057 SCSL-2003-07-PT-057 (890-976) 890

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

IN THE TRIAL CHAMBER

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

Registrar: Mr Robin Vincent

Date filed: 24 June 2003

THE PROSECUTOR

Against

MORRIS KALLON also known as (aka) BILAI KARIM

CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE SECOND DEFENCE PRELIMINARY MOTION (CONSTITUTION OF SIERRA LEONE)

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

Defence Counsel:
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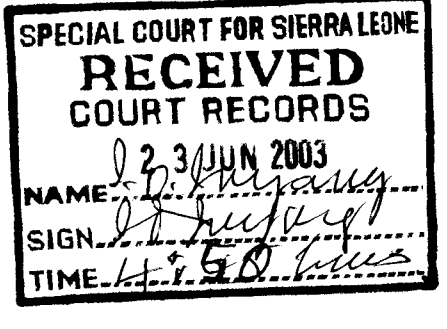

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SPECIAL COURT FOR SIERRA LEONE
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PROSECUTION RESPONSE TO THE SECOND DEFENCE PRELIMINARY MOTION (CONSTITUTION OF SIERRA LEONE)

I. INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone" (the "**Second Preliminary Motion**"), filed on behalf of Morris Kallon (the "**Accused**") on 16 June 2003.[1]

2. The Second Preliminary Motion argues essentially that the Government of Sierra Leone acted in contravention of the Constitution of Sierra Leone when it entered into the Special Court Agreement with the United Nations,[2] and that this renders the Special Court unconstitutional and therefore lacking in jurisdiction to prosecute persons before it. The Second Preliminary Motion requests the Trial Chamber to declare the Special Court "an illegal creation" and to release the Accused.

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[1] Registry Page ("RP") 636-646.

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

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

II. ARGUMENT

4. Paragraphs 5 to 13 of the Second Preliminary Motion set out at some length various provisions of the Constitution of Sierra Leone. The essence of the Defence argument is that under the Constitution of Sierra Leone, the only courts empowered to order deprivation of liberty or to try criminal offences are those envisaged by section 30(1) of that Constitution, and that the Special Court is not such a court.

5. However, the Constitution of Sierra Leone is only capable of regulating, and only purports to regulate, the judicial power *of the Republic of Sierra Leone* within the sphere of the municipal law of Sierra Leone. Section 120(1) of that Constitution, which is the first provision in Chapter 7 dealing with the judiciary, provides that "The judicial power *of Sierra Leone* shall be vested in the Judiciary of which the Chief Justice shall be the Head".[3] Indeed, paragraph 7 of the Second Preliminary Motion itself expressly acknowledges that Chapter 7 of the Constitution "is concerned with the Judiciary *of Sierra Leone*".[4]

6. However, as is expressly stated in section 11(2) of the Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**"), the Special Court does "not form part of the Judiciary of Sierra Leone". Indeed, it does not exist or operate at all within the sphere of the municipal law of Sierra Leone. It is not a national court and the Defence are in error in conceiving it to be part of the architecture of the Sierra Leonean court structure.

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3 Emphasis added.
4 Emphasis added.

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7. The Special Court was established by the Special Court Agreement, concluded by the United Nations and the Government of Sierra Leone by representatives of the United Nations and Sierra Leone possessing full powers to conclude the treaty. The Special Court Agreement is a treaty under international law[5] and is binding on both parties. A treaty is valid in international law even if it is in conflict with domestic law (which the Prosecution does not accept in this case). In other words, the constitutionality of the Special Court Agreement does not affect the jurisdiction of the Special Court for Sierra Leone for reasons set out at paragraphs 9, 10, 11, 12 and 13 below. The Second Preliminary Motion acknowledges[6] that the Special Court was established, not under the municipal law of Sierra Leone, but under *international law*. It exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone.

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

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

[6] See Second Preliminary Motion, para 3 (quoting the Secretary-General to the effect that the Special Court is "treaty-based" and that 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"), and paras 14-16 (dealing with the provisions of the Constitution of Sierra Leone relating to the conclusion of treaties).

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9. As a matter of international law, the validity of the Special Court Agreement, and the obligations of Sierra Leone under international law arising out of that Agreement, are not affected by the Constitution of Sierra Leone.

10. Article 27 of the 1969 Vienna Convention on the Law of Treaties provides that:

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

Materially identical provision is made in Article 27(1) and (3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

11. Article 46 of the 1969 Vienna Convention on the Law of Treaties provides:

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

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

12. Although Sierra Leone is not a party to either of the two treaties referred to in paragraphs 11 and 12 above,[7] the provisions of these treaties reflect customary international law.[8]

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[7] The United Nations became a party to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations by a formal confirmation dated 21 December 1998.

[8] 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]

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13. In the present case, even if it assumed for the sake of argument that the conclusion of the Special Court Agreement by the Government of Sierra Leone was in breach of the Constitution of Sierra Leone (and this is in no way conceded by the Prosecution), any such breach would not be "manifest" within the meaning of Article 46 of the two Vienna Conventions. If the argument of the Defence were correct, it would mean that the Government of Sierra Leone also violated the Constitution when Sierra Leone became a party to the ICC Statute,[9] since this similarly involved conferring on the ICC, which is not a court envisaged by section 30(1) of the Sierra Leone Constitution, the power to order deprivation of liberty or to try criminal offences. However, other States which have similar constitutional provisions have become parties to the ICC Statute without first amending their constitutions. For instance, in Australia it is well established that it is unconstitutional for any part of the federal judicial power to be conferred on a body other than a court established under Chapter III of the Australian Constitution. Nevertheless, Australia ratified the ICC Statute, and enacted legislation to implement the ICC Statute into municipal law,[10] after a committee of the Australian Parliament had found that:

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

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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).

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

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

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> Court of Australia and such other federal courts as the Parliament creates. However, the Committee accepts as reasonable the Attorney-General's submission ... that the ICC will not exercise the judicial power of the Commonwealth [of Australia], even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia."[11]

United States commentators have similarly concluded that there is no constitutional objection to ratification of the ICC Statute by the United States, on the ground that the ICC would not be exercising the governmental authority of the United States but the authority of the international community.[12] A further example that could be cited is South Africa, which has enacted legislation implementing the ICC Statute,[13] even though section 165(1) of the Constitution of South Africa provides that the judicial authority of South Africa is vested in certain courts specifically identified in section 166 thereof, of which the ICC is not one. For the purposes of Article 46 of the two Vienna Conventions, it therefore cannot be said that it is "*manifest*" that the position under the Constitution of Sierra Leone would be any different to the position under the Constitutions of Australia, the United States of America, or South Africa.

14. Indeed, the Second Preliminary Motion itself accepts[14] that the Implementing Legislation states that the Special Court Agreement was, for the part of the Government of Sierra Leone, signed under the authority of the President pursuant to section 40(4) of the Constitution. The Second Preliminary Motion itself further accepts[15] that it is asserted by the Government of Sierra Leone

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

[12] See *ibid.*, para. 2.50, referring to Professor Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn, 1996), p. 269.

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

[14] At para. 14.

[15] At para. 16.

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that the Implementing Legislation amounts to ratification of the Special Court Agreement by the Parliament for the purposes of section 40(4) of the Constitution. Thus, *prima facie* the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied. The Second Preliminary Motion itself acknowledges[16] that Chapter 7 of the Constitution of Sierra Leone is concerned with the judiciary *of Sierra Leone*, and acknowledges[17] that section 11(2) of the Implementing Legislation states that "The Special Court shall not form part of the Judiciary of Sierra Leone". Thus, *prima facie* there is no inconsistency between the Special Court Agreement and the Constitution of Sierra Leone.

15. Because there has been no *manifest* violation of the Constitution of Sierra Leone, it is immaterial to the validity of the Special Court Agreement, and to Sierra Leone's obligations under that agreement, whether the conclusion of the agreement by the Government of Sierra Leone was or was not in fact in conformity with the Constitution of Sierra Leone. It is therefore unnecessary for the Special Court to decide this question. Indeed, the Special Court has no *jurisdiction* to decide this question.

16. The question whether there has been any violation of the Constitution of Sierra Leone is one which could only be determined by the national courts of Sierra Leone. However, even if a national court of Sierra Leone were hypothetically to find that there has been a breach of the Constitution, this would not affect the validity of the Special Court Agreement and the Special Court's Statute under international law, nor would it affect Sierra Leone's obligations in international law under the Special Court Agreement.

III. MISCELLANEOUS MATTERS

17. Paragraph 24 of the Second Preliminary Motion requests an oral hearing on that motion. The Prosecution submits that this motion raises a straightforward

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16 At para. 7.
17 At para. 17.

