note 2, at 235-36.

[FN11]. Earl Conteh-Morgan & Mac Dixon-Fyle, Sierra Leone at the End of the Twentieth Century, 133-134 (Peter Lang Pub., 1999).

[FN12]. See Bundu, supra note 2, at 198.

[FN13]. Promotion and Protection of the Rights of Children, Report of the Secretary-General, U.N. GASC, 56th Sess., Agenda Item 127, at 14-15 (2001).

[FN14]. See Ilene Cohn, The Protection of Children and the Quest for Truth and Justice in Sierra Leone, 55 J. Int'l Aff., (Fall 2001).

[FN15]. Id.

[FN16]. Id.

[FN17]. See Alison Marie Grinnell, Note, Searching for a Solution: The Future of New York's Juvenile Offender

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Law, 16 N.Y.L. Sch. J. Hum. Rts. 635, 636 (Spring 2000).

[FN18]. Id.

[FN19]. See Rob Polner, Death Plunge: Homeless Man Flees 4 Kids, Jumps off Coney Island Pier, Newsday, Sept. 7, 1995, at A-5.

[FN20]. See Craig Wolff, Two Teen-agers Charged in Elevator-Shaft Death, N.Y. Times, Oct. 28, 1992, at B-1.

[FN21]. See Samuel Bruchley, She Needed a Victim: Girl, 16, Pleads to Knifing That was Part of Gang Initiation, Newsday, Apr. 20, 2001, at A-5.

[FN22]. See generally Franklin E. Zimring, The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts, 6 Va. J. Soc. Pol'y & L. 437 (Spring 1999).

[FN23]. See Grinnell, supra note 17.

[FN24]. See, e.g., Kent v. United States, 383 U.S. 541 (1966).

[FN25]. See N.Y. Crim. Proc. Law § 720.10 (2001); see also Grinnell, supra note 17.

[FN26]. See N.Y. Crim. Proc. Law § 720.10 (2001).

[FN27]. See id.

[FN28]. See id.

[FN29]. See id.

[FN30]. See, e.g., Richardson v. Ramirez, 418 U.S. 24 (1974).

[FN31]. See, e.g., **Michael** A. **Corriero** & Molly Faber, The Youth Part and Juvenile Justice, N.Y.L.J., Feb. 4, 1997, at 1.

[FN32]. See N.Y. Crim. Proc. Law § 720.10 (2001).

[FN33]. See Randi-Lynn Smallheer, Note, Sentence Blending and the Promise of Rehabilitation: Bringing the

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Juvenile Justice System Full Circle, 28 Hofstra L. Rev. 259 (Fall 1999).

[FN34]. Id.

[FN35]. See Corriero & Faber, supra note 31.

[FN36]. See Corriero & Faber, supra note 31.

[FN37]. See Corriero & Faber, supra note 31.

[FN38]. See **Corriero &** Faber, supra note 31.

[FN39]. See Corriero & Faber, supra note 31.

[FN40]. See Corriero & Faber, supra note 31.

[FN41]. See **Corriero &** Faber, supra note 31.

[FN42]. See Corriero & Faber, supra note 31.

[FN43]. See Corriero & Faber, supra note 31.

[FN44]. See Corriero & Faber, supra note 31.

[FN45]. See, e.g., Grinnell, supra note 17, at 662.

[FN46]. See, e.g., Grinnell, supra note 17, at 662.

[FN47]. See, e.g., Grinnell, supra note 17, at 662.

[FN48]. See Charles Larsen, The Good Fight: The Remarkable Life and Times of Judge Ben Lindsey (Quadrangle Books 1972); see also Robert E. Shepherd, Jr., A Brief History of the Juvenile Court in America Centennial Celebration: Doing Justice to Juvenile Justice, National Council of Juvenile and Family Court Judges, at http://www.ncjfcj.unr.edu/homepage/CentCel.htm (Mar. 11, 2002).

