SCSL-2003-07-PT- 05D (669-889)

05D

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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: 23 June 2003

THE PROSECUTOR

Against

MORRIS KALLON also known as (aka) BILAI KARIM

CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE FIRST DEFENCE PRELIMINARY MOTION (LOMÉ AGREEMENT)

Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Luc Côté, Chief of Prosecutions
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Mr James Oury
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SPECIAL COURT FOR SIERRA LEONE
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CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE FIRST DEFENCE PRELIMINARY MOTION (LOMÉ AGREEMENT)

I. INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord" (the "**First Preliminary Motion**"), filed on behalf of Morris Kallon (the "**Accused**") on 16 June 2003.[1]

2. The First Preliminary Motion argues essentially that the Special Court lacks jurisdiction to prosecute crimes pre-dating the date of signature of the Lomé Agreement (7 July 1999), as Article IX of the Lomé Agreement granted an amnesty for these crimes. Further, the Defence argues that it would be an abuse of process of the Special Court to permit the prosecution of the Accused for the crimes pre-dating 7 July 1999 for which he had been granted an amnesty. For the reasons given below, the First Preliminary Motion should be dismissed in its entirety.

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[1] Registry Page ("RP") 625-635.

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II. ARGUMENT

A. The Court is bound by its Statute

3. The Special Court for Sierra Leone enjoys a treaty-based international jurisdiction stemming from the Agreement between the United Nations and the Government of Sierra Leone.[2] The Statute of the Special Court (the "**Statute**"), which forms part of that Agreement, determines the parameters of the Special Court's jurisdiction, and governs the exercise thereof. The Special Court for Sierra Leone is bound to comply with the provisions of its Statute.

4. Article 10 of the Statute of the Court expressly provides that "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution." Accordingly, even if Article IX of the Lomé Agreement purported to be a legal bar to the prosecution of a person by the Special Court for crimes under Articles 2-4 of the Statute (which for the reasons given below, it does not and could not), the Special Court would be bound to apply the express provision in Article 10 of its Statute. The First Preliminary Motion does not provide a claim in law capable of being recognized by the Special Court.

B. Domestic law does not prevail over treaty provisions

5. The Lomé Agreement[3] is not a treaty under international law,[4] but an agreement signed between two national bodies—the Government of Sierra Leone and the RUF. Others who signed the Agreement were not parties to it, but merely signed as "moral guarantors" or as international organizations and governments who were "facilitating and supporting" the conclusion of the Agreement.[5] The Lomé Agreement thus has no

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

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

[4] Article 2 of the Vienna Convention of the Law of Treaties defines a "treaty" as "an international agreement concluded *between States* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Emphasis added). The Lomé Agreement is patently not an international treaty, and the reference in the Lomé Ratification Act to section 40(4) of the Sierra Leone Constitution cannot transform it into an international treaty.

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

force under international law. It had no legal basis at all until the Lomé Peace Agreement (Ratification) Act 1999 (the "**Lomé Ratification Act**") was enacted by the Sierra Leone Parliament, and even then its basis was limited to domestic law.

6. The Prosecution submits that even if there is a conflict between Sierra Leone's domestic law and the Special Court's Statute (and this is in no way conceded by the Prosecution), domestic law cannot be invoked to invalidate a properly concluded treaty such as the Special Court Agreement concluded between the United Nations and Sierra Leone. Therefore the Lomé Ratification Act, a national Statute, cannot be invoked to invalidate the provisions of the said treaty.

7. Article 27(1) of the 1969 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations 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.

Article 46 of that Convention 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.
>
> ...
>
> 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.

8. Materially identical provision is made in Articles 27 and 46 of the 1969 Vienna Convention on the Law of Treaties. Although Sierra Leone is not a party to either of these two Vienna Conventions,[6] their provisions reflect customary international law.[7]

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[6] 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.

[7] See Aust, *Modern Treaty Law and Practice* (2000), p. 10-11 ("When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the [Vienna] Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it ... In its 1997 *Gabcikovo* judgment ... the [International] Court [of Justice] ... applied Articles 60-62 as reflecting customary law, even though they had been considered rather controversial. ... [I]t is reasonable to assume that the Court will take the same approach in respect of virtually all of the substantive provisions of the Convention. There

9. In the present case, even if it is assumed for the sake of argument that the consent of the Government of Sierra Leone to be bound by the Special Court Agreement was expressed in violation of the Lomé Ratification Act (and this is in no way conceded by the Prosecution), that Act was not a provision of Sierra Leone's internal law "regarding competence to conclude treaties" for the purposes of Article 46 of the two Vienna Conventions. It certainly cannot be said that there has been any "*manifest*" breach of a provision of Sierra Leone's internal law regarding competence to conclude treaties.

C. The Lomé Agreement is no longer effective even in domestic law

10. Even if the Lomé Ratification Act, a national statute, somehow had some legal effect in the legal system of the Special Court (and for the reasons given above, it does not), the amnesty provision in that domestic statute, insofar as it could affect proceedings before the Special Court, was repealed as a matter of national law on 7 March 2002 by the passage through Parliament of the Special Court (Ratification) Act 2002 (the "**Implementing Legislation**"). The Implementing Legislation is an act subsequent to the Lomé Ratification Act which therefore supersedes and replaces the terms of the Lomé Ratification Act to the extent that the two acts are inconsistent. Based on the doctrine of subsequent legislation,[8] if a later enactment is inconsistent with the provisions of an earlier enactment, those provisions of the earlier enactment are impliedly, even if not expressly, repealed.

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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).

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

D. The Lomé Agreement on its proper construction does not apply

11. Even if Article IX of the Lomé Agreement somehow had some legal effect in the legal system of the Special Court (and for the reasons given above, it does not), that provision of the Lomé Agreement, properly construed, was not intended to cover crimes under Articles 2-4 of the Special Court Statute.

12. At the time of signature of the Lomé Agreement, the Special Representative of the Secretary-General for Sierra Leone appended to his signature on behalf of the United Nations a disclaimer to the effect that the United Nations holds the understanding that the amnesty provision in Article IX of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[9] In other words, this was a statement on behalf of the United Nations of the correct interpretation of that provision. Neither of the parties to the Lomé Agreement, nor any of the international organizations or States represented at the signing, voiced any objection or disagreement with this interpretation at the time, or at any subsequent time. Indeed, in the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations.[10] The inclusion of Article 10 in the Special Court's Statute can itself be seen as additional confirmation of this interpretation.

13. The Prosecution submits that this interpretation is further supported by a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law.[11] The matters referred to in the previous paragraph are themselves a practical example of this norm. Further evidence of this norm can be found in the fact that several international instruments that are closely related to the

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9 See Security Council Resolution 1315 (2000), 14 August 2000, preambular para. 5; 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. 23.

10 See Report of the Secretary-General, para. 24.

11 See, e.g., Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 514-515, indicating that *jus cogens* norms are "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy" (footnotes omitted); Cassese, *International Criminal Law* (2003), p. 316 that "whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe."

issue of crimes against humanity either expressly or impliedly prohibit amnesty.[12] The International Criminal Tribunal for the former Yugoslavia ("**ICTY**") has also declared amnesties for torture void, and has stated that amnesties granted will not receive international recognition.[13] The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone also expressed the view that to the extent that the Lomé Agreement purported to confer an amnesty for serious violations of international humanitarian law, it would be illegal under international law.[14]

14. On this basis, should it be necessary to decide the question, the Prosecution submits that Article IX of the Lomé Agreement must be correctly interpreted as not applying to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. Indeed, it would be open to the Special Court in this case to go further, and to hold that even if Article IX of the Lomé Agreement did purport to apply to such crimes, it would to that extent be illegal under international law, and therefore be of no legal effect.

E. Prosecution by the Special Court would not be an abuse of process

15. The First Preliminary Motion argues[15] that it would be an abuse of process for the Special Court to permit the prosecution of any accused for crimes pre-dating the Lomé Agreement, in breach of the "undertaking" given in Article IX thereof. This argument cannot be sustained, for the same reasons given above. It cannot be an abuse of process for the Special Court not to apply Article IX of the Lomé Agreement in circumstances where the Special Court is bound by the express provisions of Article 10 of its own Statute, and in circumstances where Article IX of the Lomé Agreement (a) is of no effect in international law, (b) has even been repealed as a matter of *national* law to the extent that it could apply to crimes under Articles 2-4 of

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12 Declaration on the Protection of all Persons from Enforced Disappearances, General Assembly Resolution 47/133, 18 December 1992, UN Doc. A/RES/47/133 (1992), Articles 14 and 18; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1965 UNTS 85 (the "Torture Convention").

13 *Prosecutor v. Furundzija, Judgment*, IT-95-17/1, T. Ch., 10 December 1998, paras. 153-157, especially footnote 172 and accompanying text.

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

15 At paras. 15-26.

the Special Court's Statute, and (c) on its correct interpretation does not even apply to crimes under Articles 2-4 of the Special Court's Statute.

16. The First Preliminary Motion relies on a number of English cases which, it says, support the proposition that it *may* be (and not that it *would* be) an abuse of process to prosecute where officials have promised an accused that he or she will not be prosecuted, even if that promise was given without authority or was not given in bad faith.

17. However, abuse of process is a *discretionary* remedy, not only in English law but in other national legal systems and in international criminal law.[16] The First Preliminary Motion itself concedes[17] that "It is accepted that a breach of promise not to prosecute does not necessarily *ipso facto* give rise to abuse", and further acknowledges[18] that "Each case must be considered on its own facts".

18. The factors to be weighed in the exercise of this discretion in English law are set out in *Archbold*.[19] One factor is the length of time that a person is left to believe that he or she will not be prosecuted.[20] In this case, the world was put on notice by the Special Representative of the Secretary-General *at the very moment that the Lomé Agreement was signed* that its Article IX did not apply (or at the very least, might not apply) to serious violations of international humanitarian law. A second factor is the gravity of the crime with which the accused is charged.[21] In this case, the crimes alleged are among the gravest crimes known to humanity. It could well be an abuse if the culprits of such offences against mankind could *not* be brought to account. A third factor is whether or not the accused has acted on the promise of non-

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16 *Barayagwiza v. Prosecutor, Decision*, ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, para. 74 ("It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion"), and paras. 75-76 (referring to cases from England, Jamaica, New Zealand, and the United States of America).

17 At para. 24.

18 At para. 16.

19 See *Archbold Criminal Pleading, Evidence and Practice, 2002* ("*Archbold*"), esp. para. 4-62; *R v. Townsend* [1997] 2 CrAppR 540.

20 *Ibid.*, para. 4-62.

21 *R v. Latif* [1996] 1 WLR 104 ("General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means").

prosecution, for instance, by co-operating with the prosecution to his or her prejudice.[22] In this case, the First Preliminary Motion does not establish that the Accused has in any way acted on any promise of amnesty in the Lomé Agreement or that he has suffered any prejudice as a result.

19. In international criminal law, given the gravity of the crimes in question, the invocation of the abuse of process doctrine will be even more difficult to justify than in national law. The Appeals Chamber of the ICTY has held that "The correct balance must, therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law", and that "the remedy of setting aside jurisdiction will ... usually be disproportionate" and will only be granted in cases where the right of the accused have been "egregiously violated".[23] The Appeals Chamber in that case concluded that "... in cases of crimes such as genocide, crimes against humanity and war crimes which are universally condemned as such ..., courts seem to find in the special character of those offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction".[24] In light of all of the matters referred to above, no egregious violation has been established by the Defence in this case.[25]

III. MISCELLANEOUS MATTERS

A. Reservation of right to join arguments advanced by other accused

20. In paragraphs 27-31 of the First Preliminary Motion, the Defence purports to reserve the right "to adopt such further arguments on this point that are ultimately advanced by other accused" in other cases. As a justification for this, the First Preliminary

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22 *Archbold*, para. 4-62, referring to *R v. Townsend* [1997] 2 CrAppR 540.