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question of law only, which could be decided on the basis of the parties' written pleadings, and does not see the need for an oral hearing. In the International Criminal Tribunal for the former Yugoslavia it has been held that the general practice is not to hear oral argument on motions prior to the trial unless good reason is shown for its need in a particular case,[18] and no particular justification for an oral hearing has been advanced by the Defence in the Second Preliminary Motion.

18. Paragraph 22 of the Second Preliminary Motion states that counsel for the Accused have not been afforded adequate time and facilities with which to consult with the Accused on the preliminary motions, and that Defence counsel "reserve the right to amend [their] arguments after having had such opportunity to consult with client on such matters". The Prosecution submits that the assertion of this "right" is inconsistent with the Rules and with the Trial Chamber's *Decision on the Defence Motion for an Extension of Time to File Preliminary Motions* of 14 June 2003.[19] The Rules require a party to put all arguments in support of a motion in the motion itself, to enable the other party to address all of those arguments in its response. A reply should only address new matters arising out of the response, and should not contain new arguments unrelated to the response, or arguments which could reasonably be expected to have been included in the original motion. Where new arguments are raised by a party outside of the prescribed time-limits, the other party must be given the opportunity to respond to them, which will result in delays and in additional pleadings beyond those contemplated in Rule 7(3) of the Rules (i.e., motion, response and reply). Therefore, the raising of new arguments outside the prescribed limits is only permissible with the leave of the Chamber.[20] Should the Defence file a motion at any future time seeking leave to raise new arguments at a late stage, the Prosecution would respond to that motion at the

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[18] *Prosecutor v. Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment*, IT-97-25-PT, T. Ch., 24 February 1999, para. 65.

[19] RP 619-624.

[20] See, e.g., *Prosecutor v. Kvocka et al., Decision on Prosecution's Motion to Strike Portion of Reply*, IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002.

appropriate time. The Prosecution merely notes at this stage that the preliminary motions alleging lack of jurisdiction raise issues of law only, on which the need for extensive consultation between Accused and Defence counsel is not evident.

19. The Defence has filed two separate preliminary motions challenging jurisdiction,[21] totalling some 19 pages. The Prosecution submits that it is the effect of Article 9.3(C) of the Practice Direction on Filing Documents Before the Special Court for Sierra Leone (the "Practice Direction"), which limits the length of motions to 10 pages, that all of the Defence's arguments on lack of jurisdiction should have been included in a single motion, and that the Defence should have applied for an extension of page limits under Article 9.5 of the Practice Direction if it considered this necessary. If this were not so, a party advancing 10 different arguments in support of an allegation of lack of jurisdiction could, without requiring any authorisation from the Chamber, file 100 pages of pleadings by the expedient device of making each argument the subject of a separate motion. However, in the interests of avoiding delay in this matter, the Prosecution has not taken objection on this occasion, and is filing responses to each of the two preliminary motions.

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[21] On the same day that the Defence filed the Second Preliminary Motion, it also filed a "Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord" (RP 625 to 635).

IV. CONCLUSION

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

Freetown, 23 June 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Luc Côté
Chief of Prosecutions

Walter ~~Mareus-~~Jones
~~Senior~~ Appellate Counsel

Christopher Staker
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

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1. 1969 Vienna Convention on the Law of Treaties, Articles 27 and 46[1]

2. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Articles 27 and 46[2]

3. Details of United Nations participation in the above treaty[3]

4. Aust, *Modern Treaty Law and Practice* (2000), p. 10-11

5. Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 618

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

6. Details of Australia's ratification[4]
7. Details of Sierra Leone's ratification[5]
8. Details of South Africa's ratification[6]

9. Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002), paras. 2.35, 2.41 to 2.55, and 3.40 to 3.49[7]

10. Constitution of South Africa, sections 165 and 166[8]

11. *Prosecutor v. Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment*, Case No. IT-97-25-T, T. Ch., 24 February 1999

12. *Prosecutor v. Kvocka et al., Decision on Prosecution's Motion to Strike Portion of Reply*, Case No. IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002

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1 Full text available at: http://www.un.org/law/ilc/texts/treaties.htm

2 Full text available at: http://www.un.org/law/ilc/texts/trbtstat.htm

3 Obtained from: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty3.asp.

4 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=42.

5 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=17.

6 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=18.

7 Full text available at: http://www.aph.gov.au/house/committee/jsct/icc/report.htm.

8 Obtained from: http://www.polity.org.za/html/govdocs/constitution/saconst08.html?rebookmark=1. Full text available at: http://www.polity.org.za/govdocs/constitution/saconst.html.

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ANNEX I

1969 Vienna Convention on the Law of Treaties, Articles 27 and 46[1]

[1] Full text available at: http://www.un.org/law/ilc/texts/treaties.htm

Vienna Convention on the Law of Treaties

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

Article 27
Internal law and observance of treaties

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

Article 46
Provisions of internal law regarding competence to conclude treaties

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

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

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

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

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

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ANNEX II

1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Articles 27 and 46[2]

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[2] Full text available at: http://www.un.org/law/ilc/texts/trbtstat.htm

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

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

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

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

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

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

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

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

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

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

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ANNEX III

Details of United Nations participation in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [3]

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[3] Obtained from: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty3.asp.

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3. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

Vienna, 21 March 1986

Not yet in force:	The 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, in accordance with its article 85 (1). Instruments of formal confirmation deposited by international organizations are not counted towards the entry into force of the Convention.
Status:	Signatories: 38 ,Parties: 37.
Text:	Doc. A/CONF.129/15.

Note: The Convention was open for signature by all States, Namibia and international organizations invited to the Conference, until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1987, at the United Nations Headquarters in New York.

PARTICIPANTS

Participant	Signature, Succession to signature (d)	Ratification, Accession (a), Formal confirmation (c), Succession (d)
Argentina	30 Jan 1987	17 Aug 1990
Australia		16 Jun 1993 a
Austria	21 Mar 1986	26 Aug 1987
Belarus		30 Dec 1999 a
Belgium	9 Jun 1987	1 Sep 1992
Benin	24 Jun 1987	
Bosnia and Herzegovina[1]	12 Jan 1994 d	
Brazil	21 Mar 1986	

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Bulgaria		10 Mar 1988 a
Burkina Faso	21 Mar 1986	
Côte d'Ivoire	21 Mar 1986	
Council of Europe	11 May 1987	
Croatia		11 Apr 1994 a
Cyprus	29 Jun 1987	5 Nov 1991
Czech Republic[2]		22 Feb 1993 d
Democratic Republic of the Congo	21 Mar 1986	
Denmark	8 Jun 1987	26 Jul 1994
Egypt	21 Mar 1986	
Estonia		21 Oct 1991 a
Food and Agriculture Organization of the United Nations	29 Jun 1987	
Germany[3]	27 Apr 1987	20 Jun 1991
Greece	15 Jul 1986	28 Jan 1992
Hungary		17 Aug 1988 a
International Atomic Energy Agency		26 Apr 2001 a
International Civil Aviation Organization	29 Jun 1987	24 Dec 2001 c
International Criminal Police Organization		3 Jan 2001 a
International Labour Organisation	31 Mar 1987	31 Jul 2000 c
International Maritime Organization	30 Jun 1987	14 Feb 2000 c
International Telecommunication Union	29 Jun 1987	
Italy	17 Dec 1986	20 Jun 1991
Japan	24 Apr 1987	
Liechtenstein		8 Feb 1990 a
Malawi	30 Jun 1987	
Mexico	21 Mar 1986	10 Mar 1988
Morocco	21 Mar 1986	
Netherlands[4]	12 Jun 1987	18 Sep 1997
Organisation for the Prohibition of Chemical Weapons		2 Jun 2000 a
Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization		11 Jun 2002 a
Republic of Korea	29 Jun 1987	
Republic of Moldova		26 Jan 1993 a
Senegal	9 Jul 1986	6 Aug 1987
Serbia and Montenegro[1]	12 Mar 2001 d	
Slovakia[2]		28 May 1993 d
Spain		24 Jul 1990 a

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Sudan	21 Mar 1986	
Sweden	18 Jun 1987	10 Feb 1988
Switzerland		7 May 1990 a
United Kingdom of Great Britain and Northern Ireland	24 Feb 1987	20 Jun 1991
United Nations	12 Feb 1987	21 Dec 1998 c
United Nations Educational, Scientific and Cultural Organization	23 Jun 1987	
United Nations Industrial Development Organization		4 Mar 2002 a
United States of America	26 Jun 1987	
Uruguay		10 Mar 1999 a
World Health Organization	30 Apr 1987	22 Jun 2000 c
World Intellectual Property Organization		24 Oct 2000 a
World Meteorological Organization	30 Jun 1987	
Zambia	21 Mar 1986	

DECLARATIONS

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon ratification,

accession or formal confirmation. For objections thereto, see hereinafter.)