[FN49]. See UN Says Sierra Leone War Crimes Court Should Be Able to Try Children, at http://www.globalpolicy.org/security/issues/sierra/court/001005af.htm (Mar. 11, 2002); see also A Call for an End to the

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Armed Conflict in Sierra Leone and for Steps to be taken to Bring Lasting Peace, at http://www.un.org/Depts/eca/news/serralon.htm (Mar. 7, 2002); see also, Security Council Sets up Observer Mission to Monitor Military and Security Situation in Sierra Leone, UN Security Council Press Release SC/6544, 3902nd mtg. (1998).

[FN50]. Id.

[FN51]. See Barbara Gash, Book Explores Sewing With African Fabrics, Knight Ridder/Tribune News Service, June 22, 2001.

[FN52]. See West Africa: IRIN-WA Update of Events in West Africa, Africa News, September 10, 1999.

[FN53]. See UN Says Sierra Leone Child Soldiers Should Note Face Trial, Agence France Presse, December 27, 2000.

[FN54]. See UN Launches Reconciliation Commission in S. Leone's Northern Town, Xinhua General News Service, August 5, 2001; see also Rodolfo Mattarollo, What to Expect of a Truth Commission, at http://www.sierra-leone.org/trcbook- rodolfomattarollo.html (accessed 3/21/2002).

[FN55]. U.N. SCOR at 11, U.N. Doc. S/2000/992 (2000); see also Security Council to Decide on Trial of Child Soldiers in Sierra Leone, Xinhua General News Service, October 6, 2000 (illustrating Olara Otunnu's approval to prosecute youngsters).

[FN56]. See Rights: U.N., Sierra Leone Agree on War Crimes Court, Inter Press Service, October 5, 2000.

[FN57]. U.N. SCOR, Res. 1315, Situation of Sierra Leone Special Court, U.N. Doc. S/RES/1315 (2000).

[FN58]. See Thomas Critiques the 'Rights Revolution,' Legal Times, May 23, 1994 (describing the underlying principles of justice).

[FN59]. See Id.

[FN60]. U.N. GAOR, 57th Sess. At 8, U.N. Doc. E/CN.4/2001/76 (2001).

[FN61]. See Britain Hails the End of Disarmament in Sierra Leone, Global News Wire, January 18, 2002.

[FN62]. See Sierra Leone: Human Rights Urges Quick Establishment of Special Court, Africa News, March 20, 2002.

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[FN63]. Andre Compte-Sponville, A Small Treatise on Great Virtues (Catherine Temerson trans., Henry Holt & Co.) (2000).

[FN64]. Id.

[FN65]. See, e.g., Establishment of a Special Court for Sierra Leone, Report by the Security-General, U.N. Doc. S/200/915 (2001) (discussing the inclusion of children between fifteen and eighteen years who may be punished as persons "most responsible").

[FN66]. See Michelle Sieff, War Criminals: Watch Out, World Today, Feb. 1, 2001.

[FN67]. See Press Release, UNAMIL, Head of U.N. Planning Team Mr. Ralph Zacklin Briefs Media on Special Court for Sierra Leone (Jan. 9, 2001) available at http://www.un.org/Depts/dpko/unamsil/DB/090102.htm (last visited Mar. 20, 2002).

[FN68]. See Sieff, supra note 66.

[FN69]. See Sieff, supra note 66.

[FN70]. See Jim Wurst, Rights: U.N., Sierra Leone Agree on War Crimes Court, Int'l Press Service, Oct. 5, 2000.

[FN71]. S.C. Res. 1315, U.N. 4186th Sess., U.N. Doc. S/Res/1315 (2000); see also Establishment of a Special Court for Sierra Leone, Report by the Security- General, U.N. Doc. S/200/915 (2001) (discussing resolution 1315 and the agreement with the Government of Sierra Leone to create an independent Special Court).