23 *Prosecutor v. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest*, IT-94-2-AR73, Appeals Chamber, 5 June 2003, paras. 28-33, esp. paras. 30-31.

24 *Ibid.*, para. 24.

25 Furthermore, and in any event, even assuming, contrary to all of the above arguments, that Article IX of the Lomé Agreement is applicable in these proceedings, that provision confers an amnesty to combatants and collaborators only in respect of "anything done by them in pursuit of their objectives". It could not simply be assumed that proceedings in this case are barred by this provision. The burden would be on the Defence to establish that the acts for which the Accused is charged were performed by him "in pursuit of ... [the] objectives" of the combatants and collaborators. The First Preliminary Motion does not even address this question. A further question which would need to be addressed is whether Lomé Agreement was subsequently vitiated though the commission of material breaches of it by the RUF.

Motion argues that as a consequence of the Trial Chamber refusing to grant the Defence an extension of time for the filing of its preliminary motions, counsel for the Accused have not able to co-operate with the counsel of other accused on this point. 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,* dated 14 June 2003.[26] 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.[27] 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 appropriate time.

B. Application for oral argument

21. Paragraph 32 of the First Preliminary Motion requests an oral hearing on that motion, on the ground that the issues it raises "of crucial and fundamental importance". The Prosecution submits that this motion raises a straightforward 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.[28]

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[26] RP 619-624.

[27] 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.

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

C. Length of Defence preliminary motions

22. The Defence has filed two separate preliminary motions challenging jurisdiction,[29] 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*, signed by the Registrar and entered into force on 27 February 2003 (the "**Practice Direction**"), which limits the length of motions to ten (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 a response to each of the two preliminary motions.

IV. CONCLUSION

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

Freetown, 23 June 2003.

For the Prosecution,

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Deputy Prosecutor

Luc Côté
Chief of Prosecutions

Walter Marcus-Jones
Senior Appellate Counsel

Christopher Staker
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

[29] On the same day that the Defence filed the First Preliminary Motion, it also filed a "Preliminary Motion Based on Lack of Jurisdiction: Establishment of Special Court Violates Constitution of Sierra Leone" (RP 636 to 647).

PROSECUTION INDEX OF AUTHORITIES

1. 1969 Vienna Convention on the Law of Treaties, Articles 2, 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. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1965 UNTS 85
5. Declaration on the Protection of all Persons from Enforced Disappearances, General Assembly Resolution 47/133, UN Doc. A/RES/47/133 (1992).
6. Aust, *Modern Treaty Law and Practice* (2000), p. 10-11
7. Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 617-618, 514-515.
8. Cassese, *International Criminal Law* (2003), 312-316.
9. *Barayagwiza v. Prosecutor, Decision*, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999
10. *Prosecutor v. Furundzija, Judgment*, Case No. IT-95-17/1, T. Ch., 10 December 1998, paras. 153-157
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. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest*, Case No. IT-94-2-AR73, Appeals Chamber, 5 June 2003
13. *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
14. Lomé Peace Agreement (Ratification) Act 1999 (including the text of the "Peace Agreement Between the Government of Sierra Leone and the

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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.

Revolutionary United Front of Sierra Leone (RUF/SL)" (the "Lomé Agreement")

15. *Archbold's Criminal Pleading, Evidence and Practice, 2002*, pp. 333-340.

16. *R v. Townsend* [1997] 2 CrAppR 540 (Court of Appeal (England and Wales))

17. *R v. Latif* [1996] 1 WLR 104 (House of Lords (England and Wales))

PROSECUTION INDEX OF AUTHORITIES

ANNEX I

1969 Vienna Convention on the Law of Treaties, Articles 2, 27 and 46[4]

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4 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 2
Use of terms

1. For the purposes of the present Convention:

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

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

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

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

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

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

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

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

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

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

Article 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.

PROSECUTION INDEX OF AUTHORITIES

ANNEX II

1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Articles 27 and 46[5]

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5 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 above treaty[6]

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6 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
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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]

PROSECUTION INDEX OF AUTHORITIES

ANNEX IV

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1965 UNTS 85

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Office of the High Commissioner for Human Rights

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984

***entry into force* 26 June 1987, in accordance with article 27 (1)**

status of ratifications declarations and reservations **monitoring body**

The States Parties to this Convention,

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

Recognizing that those rights derive from the inherent dignity of the human person,

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

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

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suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3 ***General comment on its implementation***

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

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Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

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Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized

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competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At. least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties. (amendment (see General Assembly resolution 47/111 of 16 December 1992); status of ratification)

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article. (amendment (see General Assembly resolution 47/111 of 16 December 1992); status of ratification)

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

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2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs I to 4 of th is article s hall be con fidential , and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;

(a) If a State Party considers that another State Party is not giving effect to the provisions ofthis Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months afler the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally

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recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it

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recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph I and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective reliefto the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the SecretaryGeneral, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which

may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States. 2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the SecretaryGeneral of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force onthe thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1 . Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The SecretaryGeneral shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering an d voting upon the proposal. In the event that within four months from

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the date of such communication at least one third of the States Parties favours such a conference, the SecretaryGeneral shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from thc date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Con vention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of- the notification by the Secretary-General .

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

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The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10, Switzerland
Telephone Number (41-22) 917-9000

PROSECUTION INDEX OF AUTHORITIES

ANNEX V

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

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United Nations

A/RES/47/133

General Assembly

Distr. GENERAL

18 December 1992

ORIGINAL: ENGLISH

A/RES/47/133
92nd plenary meeting
18 December 1992

47/133. Declaration on the Protection of All Persons from Enforced Disappearance

The General Assembly,

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 1

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

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

Article 2

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1. No State shall practise, permit or tolerate enforced disappearances.

2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.

Article 3

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Article 4

1. All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.

2. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance.

Article 5

In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.

Article 6

1. No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.

2. Each State shall ensure that orders or instructions directing, authorizing or encouraging any enforced disappearance are prohibited.

3. Training of law enforcement officials shall emphasize the provisions in paragraphs 1 and 2 of the present article.

Article 7

No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

Article 8

1. No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.

2. For the purpose of determining whether there are such grounds, the

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competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above.

2. In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.

Article 10

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.

3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.

Article 11

All persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured.

Article 12

1. Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.

2. Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for

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apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

Article 13

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

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

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

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

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

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

Article 14

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

Article 15

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

Article 16

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

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

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

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

Article 17

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

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

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

Article 18

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

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

Article 19

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.

Article 20

1. States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance, and shall devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin.

2. Considering the need to protect the best interests of children referred to in the preceding paragraph, there shall be an opportunity, in

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States which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance. Such adoption should, however, continue to be in force if consent is given, at the time of the review, by the child's closest relatives.

3. The abduction of children of parents subjected to enforced disappearance or of children born during their mother's enforced disappearance, and the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such.

4. For these purposes, States shall, where appropriate, conclude bilateral and multilateral agreements.

Article 21

The provisions of the present Declaration are without prejudice to the provisions enunciated in the Universal Declaration of Human Rights or in any other international instrument, and shall not be construed as restricting or derogating from any of those provisions.

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ANNEX VI

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

MODERN TREATY LAW AND PRACTICE

ANTHONY AUST

CAMBRIDGE
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ıe 1969 Convention[7], are generally
ıgh the 1969 Convention does not
ernational organisations, such as a
: rules of the Convention reflect the
ıpplicable to treaties with interna-
Article 3(b)). Where states which
: parties to a treaty to which other
icular international organisations
: also parties, *as between the states*
h applies, not customary interna-

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)lying this rule to bilateral treaties.
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:m, but not for other states.[9] The
ıuary 1980. The UN Convention
concluded on 10 December 1982.
:s to the Convention on that date,
/ith regard to UNCLOS. Article 4
st retrospection is without preju-
the Convention to which treaties
ınal law independently of the
Convention which reflect custo-
customary law) to treaties con-
·f the Convention, or concluded
entered into force for parties to

ıme subjects as Articles 1–72 of the 1969

ee Sinclair, p. 230. See also P. McDade, 'The
the Law of Treaties 1969', ICLQ (1986), pp.
lusion" of a Multilateral Treaty', BYIL (1988),
to 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 VII

Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 617-618, 514-515.

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PRINCIPLES OF PUBLIC INTERNATIONAL LAW

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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.

by tribunals. In the *Eastern Greenland*[20] case the Permanent Court took the view that Norway could not rely on her decree of 1931 affecting the disputed area, as Denmark had a prior title.[21] Municipal courts have often refused to give extra-territorial recognition to acts regarded as illegal under international law.[22] The principle itself leads to the wide field of problems as to the nullity of *ultra vires* acts, problems which cannot be properly approached by way of abstract generalizations.[23] Reference to the principle *ex injuria non oritur jus* does not provide a safe guide to the solution of specific problems. For example, acquiescence of a state may confirm the validity of an award of an arbitrator which was *in limine* open to challenge on the ground of excess of jurisdiction.[24]

5. *Jus Cogens*[25]

Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like 'fundamental' or, in respect to rights, 'inalienable' or 'inherent'. Such classifications have not had much success, but have intermittently affected the inter-

[20] *Supra*, pp. 128, 140. Other judicial applications of the principle are listed in Oppenheim, i. 142 no. 1.

[21] Cf. Judge Anzilotti, diss., PCIJ, Ser. A/B, no. 53 at pp. 94–5. See also *supra*, p. 120, on title.

[22] See *In re Krüger*, ILR 18 (1951), no. 68; *Singapore Oil Stocks* case, ILR 23 (1956), 810; *Civil Air Transport Inc.* v. *Central Air Transport Corp.*, ILR 19 (1952), no. 20 at p. 97.

[23] See Jennings and Baade, *supra*, n. 1. On the *ultra vires* acts of organizations see *infra*, pp. 696 ff. See also ch. IV, s. 7.

[24] See *Arbitral Award made by the King of Spain on 23 December 1906*, ICJ Reports (1960), 192.

[25] See generally Schwelb, 61 *AJ* (1967), 946–75; Verdross, 60 *AJ* (1966), 55–63; Scheuner, 27 *Z.a.ö.R.u.V.* (1967), 520–32; Barberis, ibid. 30 (1970), 19–45; Schwarzenberger, 43 *Texas LR* (1965), 455–78; C. de Visscher, 75 *RGDIP* (1971), 5–11; *Concept of Jus Cogens in International Law*, Conf. on Int. Law, Langonissi (Greece), 1966 (1967); Mosler, 25 *Ann. suisse* (1968), 9–40, Paul, 21 *Öst. Z. für öff. R.* (1971), 19–49; Ago, *Yrbk. ILC.* (1970), ii. 177, 184 (para. 23); ibid. (1971), ii (Pt. 1), 199, 210 (para 41); ibid. (1976), ii (Pt. 1), 3, 31–2 (paras. 98–9); Marek, in *Recueil d'études en hommage à Paul Guggenheim* (1968), 426–59; Riesenfeld, 60 *AJ* (1966), 511–15; Virally, *Ann. français* (1966), 5–29; Monaco, 125 Hague *Recueil* (1968, III), 202–12; Guggenheim, *Traité* (2nd edn.), i. 128–9; Morelli, 51 *Rivista di d.i.* (1968), 108–17; Schweitzer, 15 *Archiv des V.* (1971), 197–223; P. de Visscher, 136 Hague *Recueil* (1972, II), 102–11; Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (1974); Mann, *Festschrift für Ulrich Scheuner* (1973), 399–418; Wolfke, 6 *Polish Yrbk.* (1974), 145–62; Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976); Crawford, 48 *BY* (1976–7), 146–8; Nageswar Rao, 14 *Indian Journ.* (1974), 362–85; Tunkin, *Theory of International Law* (1974), 147–60; Akehurst, 47 *BY* (1974–5), 281–5; Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn. 1984), 203–37; Gómez Robledo, 172 Hague *Recueil* (1981, III), 9–127; Alexidze, ibid. 219–68; Gaja, ibid. 271–313; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 62–8; Nguyen Quoc Dinh, Daillier, and Pellet, *Droit international public* (1994), 200–6, 268–70; Meron, *Human Rights Law-Making in the United Nations* (1986), 173–202; Christenson, 28 *Virginia JIL* (1988), 585–648; Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 43–73.

pretation of treaties by tribunals.[26] In the recent past some eminent opinions have supported the view that certain overriding principles of international law exist, forming a body of *jus cogens*.[27]

The major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force,[28] the law of genocide, the principle of racial non-discrimination,[29] crimes against humanity, and the rules prohibiting trade in slaves and piracy.[30] In the *Barcelona Traction* case (Second Phase),[31] the majority judgment of the International Court, supported by twelve judges, drew a distinction between obligations of a state arising *vis-à-vis* another state and obligations 'towards the international community as a whole'. The Court said:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Other rules which have this special status include the principle of permanent sovereignty over natural resources[32] and the principle of self-determination.[33]

[26] On sovereignty and the restrictive interpretation of treaties see Lauterpacht, *Recognition*, pp. 300–6, and *supra*, p. 290.