Belgium[5]

21 June 1993

Reservation:

The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article.

Bulgaria[6]

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ANNEX IV

Aust, *Modern Treaty Law and Practice* (2000), pp. 10 – 11

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MODERN TREATY LAW AND PRACTICE

ANTHONY AUST

CAMBRIDGE
UNIVERSITY PRESS

e 1969 Convention[7], are generally
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rnational organisations, such as a
rules of the Convention reflect the
pplicable to treaties with interna-
Article 3(b)). Where states which
parties to a treaty to which other
cular international organisations
also parties, *as between the states*
applies, not customary interna-

ve effect

treaties which are concluded by
nters into force for those states
ying this rule to bilateral treaties.
Convention will apply to those
clusion of the treaty after the
n, but not for other states.[9] The
nuary 1980. The UN Convention
oncluded on 10 December 1982.
s to the Convention on that date,
th regard to UNCLOS. Article 4
t retrospection is without preju-
he Convention to which treaties
nal law independently of the
Convention which reflect custo-
customary law) to treaties con-
the Convention, or concluded
entered into force for parties to

ne subjects as Articles 1–72 of the 1969

Sinclair, p. 230. See also P. McDade, 'The
ne Law of Treaties 1969', ICLQ (1986), pp.
sion" of a Multilateral Treaty', BYIL (1988),
the *Gabcikovo* case, see p. 11 below.

International organisations

Since the constituent instrument (i.e., the constitution) of an international organisation and a treaty adopted *within* the organisation are made by states, the Convention applies to such instruments, but this is without prejudice to any relevant rules of the organisation (Article 5). Those rules may, for example, govern the procedure by which treaties are adopted within the organisation, how they are to be amended and the making of reservations.[11]

State succession, state responsibility and the outbreak of hostilities

For the avoidance of doubt, Article 73 confirms that the Convention does not prejudge any question that may arise in regard to a treaty from a succession of states,[12] from the international responsibility of a state (for breach of a treaty),[13] or from the outbreak of hostilities.[14] The Convention does not deal with these matters, which are largely governed by customary international law, and are discussed here in later chapters.

Bilateral and multilateral treaties

The term 'bilateral' describes a treaty between two states, and 'multilateral' a treaty between three or more states. There are, however, bilateral treaties where two or more states form one party, and another state or states the other party.[15] For the most part the Convention does not distinguish between bilateral and multilateral treaties. Article 60(1) is the only provision limited to bilateral treaties. Articles 40, 41, 58 and 60 refer expressly to multilateral treaties, and the provisions on reservations and the depositary are relevant only to such treaties.

The Convention and customary international law

The various provisions mentioned above, and the preamble to the Convention, confirm that the rules of customary international law continue

[11] See, for example, p. 109 below on the rules for reservations to ILO Conventions.
[12] See pp. 305–31 below.
[13] See pp. 300–4 below, and the *Gabcikovo* judgment, para. 47 (ILM (1998), p. 162).
[14] See pp. 243 below. [15] See p. 19 below.

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

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

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

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

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

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

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

[19] See Thirlway, 'Law and Procedure', at p. 86. [20] See Sinclair, pp. 10–24.

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

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

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

Effect of emerging customary law on prior treaty rights and obligations

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

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

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

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

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ANNEX V

Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 618

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PRINCIPLES OF PUBLIC INTERNATIONAL LAW

BY

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PART X

INTERNATIONAL TRANSACTIONS

CHAPTER XXVI

THE LAW OF TREATIES

1. *Introductory*[1]

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

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

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

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

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

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

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

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

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

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

[4] Art. 84.

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

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

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

[8] *Infra*, p. 678.

[9] *Infra*, p. 661.

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

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

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

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.

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ANNEX VI, VII, VIII

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

Details of Australia's ratification[4]
Details of Sierra Leone's ratification[5]
Details of South Africa's ratification[6]

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4 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=42.
5 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=17.
6 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=18.

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Australia (Asia / Pacific Islands)

Historica
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Parties
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Signature status:
Australia signed on 9 December 1998.

Membership:
Like-Minded Country, Commonwealth

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

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

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

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

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

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

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

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

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

Ratification and Implementation Process:
Under the Australian Constitution, treaty-making is the formal responsibility of the Executive branch rather than the Parliament. Decisions about the negotiation of multilateral conventions, including determination of objectives,

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negotiating positions, the parameters within which the Australian delegation can operate, and the final decision as to whether to sign and ratify are taken at Ministerial level, and in many cases, by Cabinet. In the case of the ICC treaty, the responsible interministerial committee submits the treaty for the approval of the Cabinet. The Cabinet then submits it to the JSCOT, which by a 1996 reform of the treaty-making process, scrutinizes all proposed treaty action by the Australian government, except for urgent treaties and non-binding treaty action (e.g. signature).

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

Last Updated:
30 September 2002

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Sierra Leone (Africa)

Signature status:
Sierra Leone signed on 17 October 1998.

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

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

Ratification and Implementation Process:
No information is available.

Last Updated:
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South Africa (Africa)

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Signature status:
South Africa signed on 17 July 1998.

Membership:
Commonwealth, Southern African Development Community (SADC), African Union

Ratification and Implementation Status:
South Africa ratified on 27 November 2000, becoming the 23rd State Party.

In June 2002, Parliament adopted implementation legislation, which includes provisions on cooperation with the Court and universal jurisdiction. This legislation came into effect on 16 August 2002.

Soon after the Rome Conference in July 1998, South Africa submitted the Rome Statute to national advisors to determine its constitutionality. An inter-departmental committee was established to study the Statute. It was found that the Statute is constitutional, and no amendments were required. Ratification only required that an explanatory memorandum attaching the Rome Statute be submitted to Cabinet and then to Parliament.

The first draft of the implementing legislation also went through a consultative phase with other governmental departments. The intent was to have the draft implementing legislation already in place, but not necessarily approved by Parliament, when Cabinet and Parliament were requested to approve ratification.

To assist SADC Member States in enacting legislation, a Southern African Development Community meeting held in Pretoria, South Africa, 5-9 July 1999 adopted a model-enabling-law that each state could adopt and adapt to their national situations. This model law covers virtually all aspects of the ICC Statute that require state action and cooperation.

Ratification and Implementation Process:
The Justice Department is responsible for preparing the ratification bill. The Departments of Justice, Defense, Intelligence, Foreign Affairs, Police, Correctional Services, and Home Affairs are responsible for preparing the implementing legislation. Cabinet must approve the submission of the Statute to Parliament (National Assembly and the Council of Provinces), which must both approve ratification via resolution. Ratification requires that an explanatory memorandum attaching the international treaty be submitted to Cabinet and then to Parliament.

The approach of the model enabling law consolidates all ICC-related matters into one statute, thus avoiding disparate amendments and provisions. It appends the Rome Statute as a schedule to the law, thus making the Statute part of the law and adopting its various definitions.

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16 October 2002

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ANNEX IX

Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002)[7]

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7 Full text available at: http://www.aph.gov.au/house/committee/jsct/icc/report.htm.

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The Parliament of the Commonwealth of Australia

Report 45

The Statute of the International Criminal Court

Joint Standing Committee on Treaties

May 2002

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ISBN

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

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

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

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

Concerns about constitutionality

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

2.36 A number of specific claims were made:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The proposed implementing legislation and the ICC crimes

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

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

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

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

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

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

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

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

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

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

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

Concerns about constitutionality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 5

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

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

PROSECUTION INDEX OF AUTHORITIES

ANNEX X.

Constitution of South Africa, sections 165 and 166[8]

[8] Obtained from: http://www.polity.org.za/html/govdocs/constitution/saconst08.html?rebookmark=1. Full text available at: http://www.polity.org.za/govdocs/constitution/saconst.html.

Chapter 8

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Courts and Administration of Justice

Index of Sections

Judicial authority

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

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

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

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

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

Judicial system

166. The courts are

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

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

Constitutional Court

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

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

(3) The Constitutional Court

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

(4) Only the Constitutional Court may

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

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

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

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

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

Supreme Court of Appeal

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

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

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PROSECUTION INDEX OF AUTHORITIES

ANNEX XI.