[FN72]. See Letter from the Security-General addressed to the President of the Security Council, U.N. Doc. S/2001/40 (Jan. 12, 2001); See also Cohn, supra note 14 (discussing the Secretary-General's proposed statute of the Special Court).

[FN73]. See Sieff, supra note 66.

[FN74]. See Sieff, supra note 66.

[FN75]. See Cohn, supra note 14.

[FN76]. See Sieff, supra note 66.

[FN77]. See Cohn, supra note 14.

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ANNEX 12:

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

International Law Commission

VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

(21 March 1986)

The Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the consensual nature of treaties and their ever-increasing importance as a source of international law,

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized,

Affirming the importance of enhancing the process of codification and progressive development of international law at a universal level,

Believing that the codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations are means of enhancing legal order in international relations and of serving the purposes of the United Nations,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights

and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Bearing in mind the provisions of the Vienna Convention on the Law of Treaties of 1969,

Recognizing the relationship between the law of treaties between States and the law of treaties between States and international organizations or between international organizations,

Considering the importance of treaties between States and international organizations or between international organizations as a useful means of developing international relations and ensuring conditions for peaceful cooperation among nations, whatever their constitutional and social systems,

Having in mind the specific features of treaties to which international organizations are parties as subjects of international law distinct from States,

Noting that international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes,

Recognizing that the practice of international organizations in

concluding treaties with States or between themselves should be in accordance with their constituent instruments,

Affirming that nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members which are regulated by the rules of the organization,

Affirming also that disputes (concerning treaties, like other international disputes, should be settled, in conformity with the Charter of the United Nations, by peaceful means and in conformity with the principles of justice and international law,

Affirming also that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.

Have agreed as follows:

PART I

INTRODUCTION

Article 1

Scope of the present Convention

The present Convention applies to:

(a) treaties between one or more States and one or more international

organizations, and

(b) treaties between international organizations.

Article 2

Use of terms

1. For the purposes of the present Convention:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the

international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

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

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

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State, or

(ii) an international organization,

which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean

respectively:

(i) a State, or

(ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" and "third organization" mean respectively:

(i) a State, or

(ii) an international organization,

not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

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

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Article 3

International agreements not within the scope
of the present Convention

The fact that the present Convention does not apply:

(i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations; or

(iv) to international agreements between subjects of international law other than States or international organizations;

shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law

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independently of the Convention;

(c) the application of the Convention to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the Convention, the Convention applies only to such treaties concluded after the entry into force of the present Convention with regard to those States and those organizations.

Article 5

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any

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relevant rules of the organization.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6

Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the rules of that organization.

Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full

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powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty between States and international organizations;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with

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the rules of the organization, without having to produce full powers.

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the states and international organizations or, as the case may be, all the organizations participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place in accordance with the procedure agreed upon by the participants in that conference. If, however, no agreement is reached on any such procedure, the adoption of the text shall take place by the vote of two-thirds of the participants present and voting unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States and those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11

Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

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2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12

Consent to be bound by a treaty expressed by signature

1. The consent of a State or of an international organization to be bound by a treaty is expressed by the signature of the representative of that State or of that organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case any be, the negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the State or organization to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations so agreed;

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(b) the signature ad referendum of a treaty by the representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

Article 13

Consent to be bound by a treaty expressed
by an exchange of instruments constituting a treaty

The consent of States or of international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States and those organizations or, as the case may be, those organizations were agreed that the exchange of instruments should have that effect.

Article 14

Consent to be bound by a treaty expressed by ratification,
act of formal confirmation, acceptance or approval

1. The consent of a State to be bound by at treaty is expressed by ratification when;

(a) the treaty provides for such consent to be expressed by means of ratification;

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(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the full powers of its

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representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

Article 15

Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

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

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case amy be, the negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

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

Article 16

Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession

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1. Unless the treaty otherwise provides, instruments of ratification, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of a State or of an international organization to be bound by treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting organizations or to the depositary, if so agreed.