[27] See Lauterpacht, 27 *BY* (1950), 397–8; id., *Yrbk. ILC* (1953), ii. 154–5, esp. para. 4; Fitzmaurice, 30 *BY* (1953), 30; id., 59 *BY* (1959), 224–5; id., 92 Hague *Recueil* (1957, II), 120, 122, 125. See also *In re Flesche, Ann. Digest*, 16 (1949), no. 87 at p. 269. For an early source: Anzilotti, *Opere*, i. 289 (3rd Ital. edn., 1927; also in *Cours de droit international* (1929), i. 340). See further *North Sea Continental Shelf* cases, ICJ Reports (1969), 97–8 (Padilla Nervo, sep. op.), 182 (Tanaka, diss. op.), 248 (Sørensen, diss. op.).

[28] McNair, *Law of Treaties* (1961), 214–15; Dept. of State Memo., 74 *AJ* (1980), 418; judgment of the Court in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), ICJ Reports (1986), 100–1 (para. 190); ILR 76, 434–5; 54 *BY* (1983), 379.

[29] See the 1966 edn. of this book, p. 417; Judge Tanaka, diss. op., *South West Africa* cases (Second Phase), ICJ Reports (1966), 298; Judge Ammoun, sep. op., *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 304; Judge Ammoun, sep. op., *Namibia* opinion, ibid. (1971), 78–81. See further *infra*, p. 596. The principle of religious non-discrimination must have the same status as the principle of non-discrimination as to sex.

[30] This statement in the third edn. (p. 513) was quoted by the Inter-American Commission of Human Rights in the *Case of Roach and Pinkerton*, Decision of 27 Mar. 1987 (OAS General Secretariat), 33–6.

[31] ICJ Reports (1970), 3 at 32. See also *In re Koch*, ILR 30, 496 at 503; *Assessment of Aliens Case*, ILR 43, 3 at 8; *Tokyo Suikosha* case, 13 *Japanese Ann. of IL* (1969), 113 at 115; *East Timor Case*, I.C.J. Reports, 1995, 90 at 102.

[32] See the relevant UN Decl. *infra*, p. 543.

[33] Judge Ammoun, sep. op., *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 304.

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ANNEX VIII

Cassese, *International Criminal Law* (2003), 312-316.

INTERNATIONAL CRIMINAL LAW

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17

LEGAL IMPEDIMENTS TO THE EXERCISE OF NATIONAL JURISDICTION

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

17.1 AMNESTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17.2 STATUTES OF LIMITATION

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

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

In many States the general provisions on the statute of limitation also apply to at least some classes of international crimes. For instance, in Spain, pursuant to Article

years). In Italy, the 20-year statute of limitation also applies to such international crimes as war crimes, crimes against humanity, and genocide as long as they do not entail a sentence of life imprisonment. (When such sentence is applicable, no statute of limitation applies.) A similar rule applies in Germany, where murder is not considered subject to statutes of limitation. In Japan, under the general rule laid down in Article 250 of the Code of Criminal Procedure, if a crime involves the death penalty, the period of statutory limitation is 50 years, whereas it runs to 10 years if the crime involves life imprisonment, or to 7 years if the penalty is imprisonment for more than 10 years.

In other countries there are instead special rules for international crimes. For instance, in Colombia the statute of limitation for torture, genocide, and forced disappearances is 30 years; in Spain, 20 years for torture and terrorism. In France, the statute of limitation for terrorism is 20 years (if the offence amounts to a misdemeanour or *délit*) and 30 years if it amounts to a serious offence (*crime*). Furthermore, a distinction is made between war crimes and crimes against humanity: for the former the statute of limitation is that provided for in general criminal rules (20 years); for the latter, a law of 26 December 1964 provides that there may be no statute of limitation. In common law countries, where there is no general rule on statutory limitation but there may be specific rules concerning specific crimes, no statutory limitation is provided for such serious offences as international crimes.

To date a few international treaties have been concluded on this matter: for instance, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, of 26 November 1968, and the European Convention of 25 January 1974, on the same subject. Only a relatively small number of States have, however, ratified such treaties. The ICC Statute provides in Article 29 that 'The crimes within the jurisdiction of the Court shall not be subject to any statute of limitation'.

As already stated above with regard to amnesties, whenever international treaties, or such customary rules as those on grave breaches of the Geneva Conventions, impose upon States the obligation to take proceedings against the alleged authors of the international crimes they envisage, the establishment or application of a statute of limitation may prove contrary to such treaties or rules.

Could one contend that the aforementioned treaty rules either reflect, or have gradually turned into, customary rules? Much depends on the legal weight one attributes to various elements of international practice.

In this regard, one should first of all recall a few recent regulations of the matter. Interestingly, the Cambodian Bill of 2000 on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of the Crimes committed During the Period of Democratic Kampuchea provides in Articles 4 and 5 that there shall be no statute of limitation for genocide and crimes against humanity, whereas in Article 3 it extends for an additional period of 20 years the statute of limitation

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IN THE APPEALS CHAMBER

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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ANNEX IX

Barayagwiza v. Prosecutor, Decision, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999

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2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction

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1. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of an appeal lodged by Jean-Bosco Barayagwiza ("the Appellant") against the "Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect" of Trial Chamber II of 17 November 1998 ("the Decision"). By Order dated 5 February 1999, the appeal was held admissible. On 19 October 1999, the Appellant filed a Notice of Appeal seeking to disqualify certain Judges of the Trial Chamber from sitting on his case ("19 October 1999 Notice of Appeal"). On 26 October 1999, the Appellant filed an additional Notice of Appeal concerning a request of the Prosecutor to amend the indictment against the Appellant ("26 October 1999 Notice of Appeal").

2. There are several areas of contention between the parties. The primary dispute concerns the arrest and detention of the Appellant during a nineteen-month period between 15 April 1996, when he was initially detained, and 19 November 1997, when he was transferred to the Tribunal's detention unit pursuant to Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules"). The secondary areas of dispute concern: 1) the Appellant's right to be informed promptly of the charges against him; 2) the Appellant's right to challenge the legality of his arrest and detention; 3) the delay between the Tribunal's request for the transfer of the Appellant from Cameroon and his actual transfer; 4) the length of the Appellant's provisional detention; and 5) the delay between the Appellant's arrival at the Tribunal's detention unit and his initial appearance.

3. The accused made his initial appearance before Trial Chamber II on 23 February 1998. On 24 February 1998, the Appellant filed a motion seeking to nullify his arrest and detention. Trial Chamber II heard the oral arguments of the parties on 11 September 1998 and rendered its Decision on 17 November 1998.

4. The dispute between the parties initially concerns the issue of under what authority the accused was detained. Therefore, the sequence of events since the arrest of the accused on 15 April 1996, including the lengthy procedural history of the case, merits detailed recitation. Consequently, we begin with the following chronology.

5. On 15 April 1996, the authorities of Cameroon arrested and detained the Appellant and several other suspects on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994. On 17 April 1996, the Prosecutor requested that provisional measures pursuant to Rule 40 be taken in

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relation to the Appellant. On 6 May 1996, the Prosecutor asked Cameroon for a three-week extension of the detention of all the suspects, including the Appellant. However, on 16 May 1996, the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant.

6. The Appellant asserts that on 31 May 1996, the Court of Appeal of Cameroon adjourned *sine die* consideration of Rwanda's extradition request, pursuant to a request to adjourn by the Deputy Director of Public Prosecution of the Court of Appeal of the Centre Province, Cameroon. The Appellant claims that in making this request, the Deputy Director of Public Prosecution relied on Article 8(2) of the Statute.

7. On 15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest. Shortly thereafter, the Court of Appeal of Cameroon re-commenced the hearing on Rwanda's extradition request for the remaining suspects, including the Appellant. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan extradition request and ordered the release of the suspects, including the Appellant. The same day, the Prosecutor made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order. The Prosecutor then requested an Order for arrest and transfer pursuant to Rule 40*bis* on 24 February 1997 and on 3 March 1997, Judge Aspegren signed an Order to that effect. The Appellant was not transferred pursuant to this Order, however, until 19 November 1997.

8. While awaiting transfer, the Appellant filed a *writ of habeas corpus* on 29 September 1997. The Trial Chamber never considered this application.

9. The President of Cameroon issued a Presidential Decree on 21 October 1997, authorising the transfer of the Appellant to the Tribunal's detention unit. On 22 October 1997, the Prosecutor submitted the indictment for confirmation, and on 23 October 1997, Judge Aspegren confirmed the indictment, and issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon. The Appellant was not transferred to the Tribunal's detention unit, however, until 19 November 1997 and his initial appearance did not take place until 23 February 1998.

10. On 24 February 1998, the Appellant filed the Extremely Urgent Motion seeking to have his arrest and detention nullified. The arguments of the parties were heard on 11 September 1998. Trial Chamber II, in its Decision of 17 November 1998, dismissed the Extremely Urgent Motion *in toto*. In rejecting the arguments put forward by the Appellant in the Extremely Urgent Motion, the Trial Chamber made several findings. First, the Trial Chamber held that the Appellant was initially arrested at the behest of Rwanda and Belgium and not at the behest of the Prosecutor. Second, the Trial Chamber found that the period of detention under Rule 40 from 21 February until 3 March 1997 did not violate the Appellant's rights under Rule 40. Third, the Trial Chamber found that the Appellant had failed to show that the Prosecutor had violated the rights of the Appellant with respect to the length of his provisional detention or the delay in transferring the Appellant to the Tribunal's detention unit. Fourth, the Trial Chamber held that Rule 40*bis* does not apply until the actual transfer of the suspect to the Tribunal's detention unit. Fifth, the Trial Chamber concluded that the provisional detention of the Appellant was legally justified. Sixth, the Trial Chamber found that when the Prosecutor opted to proceed against some of the individuals detained with the Appellant, but excluding the Appellant, the Prosecutor was exercising prosecutorial discretion and was not discriminating against the Appellant. Finally, the Trial Chamber held that Rule 40*bis* is valid and does not contradict any provisions of the Statute. On 4 December 1998, the Appellant filed a Notice of Appeal against the Decision and ten days later the Prosecution filed its Response.

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11. The Appeals Chamber considered the Appellant's appeal and found that the Decision dismissed an objection based on the lack of personal jurisdiction over the accused and, therefore, an appeal lies as of right under Sub-rule 72(D). Consequently, a Decision and Scheduling Order was issued on 5 February 1999, and the parties submitted additional briefs. Notwithstanding these additional submissions by the parties, however, the Appeals Chamber determined that additional information was required to decide the appeal. Consequently, a Scheduling Order was filed on 3 June 1999, directing the Prosecutor to specifically address the following six questions and provide documentation in support thereof:

1. Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.

2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.

3. The reason for any delay between the request for transfer and the actual transfer.

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.

6. The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.

12. The Prosecutor filed her Response to the 3 June 1999 Scheduling Order on 22 June 1999, and the Appellant filed his Reply on 2 July 1999. The submissions of the parties in response to these questions are set forth in section II.C., *infra*.