Prosecutor v. Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-T, T. Ch., 24 February 1999

UNITED
NATIONS

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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No.: IT-97-25-PT

Date: 24 February 1999

Original: English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding
Judge Antonio Cassese
Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 February 1999

PROSECUTOR

v

MILORAD KRNOJELAC

DECISION ON THE DEFENCE PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Franck Terrier
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrač
Mr Miroslav Vasič

I Introduction

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1. Milorad Krnojelac ("the accused") is charged on eighteen counts arising out of events at the Foča Kazneno-Popravni Dom ("KP Dom" or "KPD FOCA") – said to be one of the largest prisons in the former Yugoslavia – of which he is alleged to have been the commander and in a position of superior authority. The charges against him allege:

   1.1 grave breaches of the Geneva Conventions of 1949, consisting of torture (Count 3), wilfully causing serious injury to body or health (Count 6), wilful killing (Count 9), unlawful confinement of civilians (Count 12), wilfully causing great suffering (Count 14) and inhuman treatment (Count 17);[1]

   1.2 violations of the laws and customs of war, consisting of torture (Count 4), cruel treatment (Counts 7 and 15), murder (Count 10) and slavery (Count 18);[2] and

   1.3 crimes against humanity, consisting of persecution on political, racial and/or religious grounds (Count 1), torture (Count 2), inhumane acts (Counts 5 and 13), murder (Count 8), imprisonment (Count 11) and enslavement (Count 16).[3]

2. On 8 January 1999, the accused filed a Defence Preliminary Motion on the Form of the Indictment ("Motion"). On 22 January, the prosecution filed its Response to the Motion ("Response"). Leave was granted to the accused to file a Reply to that Response ("Reply"), and such Reply was filed on 10 February. The prosecution was given leave to file a further Response to two new matters raised in the Reply ("Further Response"), and this was done on 17 February.

II Nature of Accused's Responsibility

3. As to all counts, the accused requires the prosecution to identify, in relation to each count, whether the charge laid in that count is based on the accused's individual responsibility (Art 7(1) of the Statute) or on his responsibility as a superior (Art 7(3) of the Statute).[4] However, paras 4.9 and 4.10 of the indictment assert that the accused has both individual responsibility and responsibility as a superior, as well as (in the alternative) responsibility as a superior only. These assertions are

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1 The jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") to try these offences is to be found in Article 2 of the Statute of the International Tribunal ("Statute").

2 Article 3 of the Statute.

3 Article 5 of the Statute.

4 Paragraph 5 of the Motion. See also para 30 of the Motion.

clearly intended to be read distributively as applying to all the counts in the indictment. This indictment may not be the most stylish of pleadings, but this particular complaint as to form is rejected.

4. The next complaint is that, by pleading in this way, the prosecution does not know whether the accused is being charged "cumulatively or alternatively" which, the accused says, makes the indictment imprecise.[5] As paras 4.9 and 4.10 are to be read distributively, there is no such imprecision, and this complaint is also rejected.

III Different charges based upon the same facts

5. It is also submitted that, because these different responsibilities are based upon the same factual grounds, the indictment is nevertheless defective because "[r]esponsibility may not be accumulated".[6] Such a pleading is said to be contrary to the laws of the former Yugoslavia, but the Statute and the Rules of Procedure and Evidence of the International Tribunal ("Rules") are not to be read down so as to comply with those laws. This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts – as it has here – have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty.[7] More importantly, the Appeals Chamber has similarly dismissed such a complaint.[8]

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5 *Ibid*, para 18.

6 *Ibid*, paras 5 and 31.

7 See, for example, *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, paras 15-18; *Prosecutor v Delalić*, Case No IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 2 Oct 1996, para 24; *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 Apr 1997, para 32; *Prosecutor v Kupreškić*, Case No IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p 3. See also *Prosecutor v Delalić*, Case No IT-96-21-T, Judgment, 16 Nov 1998, paras 1221-1223. The International Criminal Tribunal for Rwanda ("ICTR") – whose Statute does not differ significantly from this Tribunal's Statute in any way relevant to this issue – has as well held that an accused may properly be convicted of two offences arising from the same facts where the offences have different elements, or the provisions creating the offences protect different interests, or it is necessary to record a conviction for both offences in order fully to describe the true character of what the accused did: *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment, 2 Sept 1998, para 468.

8 *Prosecutor v Delić*, Case No IT-96-21-AR72.5, Appeal Decision, 6 Dec 1996, paras 35-36.

6. Two specific arguments are nevertheless put by the accused. The first is that the same act or omission cannot support both a charge of individual responsibility and a charge of responsibility as a superior. Whether or not that is so (and it is unnecessary in this case to resolve that issue), that is not the way in which the indictment here has been pleaded. What the prosecution has done is to assert in fairly general terms that the accused is guilty of a particular offence without identifying any specific acts or omissions of the accused which would demonstrate whether his responsibility is alleged to be individual (either by way of personal participation or as aiding and abetting those who did so participate) or as a superior. For example, par 5.2 says (in part):

> **MILORAD KRNOJELAC** persecuted the Muslim and other non-Serb males by subjecting them to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings, prolonged and frequent forced labour, and inhumane conditions within the KP Dom detention facility.

Such an allegation is consistent with either type of responsibility, and the nature of the alleged responsibilities of the accused are spelt out in paras 4.9 and 4.10, in the way already stated.

7. This somewhat clumsy style of pleading appears to have been adopted because this accused was indicted with a number of others whose names remain under seal. There appears to have been an attempt to state the charge in general terms against all of the accused and then to assert that different accused have different responsibilities for the matters so charged. A pleading is not defective because its style is clumsy provided that, when taken as a whole, the indictment makes clear to each accused (a) the nature of the responsibility (or responsibilities) alleged against him and (b) the material facts – but not the evidence – by which his particular responsibility (or responsibilities) will be established. In the present case, the first of those matters has been made clear, as already stated. Something will be said later about the failure of the prosecution to give sufficient (and, in many cases, any) particulars of the material facts by which his different responsibilities will be established. At this stage, it is sufficient to say that there is no basis for this first specific argument put by the accused.

8. The second specific argument put is that crimes against humanity (Art 5 of the Statute), grave breaches of the Geneva Conventions (Art 2 of the Statute) and violations of the laws and customs or war (Art 3 of the Statute) are mutually exclusive, and that the prosecution is not permitted to rely upon them all in relation to the same facts.[9] But each Article is designed to protect different values, and each requires proof of a particular element which is not required by the

[9] Paragraph 32 of the Motion.

others.[10] It therefore does not follow that the same conduct cannot offend more than one of those values and thus fall within more than one of those Articles.

9. This submission by the accused may be the product of a confusion with the principle of double jeopardy which, in very general terms, states that a person should not be prosecuted for an offence where he has already been prosecuted and either convicted or acquitted of a different offence arising out the same or substantially the same facts. This principle has found expression in the Constitution of the United States of America:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb [...].[11]

The International Covenant on Civil and Political Rights also reads:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[12]

The former has been interpreted as saying, and the latter states expressly, that it is concerned with *successive* prosecutions upon different charges arising out of the same (or substantially the same) facts, and not with the prosecution of such charges in the *same* trial.[13]

10. The prosecution must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused's criminal conduct, so that the punishment imposed will do the same. Of course, great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of different charges arising out of the same or substantially the same facts.

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10 *Prosecutor v Tadić*, Case No IT-94-1-T, Opinion and Judgment, 7 May 1997, para 609; *Prosecutor v Kupreškić*, Case No IT-95-16-PT, Decision on Defence Challenges to Form of Indictment, 15 May 1998, p 3.

11 Fifth Amendment to the Constitution.

12 Article 14(7). See also the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No 7, Art 4(1); and the American Convention on Human Rights, Art 8(4).

13 *Green v United States* 355 US 184 (1957) at 187-188; *United States v Dixon* 509 US 688 (1993) at 704. Such was also the law of ancient Greece: *United States v Jenkins* 490 F 2d 868 (1973) at 870; affd 420 US 358 (1975); and of ancient Rome: *Bartukus v Illinois* 359 US 121 (1959) at 152.

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IV Particularity in pleading – individual responsibility

11. However, the only specific facts alleged in the indictment in the present case relevant to the accused's *individual* responsibility in relation to any of the charges are to be found in para 3.1 of the indictment, where it is alleged in general terms (and without any particularity) that the accused was present when detainees arrived and that he appeared during beatings. Even so, para 3.1 is directed only to showing that the accused had responsibility as a superior, not that he personally participated in any beatings. It may be that – differently expressed, and in a distinct, separate and more detailed allegation – these facts would go at least some way to support a finding that the accused had aided and abetted in the beatings and that he was therefore individually responsible for those beatings,[14] but para 3.1 does not provide particulars of the individual responsibility of the accused.

12. The accused therefore complains, with some justification, that he has not been informed of the facts upon which the prosecution relies to establish his individual responsibility.[15] The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged,[16] but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him"[17] and in "adequate time [...] for the preparation of his defence".[18] An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.[19] However, these obligations in relation to what must be pleaded in the indictment are not to be seen as a substitute

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14 See, generally, *Prosecutor v Furundžija*, Case No IT-95-17/1-T, Judgment, 10 Dec 1998, para 249.