Article 17

Consent to be bound by part of a treaty
and choice of differing provisions

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1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organizations or, as the case may be, the contracting organizations so agree.

2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object
and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and

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provided that such entry into force is not unduly delayed.

SECTION 2.

RESERVATIONS

Article 19

Formulation of reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

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2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international

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organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or an international organization objecting to a

reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23

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Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3.

ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24

Entry into force

1. A treaty enters into force in such manner and upon such date as it

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may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and negotiating organizations or, as the case may be, all the negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States and negotiating organizations or, as the

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case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1.

OBSERVANCE OF TREATIES

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law of States, rules of international organizations

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and observance of treaties

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

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

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

SECTION 2.

APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more

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international organizations is binding upon each State party in respect of its entire territory.

Article 30

Application of successive treaties
relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between at party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual

rights and obligations.

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5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an organization under another treaty.

6. The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.

SECTION 3.

INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all

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the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

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(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4.

TREATIES AND THIRD STATES OR THIRD ORGANIZATIONS

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Article 34

General rule regarding third States and third organizations

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35

Treaties providing for obligations for third States or third organizations

An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the rules of that organization.

Article 36

Treaties providing for rights for third States or third organizations

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise

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provides.

2. A right arises for a third organization from a provision of a teaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of international organizations to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the rules of the organization.

3. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37

Revocation or modification of obligations or rights
of third States or third organizations

1. When an obligation has arisen for a third State or a third organization in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State or the third organization, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State or a third organization in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be

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revocable or subject to modification without the consent of the third State or the third organization.

3. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the rules of that organization.

Article 38

Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39

General rule regarding the amendment of treaties

1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the rules of that organization.

Article 40

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Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State or organization.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall,

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failing an expression of a different intention by that State or that organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41

Agreements to modify multilateral treaties
between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their

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intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions

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of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

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(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation

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of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

SECTION 2. INVALIDITY OF TREATIES

Article 46

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

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

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

3. A violation is manifest if it would be objectively evident to any

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State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

Article 47

Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the negotiating States and negotiating organizations prior to his expressing such consent.

Article 48

Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international

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organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 80 then applies.

Article 49

Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State
or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51

Coercion of a representative of a State

or of an international organization

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The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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SECTION 3.

TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES

Article 54

Termination of or withdrawal from a treaty under
its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 55

Reduction of the parties to a multilateral treaty
below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

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1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57

Suspension of the operation of a treaty
under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 58

Suspension of the operation of a multilateral treaty by

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agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59

Termination or suspension of the operation
of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

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(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State

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or international organization, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in;

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the

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protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for

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terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States

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parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

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2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached

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within a period of twelve months following the date on which the objection was raised, the procedures specified in the following paragraphs shall be followed.

2. With respect to a dispute concerning the application or the interpretation of article 53 or 64:

(a) if a State is a party to the dispute with one or more States, it may, by a written application, submit the dispute to the International Court of Justice for a decision;

(b) if a State is a party to the dispute to which one or more international organizations are parties, the State may, through a Member State of the United Nations if necessary, request the General Assembly or the Security Council or, where appropriate, the competent organ of an international organization which is a party to the dispute and is authorized in accordance with Article 96 of the Charter of the United Nations, to request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court;

(c) if the United Nations or an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations is a party to the dispute, it may request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court;

(d) if an international organization other than those referred to in

sub-paragraph (c) is a party to the dispute, it may, through a Member State of the United Nations, follow the procedure specified in sub-paragraph (b);

(e) the advisory opinion given pursuant to sub-paragraph (b), (c) or (d) shall be accepted as decisive by all the parties to the dispute concerned;

(f) if the request under sub-paragraph (b), (c) or (d) for an advisory opinion of the Court is not granted, any one of the parties to the dispute may, by written notification to the other party or parties, submit it to arbitration in accordance with the provisions of the Annex to the present Convention.