II. THE APPEAL

A. **The Appellant**

13. As noted *supra*, the Appellant has submitted numerous documents for consideration with respect to his arrest and detention. The main arguments as advanced by the Appellant are consolidated and briefly summarised below.

14. First, the Appellant asserts that the Trial Chamber erred in constructing a "Chronology of Events" without a proper basis or finding. According to the Appellant, the Trial Chamber further erred in dividing the events into arbitrary categories with the consequence that the Trial Chamber considered the events in a fragmented form. This resulted in a failure to perceive the events in their totality.

15. Second, the Appellant claims that the Trial Chamber erred in holding that the Appellant failed to provide evidence supporting his version of the arrest and detention. Thus, the Appellant contends, it was error for the Trial Chamber to conclude that the Appellant was arrested at the behest of the Rwandan and Belgian governments. Further, because the Trial Chamber found that the Appellant was detained at the behest of the Rwandan and Belgian authorities, the Trial Chamber erroneously held that the Defence had failed to show that the Prosecutor was responsible for the Appellant's being held in custody by the

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Cameroon authorities from 15 April 1996 until 21 February 1997.

16. Third, the Appellant contends that the Trial Chamber erred in holding that the detention under Rule 40 between 21 February 1997 and 3 March 1997, when the Rule 40*bis* request was approved, does not constitute a violation of the Appellant's rights under Rule 40. Further, the Trial Chamber erred in holding that there is no remedy for a provisionally detained person before the detaining State has transferred him prior to the indictment and warrant for arrest.

17. Fourth, the Appellant argues that the Trial Chamber erred in failing to declare that there was a breach of the Appellant's rights as a result of the Prosecutor's delay in presenting the indictment for confirmation by the Judge. Furthermore, the Appellant contends that the Trial Chamber erred in holding that the Appellant failed to show that the Prosecutor violated his rights due to the length of the detention or delay in transferring the Appellant. Similarly, the Appellant contends that the Trial Chamber erred in holding that the provisional charges and detention of the Appellant were justified under the circumstances.

18. Fifth, with respect to the effect of the detention on the Tribunal's jurisdiction, the Appellant sets forth three arguments. The Appellant's first argument is that the overall length of his detention, which was 22 months, was unreasonable, and therefore, unlawful. Consequently, the Tribunal no longer has personal jurisdiction over the accused. The Appellant next asserts that the pre-transfer detention of the accused was 'very oppressive, torturous and discriminative'. As a result, the Appellant asserts that he is entitled to unconditional release. Finally, the Appellant contends that his detention cannot be justified on the grounds of urgency. In this regard, the length of time the Appellant was provisionally detained without benefit of formal charges amounts to a 'monstrous degree of prosecutorial indiscretion and apathy'.

19. In conclusion, the Appellant requests the Appeals Chamber to quash the Trial Chamber Decision and unconditionally release the Appellant.

B. The Prosecutor

20. In responding to the Appellant's arguments, the Prosecutor relies on three primary counter-arguments, which will be summarised. First, the Prosecutor submits that the Appellant was not in the custody of the Tribunal before his transfer on 19 November 1997, and consequently, no event taking place prior to that date violates the Statute or the Rules. The Prosecutor contends that her request under Rule 40 or Rule 40*bis* for the detention and transfer of the accused has no impact on this conclusion.

21. In support of this argument, the Prosecutor contends that the Appellant was detained on 15 April 1996 at the instance of the Rwandan and Belgian governments. Although the Prosecutor made a request on 17 April 1996 to Cameroon for provisional measures, the Prosecutor asserts that this request was 'only superimposed on the pre-existing request of Rwanda and Belgium' for the detention of the Appellant.

22. The Prosecutor further argues that the Tribunal does not have custody of a person pursuant to Rule 40*bis* until such person has actually been physically transferred to the Tribunal's detention unit. Although an Order pursuant to Rule 40*bis* was filed directing Cameroon to transfer the Appellant on 4 March 1997, the Appellant was not actually transferred until 19 November 1997. Consequently, the responsibility of the Prosecutor for any delay in bringing the Appellant to trial commences only after the Tribunal established custody of the Appellant on 19 November 1997.

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23. The Prosecutor argues that custody involves 'care and control' and since the Appellant was not under the 'care and control' of the Tribunal prior to his transfer, the Prosecutor is not responsible for any delay resulting from Cameroon's failure to promptly transfer the Appellant. Furthermore, the Prosecutor asserts that Article 28 of the Statute strikes a delicate balance of distributing obligations between the Tribunal and States. Under this arrangement, 'neither entity is an agent or, *alter ego*, of the other: and the actions of the one may not be imputed on the other just because they were carrying out duties apportioned to them under the Statute'.

24. The Prosecutor acknowledges that although the 'delay in this transfer is indeed long, there is no factual basis to impute the fault of it to the ICTR Prosecutor'. She summarises this line of argument by concluding that since the Appellant was not in the custody of the Tribunal before his transfer to the Tribunal's detention unit on 19 November 1997, it follows that the legality of the detention of the Appellant while in the custody of Cameroon is a matter for the laws of Cameroon, and beyond the competence of the Appeals Chamber.

25. The second principal argument of the Prosecution is that the Prosecutor's failure to request Cameroon to transfer the Appellant on 16 May 1996 does not give the Appellant 'prescriptive claims against the Prosecutor's eventual prosecution'. The thrust of this contention seeks to counter the argument that the Prosecutor is somehow estopped from prosecuting the Appellant as the result of correspondence between the Prosecutor and both Cameroon and the Appellant himself.

26. The Prosecutor asserts that simply because at a certain stage of the investigation she communicated to the Appellant that she was not proceeding against him, this cannot have the effect of creating statutory or other limitations against prosecution for genocide and other serious violations of international humanitarian law. Moreover, the Prosecutor argues that she cannot be barred from proceeding against an accused simply because she did not proceed with the prosecution at the first available opportunity. Finally, the Prosecutor claims that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation'.

27. The third central argument of the Prosecutor is that any violations suffered by the Appellant prior to his transfer to the Tribunal's detention unit have been cured by subsequent proceedings before the Tribunal, presumably the confirmation of the Appellant's indictment and his initial appearance.

28. In conclusion, the Prosecution argues that there is no provision within the Statute that provides for the issuance of the order sought by the Appellant, and, in any event, the remedy sought by the Appellant is not warranted in the circumstances. In the event the Appeals Chamber finds a violation of the Appellant's rights, the Prosecutor suggests that the following remedies would be proper: 1) an Order for the expeditious trial of the Appellant; and/or 2) credit for the period of undue delay as part of the sentence, if the Appellant is found guilty, pursuant to Rule 101(D).

C. **Arguments of the Parties Pursuant to the 3 June 1999 Scheduling Order**

29. With respect to the specific questions addressed to the Prosecutor in the 3 June 1999 Scheduling Order, the parties submitted the following answers.

1. **Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.**

30. On 21 February 1997, following the Decision of the Cameroon Court of Appeal to release the

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Appellant, the Prosecutor submitted a Rule 40 Request to detain the Appellant for the benefit of the Tribunal. Further, the Prosecutor submits that following the issuance of the Rule 40*bis* Order on 4 March 1997, Cameroon was obligated, pursuant to Article 28, to implement the Prosecutor's request. However, because the Tribunal did not have custody of the Appellant until his transfer on 19 November 1997, the Prosecutor contends that the Tribunal 'could not regulate the conditions of detention or other matters regarding the confinement of the accused'. Nevertheless, the Prosecutor argues that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

31. The Appellant contends that Cameroon was holding him at the behest of the Prosecutor during this entire period. Furthermore, the Appellant argues that '[t]he only Cameroonian law applicable to him was the law concerning the extradition'. Consequently, he argues that the issue of concurrent or joint personal jurisdiction by both the Tribunal and Cameroon is 'fallacious, misleading and unacceptable'. In addition, he asserts that, read in conjunction, Articles 19 and 28 of the Statute confer obligations upon the Detaining State only when the appropriate documents are supplied. Since the Warrant of Arrest and Order for Surrender was not signed by Judge Aspegren until 23 October 1997, the Appellant contends that his detention prior to that date was illegal, given that he was being held after 21 February 1997 on the basis of the Prosecutor's Rule 40 request.

2. **Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.**

32. The parties are in agreement that the Appellant was transferred to the Tribunal's detention unit on 19 November 1997, and consequently was not held by Cameroon at any period after that date.

3. **The reason for any delay between the request for transfer and the actual transfer.**

33. The Prosecutor fails to give any reason for this delay. Rather, without further comment, the Prosecutor attributes to Cameroon the period of delay between the request for transfer and the actual transfer.

34. The Appellant contends that the Prosecutor 'forgot about the matter and didn't really bother about the actual transfer of the suspect'. He argues that since Cameroon had been holding him pursuant to the Tribunal's Rule 40*bis* Order, Cameroon had no further interest in him, other than to transfer him to the custody of the Tribunal. In support of his contentions in this regard, the Appellant advances several arguments. First, the Prosecutor did not submit the indictment for confirmation before the expiration of the 30-day limit of the provisional detention as requested by Judge Aspegren in the Rule 40*bis* Order. Second, the Appellant asserts that the Prosecutor didn't make any contact with the authorities of Cameroon to provide for the transfer of the Appellant pursuant to the Rule 40*bis* Order. Third, the Prosecutor did not ensure that the Appellant's right to appear promptly before a Judge of the Tribunal was respected. Fourth, following the Rule 40*bis* Order, the Appellant claims, '[t]he Prosecutor didn't make any follow-up and didn't even show any interest'. Fifth, the Appellant contends that the triggering mechanism in prompting his transfer was his filing of a *writ of habeas corpus*. In conclusion, the Appellant rhetorically questions the Prosecutor, 'How can she expect the Cameroonian authorities to be more interested [in his case] than her?' [sic].

4. **The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.**

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35. The Prosecutor contends that the Trial Chamber and the Registry have responsibility for scheduling the initial appearance of accused persons.

36. While the Appellant acknowledges that the Registrar bears some responsibility for the delay, he argues that the Prosecutor 'plays a big role in initiating of hearings' and plays a 'key part in the process'. The Appellant contends that the Prosecutor took no action to bring him before the Trial Chamber as quickly as possible. On the contrary, the Appellant asserts that the Prosecutor delayed seeking confirmation of the indictment and 'caused the removal of the Defence's motion for Habeas Corpus from the hearing list on 31 October 1997 thus delaying further the appearance of the suspect before the Judges'.

5. **The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.**

37. With respect to the delay between the initial appearance and the hearing on the Urgent Motion, the Prosecutor again disclaims any responsibility for scheduling matters, arguing that the Registry, in consultation with the Trial Chambers, maintains the docket. The hearing on the Urgent Motion was originally docketed for 14 May 1998. However, on 12 May 1998, Counsel for the Appellant informed the Registry that he was not able to appear and defend his client at that time, because he had not been assigned co-counsel as he had requested and because the Tribunal had not paid his fees. Consequently, the hearing was re-scheduled for 11 September 1998.

6. **The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.**

38. With respect to the disposition of the *writ of habeas corpus* filed by the Appellant on 2 October 1997, the Prosecutor replied as follows:

> 24. The Prosecutor respectfully submits that following the filing of the *habeas corpus* on 2 October 1997 the President wrote the Appellant by letter of 8 October 1997, informing him that the Office of the Prosecutor had informed him that an indictment would be ready shortly.
>
> 25. The Prosecutor is not aware of any other disposition of the *writ of habeas corpus*.

39. In fact, the letter referred to was written on 8 *September* 1997—prior to the filing of the *writ of habeas corpus*—and the Appellant contends that it was precisely this letter which prompted him to file the *writ of habeas corpus*. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. However, directly contradicting the claim of the Prosecutor, the Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. Moreover, the Appellant claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. The Appellant is of the view that the *writ of habeas corpus* is still pending, since the Trial Chamber has not heard it, notwithstanding the fact that it was filed on 29 September 1997.