15 Paragraph 30 of the Motion.

16 Article 18 of the Statute; and Rule 47(B) of the Rules.

17 Article 21(4)(a) of the Statute.

18 *Ibid*, Art 21(4)(b).

19 *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20. An oft quoted statement as to the particularity with which a criminal offence must be pleaded in common law jurisdictions is that of Isaacs J in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740-741:

> "I take the fundamental principle to be that the opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms 'surprise', but he is not entitled to be told the mode by which the case is to be proved against him."

A valid indictment must identify the essential factual ingredients of the offence charged; it must specify the approximate time, place and manner of the acts or omissions of the accused upon which the prosecution relies, and it must provide fair information and reasonable particularity as to the nature of the offence charged: *Smith v Moody* [1903] 1 KB 56 at 60, 61, 63; *Johnson v Miller* (1937) 59 CLR 467 at 486-487, 501; *John L Pty Ltd v Attorney General (NSW)* (1987) 163 CLR 508 at 519-520; *R v Saffron* (1988) 17 NSWLR 395 at 445.

for the prosecution's obligation to give pre-trial discovery (which is provided by Rule 66 of the Rules) or the names of witnesses (which is provided by Rule 67 of the Rules).[20] There is thus a clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery).

13. But, even recognising that distinction, the indictment as presently drafted gives the accused no idea at all of the nature and cause of the charges against him so far as they are based upon his individual responsibility – either by way of personal participation or as aiding and abetting those who did so participate. It is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.[21] What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.[22]

14. The prosecution has already given pre-trial discovery of all the supporting material which accompanied the indictment when confirmation was sought.[23] It has not yet provided the accused with translated witness statements.[24] It submits that the supporting material "should" supply all necessary details as to the nature of the case to be made against the accused sufficient to enable him to prepare his defence, so that there is no need to amend the indictment.[25] Reliance is placed upon the decision of the ICTR in *Prosecutor v Nyiramashuko*[26] as supporting that proposition. What the ICTR said was:

> "Whilst it is essential to read the indictment together with the supporting material, the indictment *on its own* must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance."[27]

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20 *Prosecutor v Delalić*, Case No IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars, 26 June 1996, paras 9-10.

21 The prosecution has suggested that the decision in *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 32, has said to the contrary, but that is not correct. That decision makes it clear that the accused must be able to prepare his defence on "either or *both* alternatives" (emphasis added).

22 *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, para 12; *Prosecutor v Djukić*, Case No IT-96-20-T, Decision on Preliminary Motion of the Accused, 26 Apr 1996, para 18.

23 Rule 66(A)(i).

24 Rule 66(A)(ii).

25 Paragraph 15 of the Response. The proposition is repeated in para 6 of the Further Response.

26 Case ICTR-97-21-I, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, 4 Sept 1998.

27 (Paragraph 13). The emphasis has been supplied.

15. It is true that, in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation. It has not been shown to be the case here. Indeed, the lack of particularity in the indictment strongly suggests that the prosecution does not have statements which fall within that limited class of case. It is not clear from the judgment of the ICTR in *Prosecutor v Nyiramashuko* whether that case fell within such a limited class, but this Trial Chamber does not accept any interpretation of the ICTR decision which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment, except in the limited class of case to which reference has already been made.

16. Where the discovered material does not cure the imprecision in the indictment, the dangers of an imprecise indictment remain – such as in relation to subsequent pleas of *autrefois acquit* and *autrefois convict*.[28] The prosecution has not established that the discovered material does cure these imprecisions.

17. The prosecution is therefore required to amend the indictment so as to identify, *in relation to each count or group of counts*, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged. The complaints by the accused in relation to the particulars of his responsibility as a superior will be dealt with separately.

V Particularity in pleading – responsibility as a superior

18. In relation to the allegation that the accused was in a position of superior authority,[29] the accused requires the prosecution to identify with precision the "grounds" for the allegations made that, "at the critical time", he was "the head of the KPD FOCA and in a superior position to

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[28] See, generally, *Connelly v DPP* [1964] AC 1254 at 1301-1302, 1339-1340, 1364, 1368; *Rogers v The Queen* (1994) 181 CLR 251 at 256; and *R v Beedie* [1998] QB 356 at 361.

[29] Paragraph 3.1 of the indictment.

everybody in the detention camp" and "the person responsible for the functioning of the KPD FOCA as a detention camp".[30] The indictment identifies the relevant time as being from April 1992 until at least August 1993. The statements quoted by the accused are to some extent inaccurately transcribed, and in one aspect significantly so. They are also taken out of context. Paragraph 3.1 in its entirety is in the following terms:

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> SUPERIOR AUTHORITY
>
> 3.1 From April 1992 until at least August 1993, MILORAD KRNOJELAC was the commander of the KP Dom and was in a position of superior authority to everyone in the camp. As commander of the KP Dom, MILORAD KRNOJELAC was the person responsible for running the Foča KP Dom as a detention camp. MILORAD KRNOJELAC exercised powers and duties consistent with his superior position. He ordered and supervised the prison staff on a daily basis. He communicated with military and political authorities from outside the prison. MILORAD KRNOJELAC was present when detainees arrived, appeared during beatings, and had personal contact with some detainees.

19. The accused's argument fails once the actual wording of the paragraph itself is considered. To describe the accused as the "commander" of a camp – the word "commander" is significantly omitted in the statements quoted by the accused – is sufficient "ground" for asserting that he was superior to everyone else and that he was responsible for the functioning of the camp. Even if it were not, the allegations made in the remainder of the paragraph provide sufficient "ground" for asserting that the accused was in a position of superior authority as part of the basis for making him criminally responsible in accordance with Art 7(3). The manner in which these material facts are to be proved is a matter of evidence and thus for pre-trial discovery, not pleading.

20. The accused's second argument is that particular precision is required in relation to these assertions because, he says, at the relevant time the Foča KP Dom in fact consisted of two institutions – one which was under the control of the army and used for detaining war prisoners, and the other a civil correction centre. It is said that the accused will prove that he was the "head" of the second such institution, but that he had "no competence" in relation to the first. This argument also fails. An objection to the form of an indictment is not an appropriate proceeding for contesting the accuracy of the facts pleaded.[31] The prosecution's obligation is to establish the fact alleged in the indictment, that the accused was "the person responsible for running the Foča KP Dom as a detention camp". Its obligation to eliminate any reasonable doubt as to that fact arises only when

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30 Paragraph 9 of the Motion.

31 *Prosecutor v Delalić*, Case No IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars, 26 June 1996, paras 7-8; *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20; and *Prosecutor v Kupreškić*, Case No IT-95-16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatko Kupreškić, 11 Aug 1998, p 2.

the material giving rise to such a doubt appears in the evidence; it does not have to eliminate some possibility merely suggested during the course of argument,[32] still less does it have to plead the evidence by which it will do so.

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21. The accused's complaint is rejected.

VI Complaints as to imprecision in the indictment

22. The accused complains of the imprecision of a number of allegations made in the indictment.[33] There is some merit in that complaint, although the details of that complaint provided in his Motion demonstrates at times a misunderstanding of the distinction between the material facts which must be pleaded and the evidence which must be disclosed by way of pre-trial discovery. It is necessary to deal separately with each of these complaints of imprecision.

23. Under the heading "Background", the indictment asserts that "[m]ost, if not all" of the detainees in the Foča KP Dom were "civilians, who had not been charged with any crime".[34] The purpose of this allegation is to demonstrate that such detainees were persons protected by the Fourth Geneva Convention of 1949, an allegation made expressly in para 4.3, and thus relevant to the International Tribunal's jurisdiction to try the charges made under Art 2 of its Statute.

24. The accused complains that he has not been informed of the identity of the detainees who were *not* civilians, which identity, it is said, is an important matter in relation to his responsibility under Art 2.[35] The prosecution, however, does not have to establish who were *not* civilians; it has to establish that the detainees who are alleged to be the victims of the offences charged under Art 2 *were* civilians. The allegations under the heading "Background" are in any event intended only to place in their context the material facts which are alleged in the indictment when dealing with each count or group of counts. It is in relation to those material facts, rather than the background facts of a general nature only, that the accused is entitled to proper particularity.[36]

25. This complaint is rejected.

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32 *R v Youssef* (1990) 50 A Crim R 1 at 2-3 (NSW CCA).
33 Paragraph 14 of the Motion.
34 Paragraph 1.3 of the indictment.
35 Paragraph 15 of the Motion.
36 cf *Prosecutor v Kunarac*, Case No IT-96-23-PT, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 Oct 1998, p 1.