3. The provisions of paragraph 2 apply unless all the parties to a dispute referred to in that paragraph by common consent agree to submit the dispute to an arbitration procedure, including the one specified in the Annex to the present Convention.

4. With respect to a dispute concerning the application or the interpretation of any of the articles in Part V, other than articles 53 and 64, of the present Convention, any one of the parties to the dispute may set in motion the conciliation procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce full powers.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5.

CONSEQUENCES OF THE INVALIDITY

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TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70

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Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If it State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

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(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties

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established by the treaty.

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

PART VI

MISCELLANEOUS PROVISIONS

Article 73

Relationship to the Vienna Convention on the Law of Treaties

As between States parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those States under a treaty between two or more States and one or more international organizations shall be governed by that Convention.

Article 74

Questions not prejudged by the present Convention

1. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

2. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from the international

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responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

3. The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.

Article 75

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 76

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

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PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 77

Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 78

Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in

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particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

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

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or of instruments of acceptance, approval or accession

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required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

Article 79

Notifications and communications

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

(a) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

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

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1(e).

Article 80

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless those States and organizations decide upon some other means of correction, be corrected:

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

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same

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procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procs-verbal of the rectification of the text and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

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

4. The corrected text replaces the defective text ab initio, unless the signatory States and international organizations and the contracting

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States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procs-verbal specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Article 81

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII

FINAL PROVISIONS

Article 82

Signature

The present Convention shall be open for signature until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1987, at United Nations Headquarters, New York by:

(a) all States;

(b) Namibia, represented by the United Nations Council for Namibia;

(c) international organizations invited to participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.

Article 83

Ratification or act of formal confirmation

The present Convention is subject to ratification by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by international organizations. The instruments of ratification and those relating to acts of formal confirmation shall be deposited with the Secretary-General of the United Nations.

Article 84

Accession

1. The present Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by

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any international organization which has the capacity to conclude treaties.

2. An instrument of accession of an international organization shall contain a declaration that it has the capacity to conclude treaties.

3. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 85

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.

2. For each State or for Namibia, represented by the United Nations Council for Namibia, ratifying or acceding to the Convention after the condition specified in paragraph 1 has been fulfilled, the Convention shall enter into force on the thirtieth day after deposit by such State or by Namibia of its instrument of ratification or accession.

3. For each international organization depositing an instrument relating to an act of formal confirmation or an instrument of accession, the Convention shall enter into force on the thirtieth day after such deposit, or at the date the Convention enters into force pursuant to

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paragraph 1, whichever is later.

Article 86

Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized by their respective Governments, and duly authorized representatives of the United Nations Council for Namibia and of international organizations have signed the present Convention.

DONE at VIENNA this twenty-first day of March one thousand nine hundred and eighty-six.

ANNEX

ARBITRATION AND CONCILIATION PROCEDURES
ESTABLISHED IN APPLICATION OF ARTICLE 66

I. ESTABLISHMENT OF THE ARBITRAL TRIBUNAL
OR CONCILIATION COMMISSION

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and

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maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations and every party to the present Convention shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of office of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph 2, sub-paragraph (f), or agreement on the procedure in the present Annex has been reached under paragraph 3, the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph 4, the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States, international organizations or, as the case may be, the States and organizations which constitute one of the parties to the dispute shall appoint by common consent:

(a) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one arbitrator or, as the case may be, one conciliator, who shall

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be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute, provided that a dispute between two international organizations is not considered by nationals of one and the same State.

The States, international organizations or, as the case may be, the States and organizations which constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way. The four persons chosen by the parties shall be appointed within sixty days following the date on which the other party to the dispute receives notification under article 66, paragraph 2, sub-paragraph (f), or on which the agreement on the procedure in the present Annex under paragraph 3 is reached, or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within sixty days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the

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International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this sub-paragraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the rules of that organization.

II. FUNCTIONING OF THE ARBITRAL TRIBUNAL

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the vote of the Chairman shall be decisive.