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General

establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8

Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 17

Investigation and Preparation of Indictment

1. [...]

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. [...]

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20

Rights of the accused

1. [...]
2. [...]
3. [...]
4. In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language in which he or she understands of the

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nature and cause of the charge against him or her;
b. [...]
c. To be tried without undue delay;
d. [...]
e. [...]
f. [...]
g. [...]

Article 24

Appellate Proceedings

1. [...]

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

Article 28

Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   a. The identification and location of persons;
   b. [...]
   c. [...]
   d. The arrest or detention of persons;
   e. The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

Rule 2
Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40

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Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

i. to arrest a suspect and place him in custody;
ii. to seize all physical evidence;
iii. to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40*bis*

Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 58

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 62

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Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial.

Rule 72

Preliminary Motions

A. Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

B. Preliminary motions by the accused are:

i. objections based on lack of jurisdiction;
ii. [...]
iii. [...]
iv. [...]

C. The Trial Chamber shall dispose of preliminary motions *in limine litis*.

D. Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.

E. Notice of Appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.

F. Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

C. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and

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shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1. [...]

2. [...]
3. In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
4. [...]
5. [...]
6. [...]
7. [...]

D. European Convention on Human Rights

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

   a. [...]

   b. [...]

   c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   d. [...]

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e. [...]

f. the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6

1. [...]

2. [...]

3. Everyone charged with a criminal offence has the following minimum rights:

   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]

E. American Convention on Human Rights

Article 7

1. [...]
2. [...]
3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his

release if the arrest or detention is unlawful. In states Parties whose law provides that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. [...]

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

   a. [...]
   b. prior notification in detail to the accused of the charges against him;
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
   h. [...]

3. [...]

4. [...]

5. [...]

IV. DISCUSSION

A. Were the rights of the Appellant violated?

1. Status of the Appellant

41. Before discussing the alleged violations of the Appellant's rights, it is important to establish his status following his arrest and during his provisional detention. Rule 2 sets forth definitions of certain terms used in the Rules. The indictment against the Appellant was not confirmed until 23 October 1997. Pursuant to the definitions of 'accused' and 'suspect' set forth in Rule 2, the Appeals Chamber finds that the Appellant was a 'suspect' from his arrest on 15 April 1996 until the indictment was confirmed on 23 October 1997. After 23 October 1997, the Appellant's status changed and he became an 'accused'.

2. The right to be promptly charged under Rule 40*bis*

42. Unlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal

lacks any such enforcement agency. Consequently, in the absence of the suspect's voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects. The Statute and Rules of the Tribunal establish a system whereby States may provisionally detain suspects at the behest of the Tribunal pending transfer to the Tribunal's detention unit.

43. In the present case, there are two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal. Cameroon arrested the Appellant pursuant to the Rwandan and Belgian extradition requests on 15 April 1996. Two days later, the Prosecutor made her first Rule 40 request for provisional detention of the Appellant. On 6 May 1996, the nineteenth day of the Appellant's provisional detention pursuant to Rule 40, the Prosecutor requested the Cameroon authorities to extend the Appellant's detention for an additional three weeks. On 16 May 1996, however, the Prosecutor informed Cameroon that she was no longer interested in pursuing a case against the Appellant at 'that stage'. Thus, the first period runs from 17 April 1996 until 16 May 1996—a period of 29 days, or nine days longer than allowed under Rule 40. This first period will be discussed, *infra*, at sub-section IV.B.2.

44. The second period during which Cameroon detained the Appellant for the Tribunal commenced on 4 March 1997 and continued until the Appellant's transfer to the Tribunal's detention unit on 19 November 1997. On 21 February 1997, the Cameroon Court rejected Rwanda's extradition request and ordered the release of the Appellant. However, on the same day, while the Appellant was still in custody, the Prosecutor again made a request pursuant to Rule 40 for the provisional detention of the Appellant. This request was followed by the Rule 40*bis* request, which resulted in the Rule 40*bis* Order of Judge Aspegren dated 3 March 1997, and filed on 4 March 1997. This Order comprised, *inter alia*, four components. First, it ordered the transfer of the Appellant to the Tribunal's detention unit. Second, it ordered the provisional detention in the Tribunal's detention unit of the Appellant for a maximum period of thirty days. Third, it requested the Cameroon authorities to comply with the transfer order and to maintain the Appellant in custody until the actual transfer. Fourth, it requested the Prosecutor to submit the indictment against the Appellant prior to the expiration of the 30-day provisional detention.

45. However, notwithstanding the 4 March 1997 Rule 40*bis* Order, the record reflects that the Tribunal took no further action until 22 October 1997. On that day, the Deputy Prosecutor, Mr. Bernard Muna (who had spent much of his professional career working in the Cameroon legal community prior to joining the Office of the Prosecutor) submitted the indictment against the Appellant for confirmation. Judge Aspegren confirmed the indictment against the Appellant the next day and simultaneously issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon on 23 October 1997. However, the Appellant was not transferred to the Tribunal's detention unit until 19 November 1997. Thus, Cameroon held the Appellant at the behest of the Tribunal from 4 March 1997 until his transfer on 19 November 1997. At the time the indictment was confirmed, the Appellant had been in custody for 233 days, more than 7 months, from the date the Rule 40*bis* Order was filed.

46. It is important that Rule 40 and Rule 40*bis* be read together. It is equally important in interpreting these provisions that the Appeals Chamber follow the principle of 'effective interpretation', a well-established principle under international law. Interpreting Rule 40 and Rule 40*bis* together, we conclude that both Rules must be read restrictively. Rule 40 permits the Prosecutor to request any State, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40*bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.

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47. Although both Rule 40 and Rule 40*bis* apply to the provisional detention of suspects, there are important differences between the two Rules. For example, the time limits under which the Prosecutor must issue an indictment vary depending upon which Rule forms the basis of the provisional detention. Pursuant to Rule 40(D)(ii), the suspect must be released if the Prosecutor fails to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's detention unit, while Rule 40*bis*(H) allows the Prosecutor 90 days to issue an indictment. However, the remedy for failure to issue the indictment in the proscribed period of time is the same under both Rules: *release of the suspect.*

48. The Prosecutor may apply for Rule 40*bis* measures 'in the conduct of an investigation'. Rule 40*bis* applies only if the Prosecutor has previously requested provisional measures pursuant to Rule 40 or if the suspect is otherwise already being detained by the State to whom the Rule 40*bis* request is made. The Rule 40*bis* request, which is made to a Judge assigned pursuant to Rule 28, must include a provisional charge and a summary of the material upon which the Prosecutor relies.

49. The Judge must make two findings before a Rule 40*bis* order is issued. First, there must be a reliable and consistent body of material that tends to show that the suspect may have committed an offence within the Tribunal's jurisdiction. Second, the Judge must find that provisional detention is a necessary measure to 'prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation'.

50. Pursuant to Rule 40*bis*(C), the provisional detention of the suspect may be ordered for an initial period of thirty days. This initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'. Two additional thirty-day period extensions are permissible. At the end of the first thirty-day period, the Prosecutor must show that an extension is warranted by the needs of the investigation in order to have the provisional detention extended. At the end of the second thirty-day period, the Prosecutor must demonstrate that special circumstances warrant the continued provisional detention of the suspect for the final thirty-day period to be granted. In no event shall the total period of provisional detention of a suspect exceed ninety days. At the end of this cumulative ninety-day period, the suspect must be released if the indictment has not been confirmed and an arrest warrant signed.

51. The Statute and Rules of the Tribunal envision a system whereby the suspect is provided a copy of the Prosecutor's request, including provisional charges, in conjunction with the Rule 40*bis* Order. He is also served a copy of the confirmed indictment with the Warrant of Arrest, and pursuant to Rule 62(ii) he is to be orally informed of the charges against him at the initial appearance. In the present case, 6 days elapsed between the filing of the Rule *40bis* Order on 4 March 1997 and the date on which the Appellant apparently was shown a copy of the Rule 40*bis* Order. Additionally, 27 days elapsed between the confirmation of the indictment against the Appellant on 23 October 1998 and the service of a copy of the indictment upon the Appellant on 19 November 1998.

52. The Trial Chamber found that the Appellant was initially arrested at the behest of Rwanda and Belgium, a point the Prosecutor reiterates in this appeal, contending that the Prosecutor's request was merely 'superimposed' on the existing requests of those States. However, the Prosecutor fails to acknowledge that on 16 May 1996, she requested a three-week extension of the provisional detention of the Appellant. The Appeals Chamber finds the Appellant was detained at the request of the Prosecutor from 17 April 1996 through 16 May 1996. This detention—for 29 days—violated the 20-day limitation in Rule 40.

53. The Prosecutor also successfully argued before the Trial Chamber that Rule 40*bis* is inapplicable, since its operative provisions do not apply until after the transfer of the suspect to the Tribunal's detention unit. It is clear, however, that the purpose of Rule 40 and Rule 40*bis* is to limit the time that a

suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards. Moreover, if the time limits set forth in Rule 40(D) and Rule 40*bis* (H) are not complied with, those rules mandate that the suspect must be released.

54. Although the Appellant was not physically transferred to the Tribunal's detention unit until 19 November 1997, he had been detained since 21 February 1997 solely at the behest of the Prosecutor. The Appeals Chamber considers that if the Appellant were in the constructive custody of the Tribunal after the Rule *40bis* Order was filed on 4 March 1997, the provisions of that Rule would apply. In order to determine if the period of time that the Appellant spent in Cameroon at the behest of the Tribunal is attributable to the Tribunal for purposes of Rule 40*bis*, it is necessary to analyse the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant. In fact, the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

55. The Tribunal issued a valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant. These requests were honoured by Cameroon, and *but for* those requests, the Appellant would have been released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant.

56. Thus, the Appellant's situation is analogous to the 'detainer' process, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State. The U.S. Supreme Court has stated that, '[I]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...'. Moreover, that court has held that since the detaining state acts as an agent for the demanding state pursuant to the detainer, the petitioner is in custody for purposes of filing a *writ of habeas corpus* pursuant to U.S. law. Thus, the court reached the conclusion that the accused is in the constructive custody of the requesting State and that the detaining State acts as agent for the requesting state for purposes of *habeas corpus* challenges. In the present case, the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under Article 28 of the Statute.

57. Other cases have held that a defendant sentenced to concurrent terms in separate jurisdictions is in the constructive custody of the second jurisdiction after the first jurisdiction has imposed sentence on him. For example, In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent, the court concluded that '*constructive custody attached before any sentence was imposed.* In Ex p. Hampton M. Newell, the court ruled that although the petitioner was in the physical custody of the federal authorities, he was in the constructive custody of the State of Texas on the basis of a detainer that Texas had filed against him.

58. The Prosecutor relies, in part, on a definition of custody ('care and control') from an oft-cited law dictionary. However, this same law dictionary also defines custody as 'the detainer of a man's person by virtue of lawful process or authority'. Thus, even using the Prosecutor's authority, custody can be taken to mean the detention of an individual pursuant to lawful authority even in the absence of physical control. It would follow, therefore, that notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he were being detained pursuant to 'lawful process or authority' of the Tribunal. Or, as a Singapore court noted in Re Onkar Shrian, '[T]hat the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if

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he were in the actual custody of the proper gaoler'.

59. The Prosecutor has also relied on In the Matter of Surrender of Elizaphan Ntakirutimana in support of the proposition that under international law, an order by the Tribunal for the transfer of an individual does not give the Tribunal custody over such a person until the physical transfer has taken place. Reliance on this case is misguided in two respects. First, the U.S. Fifth Circuit Court of Appeals recently upheld a District Court ruling that reversed the Decision of the Magistrate that Ntakirutimana could not be extradited. Second, notwithstanding the reversal, Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.

60. The co-operation of Cameroon is consistent with its obligation to the Tribunal. The Statute and Rules mandate that States must comply with a request of the Tribunal for the surrender or transfer of the accused to the Tribunal. This obligation on Member States of the United Nations is mandatory, since the Tribunal was established pursuant to Chapter VII of the Charter of the United Nations.