26. The accused also complains of what is said to be an inconsistency between this assertion that "[m]ost if not all" of the detainees were "civilians, who had not been charged with any crime" (to which reference has already been made) and the assertion (made later in the indictment)[37] that torture had been applied to these detainees in order to obtain a confession from them or to punish them for acts which they had committed.[38] But there is no suggestion in the later assertion that the persons who had been tortured were being detained as a result of some legal process following formal charges laid against them. Indeed, the assertion assumes the absence of any proper legal process.

27. This complaint is also rejected.

28. The accused complains[39] of what is said to be an inconsistency between the allegation that he was the commander of the Foča KP Dom "from April 1992 until at least August 1993" (made in paras 2.1 and 3.1 of the indictment) and that made in para 4.5 of the indictment:

> All acts and omissions alleged in this indictment took place between April 1992 and October 1994, unless otherwise indicated.

If the reference to "at least" August 1993 is intended to permit the prosecution to prove that the accused was such commander at any time after that date, the accused is left without any real assistance as to the nature of the prosecution case upon an important material fact. The prosecution is directed to amend paras 2.1 and 3.1 of the indictment by deleting the words "at least" in each paragraph.

29. Upon the assumption that the words "at least" are deleted, there can be an inconsistency between these allegations only if it is assumed that all the offences charged took place at a time when the accused was the commander of the camp. As a matter of *form*, that assumption cannot be made, as the accused is charged with individual responsibility as well as responsibility as a superior. Nevertheless, para 4.9 of the indictment expressly limits the individual responsibility of the accused to the same period ending August 1993, so that it is clear as a matter of *substance* that, if the accused is being charged in the alternative upon both bases in relation to each count,[40] there is no room for an interpretation of the indictment as alleging *any* responsibility on the part of the accused in relation to events which took place after he ceased to be the commander of the Foča KP Dom.

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37 Paragraph 4.6 of the indictment.
38 Paragraph 15 of the Motion.
39 Paragraph 16 of the Motion.
40 See paras 3-4, *supra*.

30. The prosecution says that the references in the indictment to the longer period are intended to reflect the responsibilities of others indicted with the accused but whose names remain under seal. The current redacted form of the indictment is thus unintentionally misleading, but the prosecution has now conceded that, so far as *this* accused is concerned, para 4.5 of the indictment should be treated as having been limited to the period ending August 1993. There are appears to be some similar inconsistencies in the indictment, at paras 5.16, 5.30 and 5.36, and the prosecution is directed to make similar concessions in relation to the periods upon which it relies so far as this accused is concerned.

31. A new complaint by the accused, made for the first time in the Reply, is that the allegation that he was the commander of the Foča KP Dom "from April 1992 until [...] August 1993" (made in paras 2.1 and 3.1 of the indictment, and to which reference was made when dealing with the last complaint) is in any event imprecise because the specific date in April upon which he became such commander is not stated.[41] He draws attention to a particular event which is stated in para 5.6 of the indictment to have occurred on 17 April, and he claims not to know whether he is alleged to be responsible for that event as a superior.

32. That complaint is answered once more by paras 4.9 and 4.10 being read distributively as applying to all counts in the indictment. The prosecution does not have to establish the date upon which the accused became commander of the Foča KP Dom. The only fair interpretation of the allegation in question is that the accused is alleged to have been such commander during the period from the beginning of April 1992 until the end of August 1993. It will be sufficient for the prosecution to establish that he was such commander at the time of the various incidents which are alleged to have taken place during that period and of any other incidents upon which the prosecution may rely to establish his responsibility as a superior. In any event, the prosecution now says[42] that the earliest date upon which its best available evidence shows the accused to be the "head" of the Foča KP Dom is 18 April 1992, so that – unless evidence not currently available to it shows otherwise – it will not attribute to the accused any criminal conduct earlier than that date (including the event described in para 5.6 of the indictment).

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41 Paragraph 12 of the Reply.
42 Paragraph 4 of the Further Response.

33. The accused complains[43] of the inclusion of the words "aiding and abetting" in para 4.9 of the redacted indictment, which falls under the heading "General Allegations" and which alleges: 963

> 4.9 **MILORAD KRNOJELAC**, from April 1992 until August 1993, and others are individually responsible for the crimes charged against them in this indictment, pursuant to Article 7 (1) of the Statute of the Tribunal. Individual criminal responsibility includes committing, planning, initiating, ordering or aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below.

The accused says that the words "aiding and abetting" do not provide sufficient clarity as to the case which he has to meet.

34. The concept of individual responsibility by way of aiding and abetting in the commission of an offence by others was extensively discussed recently in *Prosecutor v Furundžija*,[44] and the concept itself cannot be said to be unclear. The Trial Chamber has already determined in this present decision that the accused is entitled to particulars of the material facts (but not the evidence) upon which the prosecution relies to establish the individual responsibility of the accused for each offence or group of offences charged.[45] Such particulars must necessarily demonstrate the basis upon which it is alleged that the accused aided and abetted those who personally participated in each of the offences charged.

35. This complaint is rejected.

36. The accused complains[46] that the indictment fails in many instances to identify even the approximate time when the various offences are alleged to have occurred.[47] The prosecution submits that, because the charges concern events which took place over a specified period in the conduct of a detention center, it is not obliged to provide information as to the identity of the victim, the specific area where and the approximate date when the events are alleged to have taken place or (where the accused is charged with responsibility as a superior or as aiding and abetting rather than as having personally participated in those events) the identity of the persons who did personally participate in those events.

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43 Paragraph 23 of the Reply. This complaint replaces that originally made in para 17 of the Motion.

44 Case No IT-95-17/1-T, Judgment, 10 Dec 1998, paras 190-249. The legal ingredients to be established by the prosecution are stated in para 249.

45 Paragraphs 13 and 17, *supra*.

46 Paragraph 19 of the Motion.

47 See *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20, referred to in para 12, *supra*.

37. On the face of it, the stand taken by the prosecution is directly contrary to its obligations as to pleading an indictment as imposed by the Statute and the Rules, to which reference has already been made,[48] as interpreted by the Trial Chamber in *Prosecutor v Blaškić*.[49] The prosecution nevertheless relies upon the decision of the Trial Chamber in *Prosecutor v Aleksovski*[50] as justifying its stand.

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38. According to that decision, the indictment charged Aleksovski in relation to certain events which occurred in the Kaonik prison while he was responsible for it. The indictment identified a period of five months during which it was alleged that he was so responsible. It is apparent from the decision that the indictment did not identify either the place or the approximate date of the events which are alleged to have occurred. The Trial Chamber stated:[51]

> The time period – the first five months of 1993 – is sufficiently circumscribed and permits the accused to organise his defence with full knowledge of what he was doing. It follows that, because it specifies the overall period during which the crimes were allegedly committed, the indictment does not violate the rules governing the presentation of the charges.

Insofar as that decision supports the submission of the prosecution, that it is not obliged to provide the information referred to in the paragraph before last, there are two observations to be made about it. The first is that it is no answer to a request for particulars that the accused knows the facts for himself; the issue in relation to particulars is not whether the accused knows the true facts but, rather, whether he knows what facts are to be alleged against him.[52] It cannot be assumed that the two are the same. The second observation is that what the accused needs to know is not only what is to be alleged to have been his own conduct giving rise to his responsibility as a superior but also what is to be alleged to have been the conduct of those persons for which he is alleged to be responsible as such a superior. Only in that way can the accused know the "nature and cause of the charge against him".[53] With great respect to the Trial Chamber in *Aleksovski*, this Trial Chamber is unable to agree with the decision insofar as it supports the prosecution's submission.

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48 See para 12, *supra*.

49 Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20.

50 Case No IT-95-14/1-PT, Decision of Trial Chamber I on the Defence Motion of 19 June 1997 in Respect of Defects in the Form of the Indictment, 25 Sept 1997, para 11.

51 Paragraph 11.

52 This is a matter of fairness, and has been recognised in many cases in common law jurisdictions: *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 413; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at 229; *Philliponi v Leithead* (1959) SR (NSW) 352 at 358-359; *Bailey v FCT* (1977) 136 CLR 214 at 219, 220.

53 Article 21(4)(a) of the Statute.

39. In any event, the accused in the present case is also charged upon the alternative basis of his own individual participation in these events. Particulars must be supplied which enable the accused to know the nature of the case which he must meet upon that basis. 965

40. It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair.[54] The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.

41. In some jurisdictions, a procedure has been adopted of permitting an oral examination and cross-examination of a witness prior to the trial by counsel in the case (who are less restricted in their scope for questioning than police officers or other investigators), in an endeavour to elicit from the witness sufficient information to cure the prejudice which would otherwise exist.[55] But it is necessary first to determine whether the prosecution is able to give better particulars.