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6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. FUNCTIONING OF THE CONCILIATION COMMISSION

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

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11. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

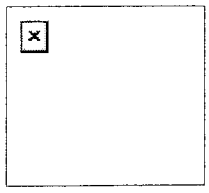
13. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

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ANNEX 13:

Rome Statute of the International Criminal Court.



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ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1

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The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

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Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

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(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

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

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

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

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

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(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

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(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

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

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

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

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

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

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively

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demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

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2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to

the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

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Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court
or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings

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with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the

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jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

1. The Court shall apply:

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

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

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

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to

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the person being investigated, prosecuted or convicted shall apply.

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

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(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

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Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

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(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

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List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37
Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38
The Presidency

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1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

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1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a

professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43
The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency,

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competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45
Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46
Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the

Rules of Procedure and Evidence.

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Article 48
Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49
Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by: 3823

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

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2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

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(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation
to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a

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statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

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(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

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(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release

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pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the

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Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

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10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62
Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

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(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

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2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language

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which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

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2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70
Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72
Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things,

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providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision

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shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

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PART 7. PENALTIES

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

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Article 81
Appeal against decision of acquittal or conviction
or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during

the period allowed for appeal and for the duration of the appeal proceedings. 384

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

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Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

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

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85
Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

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Article 86
General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87
Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88
Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of

cooperation which are specified under this Part.

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Article 89
Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

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(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91
Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's

probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

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Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the

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reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

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

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

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(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

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Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity
and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party

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and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

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PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106
Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the

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proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112
Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

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(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

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Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114
Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115
Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119
Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

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Article 120
Reservations

No reservations may be made to this Statute.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122
Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a

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Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124
Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court

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prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

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ANNEX 14:

Progress Reports submitted by States to the Council of Europe on ratification and implementation of the Rome Statute of the International Criminal Court.

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http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Transnational_criminal_justice/International_Criminal_Court/Documents/2Country_Information.asp

Progress Reports submitted by States to the Council of Europe on ratification and implementation of the Rome Statute of the International Criminal Court

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The following is a list of all States that submitted reports to the Council of Europe regarding the progress of their national implementation of the International Criminal Court.

A. Reports stating that there is no need for constitutional amendment prior to ratification of the ICC Statute:

- Croatia
- Former Yugoslav Republic of Macedonia
- Spain
- Switzerland
-
- **Canada:** (Report indicates that the command responsibility provisions of the ICC Staute "raised complex constitutional questions", but indicates that the problem was addressed by enacting ordinary legislation.)

B. Reports containing no discussion of any conflict between the Constitution and the ICC Statute necessitating constitutional amendment prior to ratification:

- Bulgaria
- Germany
- Japan
- Portugal
- United Kingdom

- **Norway**: (Although some provisions regarding Norway's judicial primacy were discussed, the report did not indicate that there was any constitutional inconsistency necessitating a constitutional amendment in order to permit the Constitution and the ICC Statute to be compatible).

C. Nations Suggesting that the ICC would Require them to Amend their Constitution, but giving either no reason why, or stating a constitutional difficulty other than the one argued by the Defence in relation to Sierra Leone:

- **Armenia**: (Report indicates that there may be a constitutional incompatibility because the Armenian Constitution provides for immunities for deputies of Parliament and provides for the President to grant pardons.)
- **Austria:** (Report indicates that the Constitution had to be amended to give effect to Article 27 of the Rome Statute (providing that State officials have no immunities) and Article 89 of the Rome Statute (dealing with surrender of persons to the Court)).
- **Azerbaijan:** (Report indicates that the provisions of the ICC Statute dealing with surrender of persons to the Court, lack of immunities of State officials, and pardon

conflict with the Constitution and would require amendment in order to implement the ICC Statute).