61. Thus, the Appeals Chamber finds that, under the facts of this case, Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority. In the present case, the Prosecutor specifically requested Cameroon to detain and transfer the Appellant. The Statute of the Tribunal obligated Cameroon to detain the Appellant for the benefit of the Prosecutor. The Prosecutor has admitted that it had personal jurisdiction over the Appellant after the Rule 40*bis* Order was issued. That Order also asserts personal and subject matter jurisdiction. This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody. However, as will be discussed below, this limitation imposed on the Tribunal is consistent with international law. Even if the appellant was not in the constructive custody of the Tribunal, the principles governing the provisional detention of suspects should apply.

62. The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

63. It is well-established under international human rights law that pre-trial detention of suspects is lawful, as long as such pre-trial detention does not extend beyond a reasonable period of time. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged. For example, in Glenford Campbell v. Jamaica, the suspect was detained for 45 days without being formally charged. In holding this delay to be a violation of ICCPR Article 9(2), the Committee stated the following:

> [T]he Committee finds that the author was not "promptly" informed of the charges against him:

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> one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirement of article 9, paragraph 2.

64. Similar findings have been made in other cases involving alleged violations of ICCPR Article 9(2). For example, in Moriana Hernández Valentini de Bazzano, a period of eight months between the commencement of detention and filing of formal charges was held to violate ICCPR Article 9(2). In Monja Jaona, a period of eight months under which the suspect was placed under house arrest without being formally charged was found to be a violation of ICCPR Article 9(2). In Alba Pietraroia, the petitioner was detained for seven months without being formally charged and the Committee held that this detention violated ICCPR Article 9(2). Finally, in Leopoldo Buffo Carballal, a delay of one year between arrest and formal filing of charges was held to be a violation of ICCPR Article 9(2).

65. The Appeals Chamber also notes that the delay in indicting the Appellant apparently caused concern for President Kama. In a letter sent to the Appellant's Counsel on 8 September 1997, President Kama:

> I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review.

However, even at that point the 90-day period had expired.

66. Additionally, the Trial Chamber, in its Decision dismissing the Extremely Urgent Motion, stated, 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'. Moreover, even the Prosecutor acknowledged that the delay in indicting the Appellant was not justified. During the oral argument on the Appellant's Extremely Urgent Motion on 11 September 1998, Mr. James Stewart, appearing for the Prosecutor, acknowledged that the Appellant could or should have been indicted earlier:

> Now, I will say this, and I have to be frank with you, the president of this tribunal – and this is reflected in one of the letters that was sent to the accused –was anxious for the prosecutor to produce an indictment, if we were going to indict this man, and it may have been that *the indictment was, was not produced as early as it could have been or should have been...*

67. In conclusion, we hold that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects. The delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*. In the present appeal, Judge Aspregren issued the Rule 40*bis* Order with the proviso that the indictment be presented for confirmation within 30 days (the Rule permits for two 30-day extensions). In doing so, he invoked Sub-rule 40*bis*, thereby making an assertion of jurisdiction over the Appellant. The Prosecutor agrees that there was 'joined or concurrent jurisdiction' over the Appellant. Sub-rule 40*bis*(H) provides explicitly that the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made if the indictment is not issued within 90 days. This limitation on the detention of suspects is consistent with established human rights jurisprudence.

3. The delay between the transfer of the Appellant and his initial appearance

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68. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer. At the outset of this analysis the Appeals Chamber rejects the Prosecutor's contention that a 31-day holiday recess, between 15 December 1997 and 15 January 1998, could somehow justify this delay. The Appellant should have had his initial appearance well before the holiday recess even commenced and did not have it until over one month after the end of the recess.

69. The issue, therefore, is whether the 96-day period between the Appellant's transfer and initial appearance violates the statutory requirement that the initial appearance is held without delay. There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity. Consequently, it is even more important for the protection of his rights that his initial appearance was held without delay.

70. Rule 62, which is predicated on Articles 19 and 20 of the statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged *without delay* upon his transfer to the seat of the Tribunal. In determining if the length of time between the Appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest. The U.N. Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days. Thus, in Kelly v. Jamaica, the U.N. Human Rights Committee held that a detention of five weeks before being brought before a Judge violated Article 9(3).

71. Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62. Moreover, we find that the Appellant's right to be promptly indicted under Rule 40*bis* to have been violated. Although we find that these violations do not result in the Tribunal losing jurisdiction over the Appellant, we nevertheless reaffirm that the issues raised by the Appellant certainly fall within the ambit of Rule 72.

72. In the Tadić Interlocutory Appeal Decision, the Appeals Chamber set forth several policy arguments for why a liberal approach to admitting interlocutory appeals is warranted. The Appeals Chamber there stated:

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

We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.

B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine, the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

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75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating that:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*

The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica, the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

1. the length of the delay;
2. the prosecution's reasons to justify the delay;
3. the accused's efforts to assert his rights; and
4. the prejudice caused to the accused.

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case.

In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments, as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention, particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained. The second period is at the initial appearance of the accused after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to

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challenge its lawfulness...'. However, there is no requirement that the suspect be informed in any particular way. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all, so long as the suspect is informed promptly.

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above, the Human Rights Committee held in Glenford Campbell v. Jamaica, that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5 (2) have been held to be lawful. However, a delay of ten days between the arrest and informing the suspect of the charges has been held to run afoul of Article 5(2).

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent

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of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects; seeking provisional measures and the arrest and transfer of suspects; protecting the rights of suspect, by ensuring that the suspect understands those rights; submitting indictments for confirmation; amending indictments prior to confirmation; withdrawing indictments prior to confirmation; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation

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and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant'. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused. In this regard, we note that some courts have stated that 'mere delay' which gives rise to prejudice and unfairness might by itself amount to an abuse of process. For example, in R. Grays Justices ex p. Graham, the Queen's Bench stated in *obiter dicta* that:

> [P]rolonged delay in starting or conducting criminal proceedings may be an abuse of process when the substantial delay was caused by the improper use of procedure or inefficiency on the part of the prosecution and the accused has neither caused nor contributed to the delay.

93. The Prosecutor has asserted that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation,. The Prosecutor further argues that she should not be barred from proceeding against the Appellant simply because she did not proceed against the Appellant at the first available opportunity. In putting forth this argument, the Prosecutor relies on Judge Shahabuddeen's Separate Opinion from the Kovačević Decision. In that Separate Opinion, Judge Shahabuddeen referred to United States v. Lovasco, a leading United States case on pre-indictment delay, wherein the Court stated:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining 'due process', to impose on law enforcement officers our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates ... "fundamental conceptions of justice..." which "define the community's sense of fair play and decency"...

The Court continued:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

94. The facts in Lovasco are clearly distinguishable from those of the Appellant's case, and, therefore, we do not find the Supreme Court's reasoning persuasive. In Lovasco, the respondent was subjected to an 18-month delay between the alleged commission of the offences and the filing of the indictment. However, Mr. Lovasco had not been arrested during the 18-month delay and was not in custody during that period when the police were conducting their investigation. We also note that in United States v. Scott, in a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavored doctrine'.

95. Moreover, in the Kovačević Decision relied upon by the Prosecutor, the Appeals Chamber held that that the Rules provide a mechanism whereby the Prosecutor may seek to amend the indictment. Pursuant to Rule 50(A), the following scheme for amending indictments is available to the Prosecutor. The Prosecutor may amend an indictment, without prior leave, at any time before the indictment is confirmed. After the indictment is confirmed, but prior to the initial appearance of the accused, the

indictment may be amended only with the leave of the Judge who confirmed it. At or after the initial appearance of the accused, the indictment may be amended only with leave of the Trial Chamber seized of the case. The Prosecutor thus has the ability to amend indictments based on the results of her investigations. Therefore, the Prosecutor's argument that investigatory delay at the pre-indictment stage does not violate the rights of a suspect who is in provisional detention is without merit. Rule 40*bis* clearly requires issuance of the indictment within 90 days and the amendment process is available in situations where additional information becomes available to the Prosecutor.

96. Although a suspect or accused before the Tribunal is transferred, and not extradited, extradition procedures offer analogies that are useful to this analysis. In the context of extradition, several cases from the United States confirm that the prosecuting authority has a due diligence obligation with respect to accused awaiting extradition. For example, in Smith v. Hooey, the Supreme Court found that the Government had a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial'. In United States v. McConahy, the court held that the Government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would prove futile. We note that the Appellant made several inquiries of Tribunal officials regarding his status. It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about.

97. Moreover, conventional law and the legislation of many national systems incorporate provisions for the protection of individuals detained pending transfer to the requesting State. We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State. In no case may the provisional detention extend beyond 40 days from the date of arrest.

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated

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through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing

in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials.

106. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40(D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems. Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States and Zimbabwe. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above, the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek

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to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant without prejudice—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D), on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under...the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'.

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

113. For the foregoing reasons, THE APPEALS CHAMBER hereby: 765

Unanimously,

1. ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

2. DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

3. DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

4. DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

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

Gabrielle Kirk McDonald Mohamed Shahabuddeen Lal Chand Vohrah

Presiding

Wang Tieya Rafael Nieto-Navia

Dated this third day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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Appendix A

Chronology of Events

15 April 1996:	Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. The accused was among those arrested. The parties disagree with respect to the question of under whose authority the accused was detained. The Appellant asserts he was arrested by Cameroon on the basis of a request from the Prosecutor, while the Prosecutor contends that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
17 April 1996:	The Prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
6 May 1996:	The Prosecutor seeks a three-week extension for the detention of the Appellant in Cameroon.
16 May 1996:	The Prosecutor informs Cameroon that she seeks to transfer and hold in provisional detention under Rule 40*bis* four of the individuals detained by Cameroon, *excluding* the Appellant.
31 May 1996:	The Court of Appeal in Cameroon issues a Decision to adjourn *sine die* consideration of the Rwandan extradition proceedings concerning the Appellant as the result of a request by the Cameroonian Deputy Director of Public Prosecution. In support of his request, the Deputy Director cites Article 8(2) of the ICTR Statute.
15 October 1996:	The Prosecutor sends the Appellant a letter indicating that Cameroon is not holding the Appellant at her behest.
21 February 1997:	The Cameroon court rejects Rwanda's extradition request for the Appellant. The court orders the Appellant's release, but he is immediately re-arrested at the behest of the Prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the Appellant.
24 February 1997:	Pursuant to Rule 40*bis*, the Prosecutor requests the transfer of the accused to Arusha.
4 March 1997:	An Order pursuant to Rule 40*bis* (signed by Judge Aspegren on 3 March 1997), is filed. This Order requires Cameroon to arrest and transfer the Appellant to the Tribunal's detention unit.
10 March 1997:	The Appellant is shown a copy of the Rule 40*bis* Order, including the general nature of the charges against him.
29 September 1997:	The Appellant files a *writ of habeas corpus*.
21 October 1997:	The President of Cameroon signs a decree ordering the Appellant's transfer to the Tribunal's detention unit.
22 October 1997:	The Prosecutor submits the indictment for confirmation.

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23 October 1997:	Judge Aspegren confirms the indictment against the Appellant and issues a Warrant of Arrest and Order for Surrender to Cameroon.
19 November 1997:	The Appellant is transferred to Arusha.
23 February 1998:	The Appellant makes his initial appearance.
24 February 1998:	The Appellant files the Extremely Urgent Motion seeking to nullify the arrest.
11 September 1998:	The Trial Chamber hears the arguments of the parties on the Motion.
17 November 1998:	The Trial Chamber dismisses the Extremely Urgent Motion *in toto*.
27 November 1998:	The Appellant notified the Appeals Chamber of his intention to appeal, claiming that he did not receive the Decision until 27 November 1998. On that same day, he signs his Notice of Appeal.