42. The complaint by the accused is at this stage upheld, and the prosecution is required to identify in the indictment the approximate time when each offence is alleged to have taken place. Obviously, there will be cases where the identification cannot be of a specific date, but a reasonable range should be specified. The period of April 1992 to August 1993 would *not* be a reasonable period.

43. The accused has also suggested that greater precision than usual will be required in specifying these times in relation to the offences based upon Art 2 of the Statute because the period

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54 See, for example, *S v The Queen* (1989) 168 CLR 266 at 275 (that case was primarily concerned with the situation where there had been sexual assaults over a long period of time, and where the prosecution had failed to identify from that course of conduct the particular assaults upon which the three counts had been based, but the principle remains the same); *R v Kennedy* (1997) 94 A Crim R 341 (NSW CCA).

55 The procedure is examined in some detail in two New South Wales cases: *R v Basha* (1989) 39 A Crim R 337 at 339-340 (NSW CCA); *R v Sandford* (1994) 33 NSWLR 172 at 180-181 (NSW CCA).

from April 1992 to August 1993 straddles the period of May 1992 when – so it was found by the Trial Chamber in *Prosecutor v Tadić* – the conflict ceased to be an international one in the relevant area.[56] However, that finding was one of fact only, made upon the evidence presented in that trial and in proceedings between different parties. It cannot amount to a *res judicata* binding the Trial Chamber in this trial.[57] In the Čelebići case, for example, it was held that the conflict in that area continued to be international in character for the rest of 1992.[58] It is clear that it is for the Trial Chamber in each individual trial to determine this issue for itself upon the evidence given in that trial. That is not an issue of fact which can be resolved at this stage.

44. When identifying the facts by which Counts 2 to 7 are to be proved,[59] the indictment, under the general heading "Beatings in the Prison Yard", has alleged as facts:

> 5.4 On their arrival in the prison and/or during their confinement, many detainees of the KP Dom were beaten on numerous occasions by the prison guards or by soldiers in the presence of regular prison personnel.
>
> 5.5 On several occasions between April and December 1992, soldiers approached and beat detainees in the prison yard, among them FWS-137, while guards watched without interfering.

The accused asserts that it is unclear whether the case against him is to be that it was the guards or the soldiers who were the perpetrators, and that, if the former, the reference to regular prison personnel is unclear.[60]

45. It is reasonably clear that the prosecution here is relying upon a number of beatings at different times – some by the prison guards, and some by soldiers in the presence of regular prison personnel. The significance of the presence of the regular prison personnel and their inaction at the time is that the beatings by the soldiers were being at least condoned, and perhaps also encouraged, by the regular prison personnel. This in turn suggests that the infliction of such beatings, either by the prison guards or by the soldiers, was a course of conduct approved by the accused as the person in command of the prison.

46. But, if these two paragraphs were intended to stand alone, the prosecution has failed to give the accused any idea at all of the basis of its case. The accused is entitled to know where and

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56 Case No IT-94-1-T, Judgment, 7 May 1997, para 607.

57 *Prosecutor v Delalić*, Case No IT-96-21-T, Judgment, 16 Nov 1998, para 228. See also *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 28.

58 *Prosecutor v Delalić*, Case IT-96-21-T, Judgment, 16 Nov 1998, par 234.

59 They charge crimes against humanity (torture and inhumane acts), grave breaches of the Geneva Conventions (torture and wilfully causing serious injury to body or health) and violations of the laws or customs of war (torture and cruel treatment).

60 Paragraphs 20-21 of the Motion.

approximately when these beatings occurred and the identity of the prison guards, the soldiers and the regular prison personnel. The accused has very properly conceded that, if the prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their "category" (or their official position) as a group.[61]

47. Paragraphs 5.6 to 5.9 of the indictment go on to allege facts with a reasonable degree of particularity, and it may be that the prosecution intended paras 5.4 and 5.5 to be merely descriptive in general terms of what follows in those paragraphs. If that is so, this should be made clear. Better still, paras 5.4 and 5.5 should be either deleted or incorporated in the later paragraphs.

48. The complaint as to imprecision is upheld, and the prosecution is directed to amend paras 5.4 and 5.5 of the indictment accordingly.

49. Paragraph 5.15 of the indictment, under a general heading of "Torture and Beatings as Punishment", alleges as facts to be proved:

> 5.15 In the summer of 1992, the detainees AM, FM, HT and S, who passed messages to one another, were beaten by guards as a punishment.

The accused complains, again with some justification, that the prosecution should plead with more particularity than this.[62] The period specified is far too wide, and there is no specification as to whether this happened on one occasion or on different occasions, where and approximately when it happened or the identity of the guards concerned (at least by reference to their category or position as a group).

50. The prosecution is therefore ordered to amend the indictment in order to provide such further and better particulars of the allegation in para 5.15.

51. Paragraph 5.16 of the indictment refers in general terms (and without any particularity) to detainees being subjected to collective punishment for the misdeeds of individual detainees. It then identifies one such incident which is alleged to have occurred in June 1994. If the general allegation is intended to stand alone, it gives the accused no idea at all as to the nature of the case against him.[63] If it is intended to be merely be descriptive in general terms of what follows, then the date is outside the period during which the accused is alleged to have been the commander of the

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61 Paragraphs 20 and 22 of the Reply.
62 Paragraph 22 of the Motion.
63 Paragraph 23 of the Motion.

Foča KP Dom and outside the period identified as that during which he is alleged to have an individual responsibility for the offences alleged. One or the other has to be amended so far as this accused is concerned. The prosecution is directed to amend par 5.16 of the indictment.

52. Paragraph 5.17 of the indictment reads:

> 5.17 Policemen from the local or the military police, in concert with the prison authorities, interrogated the detainees after their arrival. [...] During or after the interrogation, the guards and others often beat the detainees.

The accused complains that it is not clear what was intended by the reference to "others" in the second sentence.[64] It seems that it was intended to refer to the policemen from the local or military police who also took part in the interrogations but, if this were not intended, the allegation should be made clear. The prosecution is directed to amend para 5.17 accordingly.

53. Paragraph 5.21 of the indictment alleges that the accused participated in concert with political leaders or military commanders in the selection of detainees to be beaten. Those selected are alleged to have been taken for interrogation and then beaten. The indictment then alleges:

> Some of the detainees returned to their rooms severely injured. Some of the detainees were selected for beatings several times. A substantial number of the selected detainees never returned from the beatings and are still missing.

The accused submits that the last sentence renders his defence impossible, because he is not made aware of the identity of those still missing, when they were beaten up and whether the beating is alleged to have a direct bearing upon their disappearance.[65]

54. The indictment does assert, in the same paragraph, that:

> The selected detainees were mostly prominent inhabitants of Foča, who were suspected of not having told the truth during the official interrogations, who were accused of possessing weapons, or who were members of the SDA.

This assertion provides insufficient information as to the identity of the detainees involved. The prosecution is, however, entitled to ask the International Tribunal to infer that the beatings led directly to the disappearance, and it is not to the point at the pleading stage that, as the accused suggests, there may be the possibility that the detainees were "exchanged" (or, as was probably intended, transferred).

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[64] Paragraph 24 of the Motion.
[65] Paragraph 25 of the Motion.

55. The accused is nevertheless entitled to particulars of those beaten, those who disappeared, approximately when the beatings occurred and by whom. In each case, those persons should be identified at least by reference to their category (or position) as a group. The complaint as to imprecision is upheld, and the prosecution is directed to amend the indictment accordingly. 969

56. Paragraphs 5.27-28 allege:

> 5.27 Between June and August 1992, the KP Dom guards increased the number of interrogations and beatings. During this period, guards selected groups of detainees and took them, one by one, into a room in the administration building. In this room, the guards often would chain the detainee, with his arms and legs spread, before beating him. The guards kicked and beat each detainee with rubber batons, axe-handles and fists. During the beatings, the guards asked the detainees where they had hidden their weapons or about their knowledge of other persons. After some of the beatings, the guards threw the detainees on blankets, wrapped them up and dragged them out of the administration building.
>
> 5.28 An unknown number of the tortured and beaten detainees died during these incidents. Some of those still alive after the beatings were shot or died from their injuries in the solitary confinement cells. The beatings and torture resulted, at least, in the death of the detainees listed in Schedule A to this indictment.

Twenty-nine names are listed in the schedule.

57. The accused says in effect that, by dividing these allegations into two paragraphs, the prosecution fails to link the allegations in para 5.27 with the charge of murder (as a crime against humanity and as a violation of the laws and customs of war), whilst para 5.28 contains no detail in relation to the detainees who died.[66] There is no basis for this complaint. If the accused had complained to the prosecution *before* seeking relief by way of motion, as he should have, the answer would simply have been that the two paragraphs should be read together. That is necessarily self-evident.