- **Belgium:** (Report indicates that prior to ratification, the Attorney General indicated that the Constitution would require amendment, but that the Parliament ratified it without any Constitutional amendment, although a constitution amendment may be adopted in the future. No indication was given in the report of why a constitutional amendment was required.)
- **Czech Republic:** (Report indicates that the extradition, immunity, and pardon provisions of the Czech Constitution required amendment before the ICC Statute could be implemented.)
- **Estonia:** (Report indicates that the provision in the Rome Statute that State officials have no immunities may conflict with the Constitution but that this was not the dominant view).
- **Finland**: (Report indicates that ratification of the ICC Statute would raise a number of issues with the Finnish Constitution, including the provisions of the ICC Statute regarding extradition/transfer, early release, pardon, and future decisions of parties to the ICC).
- **Hungary**: (Report indicates that implementation of the ICC Statute will require change to the Constitutional provisions regarding Head of State Immunity.)
- **Liechtenstein**: (Report indicates that only the Head of State immunity provisions of the ICC Statute could conflict with the Constitution.)
- **Lithuania**: (The only constitutional incompatibility discussed concerned the provisions dealing with extradition.)
- **Netherlands**: (Although there was a discussion in the Report regarding whether the Netherlands Constitution would permit ICC jurisdiction, the report indicated that there was in fact no conflict. The report states, "whether the establishment of a court not belonging to the Dutch judiciary would be in conflict with the Constitution; this was considered not to be the case for article 92 of the Constitution allows for the judiciary power to be transferred to an international organization; Other Constitutional problems were cited regarding transfer/extradition, head of state immunity and other ICC provisions."
- **Poland**: The report stated that only the ICC's immunity and transfer/extradition provisions would present Constitutional incompatibility issues.
- **Slovenia**: The report discussed only extradition as a source of Constitutional incompatibility with the ICC.
- **Sweden**: The only Constitutional issues raised in the report were extradition/transfer, Head of State immunity, and pardons.

D. Reports suggesting that ratification of the ICC Statute would be incompatible with the Constitution on grounds similar to those raised by the Defence in this case:

- **Ireland**: The report stated that, "In order for Ireland to ratify the Rome Statute it was necessary to amend the Constitution of Ireland, primarily because it was considered that certain provisions of the Constitution – those relating to the State's sovereign power to administer criminal justice, and those conferring emergency powers on Parliament during a time of war- could conflict with the State's duties under the Rome Statute." This

constitutional amendment was submitted by referendum to the voters, it passed, and the President signed it into law in 2001.

- **Moldova:** The report stated that, "Under [certain] provisions of the Constitution, therefore, any crime committed on Moldovan territory, including those provided for in Articles 5, 6, 7 and 8 of the Rome Statute, falls within the exclusive jurisdiction of the courts mentioned in Article 115 of the Constitution, which makes no provision for any other court to judge these crimes."
- **Ukraine:** The report stated that the Ukrainian Constitution was inconsistent with the ICC provisions, "according to which 'An International Criminal Court …is complementary to national criminal jurisdictions' (paragraph 10 of the Preamble and Article 1 of Rome Statute)…In accordance with the conclusion of the Constitutional Court, further measures will be taken in Ukraine to complete internal procedures necessary for submitting the Rome Statute to the Verkhovna Rada of Ukraine (Parliament) for its ratification.

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Trial Chamber
☐ Designated Judge:
☐ Trial Chamber

Appeal Chamber
X☐ Pre-Hearing Appeals Judge
☐ Appeals Chamber
☐ President

X☐ **Defence Counsel:**
For Kallon – Powles and Oury
For Norman – Owen, Whitaker and Tejan-Sie
For Kamara – Fleming
For Fofana – Pestman and Bockarie

X☐ **Prosecution Counsel: de Silva, Marcus Jones, Staker and Tejan-Cole**

X☐ **Defence Office:**
☐ **Others required:**

Filed by:	☐ Chamber ☐ Judge	☐ Defence (name)	☐ Prosecutor **de Silva, Marcus Jones, Staker and Tejan-Cole** (name)	☐ Other: (name)
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