PROSECUTION INDEX OF AUTHORITIES

ANNEX X

Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1, T. Ch., 10 December 1998, paras. 153-157

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IN THE TRIAL CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 10 December 1998

PROSECUTOR

v.

ANTO FURUNDZIJA

JUDGEMENT

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

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

I. INTRODUCTION

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

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

HEREBY RENDERS ITS JUDGEMENT.

A. The International Tribunal

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

(b) The Prohibition Imposes Obligations Erga Omnes

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

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

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

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

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

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

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obedience imposed by the individual State".[173]

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

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

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170. *See also* the General Comment No. 24 on "Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political
Rights] or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant", issued on 4 Nov. 1994 by the United Nations Human Rights Committee, para. 10 ("the prohibition of torture has the status of a peremptory norm"). In 1986, the United Nations Special Rapporteur, P. Kooijmans, in his report to the Commission on Human Rights, took a similar view (E/CN. 4/1986/15, p. 1, para 3). That the international proscription of torture has turned into *jus cogens* has been among others held by U.S. courts in *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992) Cert. Denied, *Republic of Argentina v. De Blake*, 507 U.S. 1017,123L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al. v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9th Cir. 1992) Cert. Denied, *Marcos Manto v. Thajane*, 508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993).

171. Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969.

172. As for amnesty laws, it bears mentioning that in 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the
ICCPR stated the following: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." (*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev. 1 at 30 (1994)).

173. IMT, Vol. 1, p. 223.

174. *See Attorney-General of the Government of Israel v. Adolf Eichmann 36 I.L.R. 298*; *In the Matter of the Extradition of John Demjanjuk*, 612
F. Supp.544, 558 (N.D. Ohio 1985). *See also Demjanjuk v. Petrovsky,* 776 F. 2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986), for a discussion of the universality principle as applied to the commission of war crimes.

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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

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UNITED
NATIONS

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

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I Introduction

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.

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:

> 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.

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:

> 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.

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.

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.

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]

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.

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]

Case: IT-98-30/1-A

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.

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PROSECUTION INDEX OF AUTHORITIES

ANNEX XII

Prosecutor v. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, Appeals Chamber, 5 June 2003

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UNITED NATIONS

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

Case No.: IT-94-2-AR73

Date: 5 June 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Amin El Mahdi

Registrar: **Mr. Hans Holthuis**

Decision of: **5 June 2003**

PROSECUTOR

v.

DRAGAN NIKOLI]

DECISION ON INTERLOCUTORY APPEAL CONCERNING LEGALITY OF ARREST

Counsel for the Prosecutor:
Mr. Upawansa Yapa

Counsel for the Accused:
Mr. Howard Morrison
Ms. Tanja Radosavljevi}

I. Background

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (respectively, "Appeals Chamber" and "International Tribunal") is seised of the "Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 9th October 2002" filed by counsel for Dragan Nikoli} (respectively, "Defence" and "Accused" or "Appellant") on 27 January 2003 ("Appeal"), pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Appeal concerns a decision issued by Trial Chamber II on 9 October 2002 on the legality of the Accused's arrest by the Stabilisation Force (respectively, "Impugned Decision" and "SFOR"). The Accused, indicted by the International Tribunal for crimes against humanity and war crimes on 1 November 1994, was arrested by SFOR on or about 20 April 2000 in Bosnia and Herzegovina.[1] In the Impugned Decision, the Trial Chamber found that the Appellant was "allegedly illegally arrested and abducted from the territory of FRY by some unknown individuals and transferred by them to the territory of Bosnia and Herzegovina" and that "neither SFOR nor the Prosecution were involved in these acts".[2] It also determined that since the Accused had '"come into contact with SFOR", SFOR was obliged to arrest, detain and transfer him to the Hague'".[3] It found that the Accused's abduction involved neither a violation of the sovereignty of Serbia and Montenegro[4] that could be attributed either to SFOR or to the Office of the Prosecutor ("OTP" or "Prosecution"), nor a violation of the Accused's human rights or the fundamental principle of due process of law.[5] For all these reasons, it concluded that there did not exist a "legal impediment to the Tribunal's exercise of jurisdiction over the Accused".[6]

3. The question presented in this appeal is whether the International Tribunal can exercise jurisdiction over the Appellant notwithstanding the alleged violations of Serbia and Montengro's sovereignty and of the Accused's human rights committed by SFOR, and by extension OTP, acting in collusion with the unknown individuals who abducted the Accused from Serbia and Montenegro.

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[1] *Prosecutor v.Dragan Nikoli}*, Case No. IT-94-AR72, "Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 9 October 2002.
[2] *Supra* n.1, p. 39.
[3] *Ibid.*
[4] As the name of the Federal Republic of Yugoslavia (FRY) has been officially changed on 4 February 2003 and now is Serbia and Montenegro, this decision will, except where quoting portions of the Impugned Decision, only refer to the State Union of Serbia and Montenegro.
[5] *Ibid.*
[6] *Ibid.*

4. As to the procedural background leading to this appeal, the following must be recalled. On 9 October 2002, the Appellant filed a notice of appeal against the Impugned Decision pursuant to Rule 108 and/or Rule 72 of the Rules[7]. The Prosecution responded on 18 November 2002.[8] On 9 January 2003, the Appeals Chamber dismissed the Notice of Appeal on the ground that the Defence should have filed its Notice of Appeal neither under Rule 108 nor under Rule 72 but under Rule 73 of the Rules.[9]

5. On 14 January 2003, the Appellant sought certification for leave to appeal from the Trial Chamber.[10] OTP responded on 17 January 2003.[11] The Defence replied on 20 January 2003.[12] On 17 January 2003, the Trial Chamber granted certification.[13] On 27 January 2003, the Appellant filed the Appeal. The Prosecution responded on 3 February 2003 ("Response").[14] No reply was filed by the Defence.

II. Submissions of the Parties

Ground I – The Trial Chamber erred in holding that the conduct of third parties who unlawfully abducted the Accused across state borders could not be attributed to SFOR and OTP.

6. The Defence argues that the Trial Chamber erred in holding that the conduct of the persons who apprehended the Appellant should not be imputed to SFOR and, by extension, to the OTP. The Defence asserts that the Trial Chamber's use of the International Law Commission's ("ILC")Draft Articles on State Responsibility[15] to determine whether the conduct of third parties can be attributed to SFOR or the OTP was inappropriate because the Draft Articles are not recognised as customary

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[7] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-AR72, "Notice of Appeal from the Judgement, pursuant to Rule 108 of the Rules of Evidence and Procedure, of Trial Chamber II dated the 9th day of October 2002 concerning the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 7 November 2002.
[8] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-AR72, "Prosecution Response to the Two Defence Documents filed on 8 November 2002 purporting to be a Notice of Appeal pursuant to Rule 108 and a Motion for Extension of Time under Rule 127 Respectively", 18 November 2002.

[9] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-AR72, "Decision on Notice of Appeal", 9 January 2003.
[10] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-AR72, "Motion for Certification and Relief under the Provisions of Rules 73 and 127 of the Rules", 20 January 2003.
[11] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-2-PT, "Prosecution's Response to the Defence Motion for Certification and Relief Under the Provisions of Rules 73 and 127 of the Rules of Procedure and Evidence", Case No. IT-94-2-PT, 17 January 2003.
[12] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-2-PT, "Reply to Response of the Prosecutor, filed on the 17th January 2003 to the Defence Motion Filed on the 14th January 2003 for Certification and Relief under Rules 73 and 127 of the Rules of Procedure and Evidence", 20 January 2003.
[13] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-AR72, "Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal'", 17 January 2003.
[14] *Prosecutor v. Dragan Nikoli}*, Case No. IT-94-2-AR73, "Prosecution Response to 'Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 09 October 2002'", 3 February 2003.
[15] Draft Articles of the International Law Commission on the issues of Responsibilities of States for Internationally Wrongful Acts and commentary, adopted by the ILC at its fifty-third session in 2001 (*See* UNGAOR, 56th Sess., Supp. No. 10 (A/56/10), chp.IV.E.2).

or treaty law. The Defence argues that the Appeals Chamber should apply a different test. The Defence contends that SFOR knew that the Accused had been the victim of an unlawful and violent abduction and that by taking the Accused into custody, SFOR colluded in the original crime. Furthermore, it asserts that SFOR's responsibility cannot be excused simply on the ground that it was enforcing its mandate.

7. The Prosecution argues that the Trial Chamber was correct in finding that the ILC Draft Articles offer important guidance on the state of customary international law and constitute a useful distillation of State practice. It submits that in any case, since the Trial Chamber acknowledged the limitations of the ILC Draft Articles as a formal source of law, no error can be imputed to it.

8. As to SFOR's collusion with the "unknown individuals", the Prosecution points out that the parties submitted to the Trial Chamber (on 12 July 2002) a stipulation "that the apprehension and transportation [of the Accused] into the territory of Bosnia and Herzegovina was undertaken by unknown individuals having no connection with SFOR and/or the Tribunal"[16] ("Agreement"). Even without such an agreement, the Prosecution asserts that simply taking an accused into custody from third parties cannot amount to the adoption or approval of any prior irregularity on the part of such parties.

Ground II – The Trial Chamber erred in finding that SFOR implemented its obligations under the International Tribunal's Statute and Rules and that there was no collusion or official involvement in the allegedly illegal acts.

9. As in the previous ground, the Defence argues that SFOR knew that the Accused had been illegally detained and that his subsequent arrest demonstrates SFOR's collusion in the prior criminal activity. This collusion, the Defence contends, constitutes an abuse of process. The Prosecution responds that SFOR had no knowledge of the identity of the Accused's captors and that, because of SFOR's mandate, SFOR was obligated to arrest the Accused once it had confirmation that he was an indictee of the International Tribunal.

Ground III – The Trial Chamber erred by not considering the relationship between SFOR and the OTP.

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[16] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber as Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal under Rule 72 and Generally, the Nature of the Relationship between the OTP and SFOR and the Consequences of any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention", 29 October 2001.

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10. The Defence asserts that if there was collusion between the Accused's captors and SFOR, the Trial Chamber should have examined the nature of the relationship between SFOR and the OTP when considering the question of whether a stay of the proceedings ought to be granted. In this regard, the Defence refers to its submissions before the Trial Chamber in which it argued that SFOR acts as both a *de facto* and a *de jure* agent of the International Tribunal and the OTP when detaining and arresting indictees.[17] The Defence adds that, in any event, the Trial Chamber ought to have addressed the issue of the relationship between SFOR and OTP in order to come to a reasoned conclusion on the nature and seriousness of the violations of the Accused's rights and the occurrence of an abuse of process.

11. The Prosecution responds that, in the absence of wrongdoing by SFOR, the nature of its relationship with the OTP is irrelevant. While it is true that SFOR and the OTP have a working relationship and actively cooperate with each other, the actions of SFOR are not thereby automatically attributable to the OTP.

Ground IV – The Trial Chamber erred by concluding that SFOR did not breach State sovereignty.

12. The Defence claims that Serbia and Montenegro's constitution prohibits the transfer of persons sought by the Tribunal, and that the Accused's apprehension deprived a national of Serbia and Montenegro of his State's due process protection and of his right to challenge the legality of his arrest before Serbian and Montenegrin courts.

13. The Defence also argues that in arresting indictees such as the Accused, SFOR is analogous to an executive authority of a State. In exercising its mandate, SFOR violated Serbia and Montenegro's sovereignty by denying it the right to protect its nationals from breaches of international law, such as collusion in a cross-border abduction.

14. The Prosecution asserts that, even if SFOR breached Serbia and Montenegro's sovereignty, Serbia and Montenegro was obligated to transfer the Accused to the International Tribunal once he is in its custody. In such a case, the right to exhaust domestic judicial remedies is superseded by the transfer obligations of Serbia and Montenegro.

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[17] *Supra* n.7, p.6.

Ground V – The Trial Chamber erred in concluding that the circumstances of the apprehension of the Accused were insufficiently "egregious" to justify the exercise of a discretionary stay of the proceedings.