58. The accused is, however, justified in his complaint as to the lack of precision even when the two paragraphs are read together. The complaint that, because the prosecution is unable to state the number of detainees who died, the accused cannot defend himself is nevertheless rejected. The prosecution must provide some identification of who died (at least by reference to their category or position as a group), and it is directed to amend the indictment accordingly. If its case is to be that the detainees which it identifies died, and also that a number of other persons died whom it is unable to identify, the charge would nevertheless be sufficiently pleaded in the circumstances of this case once those particulars have been included in the indictment.

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[66] Paragraph 26 of the Motion.

59. Counts 11-15 of the indictment allege, *inter alia*, that the conditions under which the detainees were kept at the Foča KP Dom were inhumane. The accused complains that the generality of the allegations in the indictment that "the health of many detainees was destroyed" and that "some became suicidal, while others simply became indifferent as to what would happen to them" denies to him the opportunity of proving, for example, that this was no more than a consequence which typically manifests itself in detainees.[67] 970

60. There is, of course, no onus of proof upon the accused to prove anything, but even a complaint that the accused has been completely denied the opportunity of investigating the allegations must be rejected when the context in which these two allegations appear in the indictment:

> 5.32 During their confinement, the detainees were locked in their cells, except when they were lined up and taken to the mess to eat or to work duties. After April 1992, the cells were overcrowded, with insufficient facilities for bedding and personal hygiene. The detainees were fed starvation rations. They had no change of clothes. During the winter they had no heating. They received no proper medical care. As a result of the living conditions in the KP Dom, the health of many detainees was destroyed. Due to the lack of proper medical treatment, the 40-year old detainee, Enes Hadžić, died in April or May 1992 from a perforated ulcer.
>
> 5.33 Torture, beatings and killings were commonplace in the KP Dom prison. The detainees could hear the sounds of the torture and beatings. The detainees lived in constant fear that they would be next. The detainees kept in solitary confinement were terrified because the solitary confinement cells were generally known to be used for severe assaults. Because all detainees lived in a constant state of fear, some became suicidal, while others simply became indifferent as to what would happen to them. Most, if not all of the detainees, suffered from depression and still bear the physical and psychological wounds resulting from their confinement at KP Dom.

There is thus a clear causal connection asserted by the prosecution. That said, however, the allegations are insufficiently precise as to where and approximately when the torture, the beatings and the killings took place and who was individually responsible for that conduct (at least by reference to their category or position as a group). If the prosecution is able to do so, particulars as to who (other than Enes Hadžić) were the victims, should be supplied but, if the events themselves are sufficiently identified, the names of the victims are of less importance.

61. The prosecution is ordered to provide such particulars.

62. Both para 5.36 of the indictment expressly, and para 5.37 by implication, assert either individual responsibility or responsibility as a superior on the part of the accused for offences which took place in 1994 – that is, after the period from April 1992 to August 1993 limited by the general allegations in the earlier part of the indictment for such responsibility. The prosecution must

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[67] Paragraph 27 of the Motion.

concede that, so far as *this* accused is concerned, these allegations are limited to that period ending August 1993.

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63. The accused also points to the absence of any identification of time in para 5.39 of the indictment (which falls within the same group of charges alleging enslavement as paras 5.36-37), and requires particulars.[68] The prosecution is directed to amend the indictment so as to provide such particulars.

VII Application for oral argument

64. In his Preliminary Motion on the Form of the Indictment, in his Motion to file a Reply to the prosecution's Response to the Preliminary Motion, and in a separate request following the filing of the prosecution's Further Response, the accused sought leave to make oral submissions. He did so because the Trial Chamber, in its Order for Filing of Motions,[69] ordered that there will be no oral argument on any motion unless specifically requested by counsel for either party and approved by the Trial Chamber, taking into account the need to ensure a fair and expeditious trial.

65. The general practice of the International Tribunal is not to hear oral argument on such motions prior to the trial unless good reason is shown for its need in the particular case. That general practice is soundly based upon the peculiar circumstances in which the International Tribunal operates, in that counsel appearing for accused persons before it invariably have to travel long distances from where they ordinarily practise in order to appear for such oral argument; counsel appearing for the prosecution are often appearing in other trials currently being heard; and the judges comprising the Trial Chamber in question are usually engaged in other trials at the time when the motion has to be determined.

66. Counsel for the accused has not identified any particular issues upon which he wishes to put oral arguments or explained why he was unable to put those arguments in writing. In his most recent request, Counsel for the accused has sought to justify oral submissions upon the basis that the prosecution's Further Response has failed to respond, or has responded in a contradictory and insufficient way, to the submissions which he had put in support of the accused's Motion. Insofar as that very general assertion may be accurate, it is well within the competence of the judges of the International Tribunal to see that fact for themselves.

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[68] Paragraphs 28-29 of the Motion.
[69] The order is dated 17 June 1998.

67. Having regard to the very extensive written submissions already put forward by counsel for the accused, and the need to ensure a fair and expeditious trial, the Trial Chamber is not persuaded of the need for oral argument in this case.

68. The application is refused.

VIII Disposition

FOR THE FOREGOING REASONS, Trial Chamber II decides that –

(1) the Motion is granted, with regards to and as set out in paras 17, 28, 30, 39, 42, 46-48, 49-50, 51, 52, 55, 58, 60-61, 62 and 63 of this decision. The Prosecutor is directed to amend the indictment accordingly and to file and serve an amended indictment on or before 26 March 1999; and

(2) the Motion is rejected, including the application for oral argument, with regards to and as set out in the remainder of this decision.

Done in English and French, the English version being authoritative.

Done this 24th day of February 1999
At The Hague
The Netherlands

David Hunt
Presiding Judge

[Seal of the Tribunal]

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PROSECUTION INDEX OF AUTHORITIES

ANNEX XII

Prosecutor v. Kvocka et al., Decision on Prosecution's Motion to Strike Portion of Reply, Case No. IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002

IN THE APPEALS CHAMBER

Before: Pre-Appeal Judge, Judge David Hunt

Registrar: Mr Hans Holthuis

Decision of: 30 September 2002

PROSECUTOR
v
Miroslav KVOCKA
Milojica KOS
Mladjo RADIC
Zoran ZIGIC
Dragoljub PRCAC

DECISION ON PROSECUTION'S MOTION TO STRIKE PORTION OF REPLY

Counsel for the Prosecutor:

Ms Susan L Somers for the Prosecutor

Counsel for the Defence:

Mr Slobodan Stojanovic for Zoran Zigic

I, Judge David Hunt, Pre-Appeal Judge,

NOTING Zoran Zigic's confidential "Motion to Present Additional Evidence", filed on 23 August 2002 ("Motion");

NOTING the "Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 9 September 2002;

NOTING paragraphs 33 and 34 of Zigic's confidential "Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 23 September 2002 ("Zigic's Reply"), where he refers to and summarises the statement of Faruk Hrncic ("Hrncic") a witness which he wishes to call;

BEING SEISED OF "Prosecution's Motion to Strike Portion of Zigic's Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 26 September 2002, whereby the prosecution requests that paragraphs 33 and 34 of Zigic's Reply be struck out on the basis that these two paragraphs go beyond the proper scope and ambit of a reply;

NOTING Zigic's "Reply to Prosecution's Motion to Strike Portion of Zigic's Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed confidentially on 30 September 2002;

NOTING that Zigic complains in his Motion that certain alleged eyewitness to the murder of Becir Medunjanin for which he was convicted were not called at trial, although available, but he does not identify Hrncic as one of those witnesses;

NOTING that Zigic submits in his Reply for the first time that the prosecution refused to help him at the trial to call five witnesses[1] and that he identifies in his Reply also for the first time that one of them, Hrncic, should now be called "in the interests of justice";[2]

CONSIDERING that the letter of the prosecution's Senior Trial Attorney dated 25 October 2000 to which Zigic referred in his Motion was put forward by him as being itself evidence which he sought to have admitted in evidence;[3]

CONSIDERING, therefore, that paragraphs 33 and 34 of Zigic's Reply contain new material going beyond the scope of what is permissible to include in a reply;

HEREBY GRANT the motion and **ORDER** that paragraphs 33 and 34 be struck out of Zigic's Reply.

NOTING, however, that if he decides to pursue the matter further, Zigic may seek leave to add the content of those paragraphs to his original Motion. If he does so, the prosecution will have the right to file a further response to it.

Done in English and French, the English text being authoritative.

Dated this 30th day of September 2002,
At The Hague,
The Netherlands.

_____
David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]

1 - Motion, page 6 and letter annexed in the Motion.
2 - Motion, page 2.
3 - Letter annexed in the Motion.