15. The Defence contends that the Trial Chamber erred in finding that the circumstances of the Accused's arrest were insufficiently egregious to justify a discretionary stay of the proceedings. The Defence argues that, following the reasoning of the Appeals Chamber of the International Criminal Tribunal ("ICTR") in *Barayagwiza*, a court may decline to exercise its jurisdiction in cases where violations of an accused's rights are so egregious that to exercise jurisdiction would be detrimental to the court's integrity. The Defence contends that kidnapping constitutes such an egregious violation. In order to deter future kidnappings, the Defence stresses that the International Tribunal should only exercise jurisdiction over indictees who were transferred to the International Tribunal through lawful means. Exercising jurisdiction in this case amounts to condoning kidnappings that are executed with minimal violence.

16. The Prosecution responds that the Trial Chamber, in accordance with the ICTR Appeals Chamber's reasoning in *Barayagwiza,* correctly concluded that the circumstances of the Accused's arrest did not satisfy the standard of "egregious treatment". In any case, according to the Prosecution, breaches of international law by non-SFOR entities do not divest the International Tribunal of its jurisdiction over indictees.

III. Discussion

(a) Preliminary Considerations

17. The essence of the Defence's position is that SFOR, and by extension the OTP, acted in collusion with the individuals who took the Accused from Serbia and Montenegro to SFOR in Bosnia and Herzegovina. SFOR knew that the accused had been kidnapped. By taking the Accused into its custody, SFOR effectively accepted that kidnapping in breach of Serbia and Montenegro's sovereignty and the Accused's human rights. Therefore, jurisdiction must be set aside.

18. The Appeals Chamber observes that the basic assumption underlying the Defence submissions is that setting aside jurisdiction by the International Tribunal is the appropriate remedy for the violations of State sovereignty and/or human rights that allegedly occurred in this case. That assumption requires further scrutiny. For, if the setting aside of jurisdiction is not the appropriate remedy for such violations, then, even assuming that they occurred and that the Defence is correct that the responsibility for the actions of the Accused's captors should be attributed to SFOR,

jurisdiction would not need to be set aside. Thus, the first issue to be addressed is in what circumstances, if any, the International Tribunal should decline to exercise its jurisdiction because an accused has been brought before it through conduct violating State sovereignty or human rights. Once the standard warranting the declining of the exercise of jurisdiction has been identified, the Appeals Chamber will have to determine whether the facts of this case are ones that, if proven, would warrant such a remedy. If yes, then the Appeals Chamber must determine whether the underlying violations are attributable to SFOR and by extension to the OTP.

19. Before turning to these issues, however, the Appeals Chamber wishes to clarify that what is at issue here, is not jurisdiction *ratione materiae* but jurisdiction *ratione personae*. Jurisdiction *ratione materiae* depends on the nature of the crimes charged. The Accused is charged with war crimes and crimes against humanity. As such, there is no question that under the Statute, the International Tribunal does have jurisdiction *ratione materiae*. In this case, jurisdiction *ratione personae* depends instead on whether the Appeals Chamber determines that there are any circumstances relating to the Accused which would warrant setting aside jurisdiction and releasing the Accused. It is to this determination that the Chamber now turns.

(b) Under what circumstances does a violation of State sovereignty require jurisdiction to be set aside?

20. The impact of a breach of a State's sovereignty on the exercise of jurisdiction is a novel issue for this Tribunal. There is no case law directly on the point, and the Statute and the Rules provide little guidance. Article 29 of the Statute, *inter alia*, places upon all States the duty to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. It also requires States to comply without undue delay with requests for assistance or orders issued by Trial Chambers, including the arrest or detention of persons. The Statute, however, does not provide a remedy for breaches of these obligations. In the absence of clarity in the Statute, Rules, and jurisprudence of the International Tribunal, the Appeals Chamber will seek guidance from national case law, where the issue at hand has often arisen, in order to determine State practice on the matter.

21. In several national cases, courts have held that jurisdiction should not be set aside, even though there might have been irregularities in the manner in which the accused was brought before them. In the *Argoud* case, the French Court of Cassation (Criminal Chamber) held that the alleged violation of German sovereignty by French citizens in the operation leading to the arrest of the

accused did not impede the exercise of jurisdiction over the accused; it would be for the injured State (Germany) to complain and demand reparation at the international level and not for the accused.[18] The *Cour de Sûreté*, the lower court, had actually noted that the State concerned (Germany) had not lodged any formal complaint and that ultimately, the issue was dealt with through diplomatic means.[19] In *Stocke*, the German Federal Constitutional Court (Bundesverfassungsgericht) endorsed a ruling by the Federal Court of Justice (Bundesgerichtshof) rejecting the appeal of the accused, a German national residing in France, claiming that he was the victim of an unlawful collusion between the German authorities and an informant who had deceptively brought him to German territory. The Court found that, even though there existed some decisions taking the opposite approach, according to international practice, courts would in general only refuse to assume jurisdiction in a case of a kidnapped accused if another State had protested against the kidnapping and had requested the return of the accused.[20] In *United States v. Alvarez-Machain*, the Supreme Court of the United States held that the abduction of an accused who was a Mexican citizen, though it may have been in violation of general international law, did not require the setting aside of jurisdiction even though Mexico had requested the return of the accused.[21]

22. On the other hand, there have been cases in which the exercise of jurisdiction has been declined. In *Jacob-Salomon*, an ex-German citizen was abducted on Swiss territory, taken to Germany, and held for trial on a charge of treason. The Swiss Government protested vigorously, claiming that German secret agents had been involved in the kidnapping, and sought the return of Jacob-Salomon. Though it denied any involvement of German agents in Swiss territory, the German government agreed (without arbitration) to return Jacob-Salomon to the Swiss Government.[22] More recently, in *State v. Ebrahim*, the Supreme Court of South Africa had no hesitation in setting aside

[18] *In Re Argoud*, Court of Cassation, Judgment of 4 June 1964 in ILR, Vol. 45, p. 97.
[19] See relevant portion of the decision of the *Cour de Sûreté*, which dates 30 December 1963, in *Journal du Droit International*, "Pratique Comparée des États", Vol. 13, 1964, p. 191.
[20] See respectively Decision of 17 July 1985, AZ: 2 BvR 1190/84, Bundesverfassungsgericht (Federal Constitutional Court), para 1 c) and Judgement of 2 August 1984, Az: 4 StR 120/83, Bundesgerichtshof (Federal Court of Justice), para 2 b). The Bundesgerichtshof had found that the jurisdiction of German courts would only have been put into question had the French Republic requested reparation for an alleged violation of the French-German extradition treaty. The case was then brought to the European Commission of Human Rights ("Commission"); see *Stocke v. Federal Republic of Germany*, Commission, Decision on Admissibility, Application No. 11755/85, 9 July 1987. The Commission declared it admissible and, in turn, referred it to the European Court of Human Rights ("ECHR"). The latter dismissed it without passing on, however, the issue here discussed. See *Stocke v.Germany*, ECHR, Judgement of 18 February 1991, para 54.
[21] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See also *United States v. Matta-Ballesteros*, 71 F.3d 754 (1997), and *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).
[22] See Preuss Lawrence, "Settlement of the Jacob Kidnapping Case (Switzerland-Germany)", American Journal of International Law, 1936, Vol.30/1, pp. 123-124 and, of the same author, see also "Kidnapping of Fugitives From Justice on Foreign Territory", American Journal of International Law, 1935, Vol. 29/3, pp. 502-507.

jurisdiction over an accused kidnapped from Swaziland by the security services.[23] Similarly, in the *Bennet* case, the House of Lords granted the appeal of a New Zeland citizen, who was arrested in South Africa by the police and forcibly returned to the United Kingdom under the pretext of deporting him to New Zealand. It found that if the methods through which an accused is brought before the court were in disregard of extradition procedure, the court may stay the prosecution and order the release of the accused.[24]

23. With regard to cases concerning the same kinds of crimes as those falling within the jurisdiction of the International Tribunal, reference may be made to *Eichmann* and *Barbie*. In *Eichmann*, the Supreme Court of Israel decided to exercise jurisdiction over the accused, notwithstanding the apparent breach of Argentina's sovereignty involved in his abduction.[25] It did so mainly for two reasons. First, the accused was "a fugitive from justice" charged with "crimes of an universal character...condemned publicly by the civilized world".[26] Second, Argentina had "condoned the violation of her sovereignty and has waived her claims, including that for the return of the appellant. Any violation therefore of international law that may have been involved in this incident ha[d] thus been removed".[27] In *Barbie*, the French Court of Cassation (Criminal Chamber) asserted its jurisdiction over the accused, despite the claim that he was a victim of a disguised extradition, on the basis, *inter alia*, of the special nature of the crimes ascribed to the accused, namely, crimes against humanity.[28]

24. Although it is difficult to identify a clear pattern in this case law, and caution is needed when generalising, two principles seem to have support in State practice as evidenced by the practice of their courts. First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such ("Universally Condemned Offences"), courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction. The initial *iniuria* has in a way been cured and the risk

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[23] *State v. Ebrahim, Supreme Court* (Appellate Division), Opinion, 16 February 1991. See text in International Legal Materials, Vol. 31, n. 4, July 1992, pp. 890-899.
[24] *Re Bennet, House of Lords*, 24 June 1993, All England Law Reports (1993) 3, pp. 138-139. See also Lowe Vaughan, "Circumventing Extradition Procedures is an Abuse of Process", Cambridge Law Journal, 1993, pp. 371-373.
[25] Fawcett J.E.S., *The Eichmann Case*, British Yearbook of International Law, Vol. 38, 1962, pp. 181-215.
[26] *People of Israel v. Eichmann*, Supreme Court of Israel, Judgement of 29 May 1962 in ILR, Vol. 36, p. 306.
[27] *Ibid.*
[28] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Court of Cassation (Criminal Chamber, Judgement of 6 October 1983 in ILR, Vol. 78, pp. 130-131. See also Benedetto Conforti, "International Law and the Role of Domestic Legal System", Martinus Nijhoff Publishers, p. 157.

of having to return the accused to the country of origin is no longer present. Drawing on these indications from national practice, the Appeals Chamber adds the following observations. 809

25. Universally Condemned Offences are a matter of concern to the international community as a whole.[29] There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts.

26. This legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused. The latter point will be addressed in Part (c) below. In the opinion of the Appeals Chamber, the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved. This is all the more so in cases such as this one, in which the State whose sovereignty has allegedly been breached has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction.[30] *A fortiori*, and leaving aside for the moment human rights considerations, the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organisation, or other entity, do not necessarily in themselves violate State sovereignty.

27. Therefore, even assuming that the conduct of the Accused's captors should be attributed to SFOR and that the latter is responsible for a violation of Serbia and Montenegro's sovereignty, the Appeals Chamber finds no basis, in the present case, upon which jurisdiction should not be exercised.

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[29] See Higgins, Rosalyn, "Problems & Process (International Law and How We Use it)", Clarendon Press, Oxford, 1995, p. 72.

(c) Under what circumstances does a human rights violation require jurisdiction to be set aside? 810

28. Turning now to the issue of whether the violation of the human rights of an accused requires the setting aside of jurisdiction by the International Tribunal, the Appeals Chamber recalls first the analysis of the Trial Chamber. The Trial Chamber found that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. The Trial Chamber, however, did not exclude that jurisdiction should not be exercised in certain cases. It held that:

> in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment.[31]

29. This approach, the Appeals Chamber observes, is consistent with the dictum of the U.S. Federal Court of Appeals in *Toscanino*.[32] In that case, the Court held that "[we] view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights".[33] A Trial Chamber of the International Tribunal in *Dokmanovi}* also relied on this approach.[34] Along the same lines, the ICTR Appeals Chamber in *Barayagwiza* held that a court may decline to exercise jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".[35]

30. The Appeals Chamber agrees with these views. Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*,[36] certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of

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[30] See in this regard *Ocalan v. Turkey*, ECHR, Judgement of 12 March 2003, para 97.
[31] Impugned Decision, para 114.
[32] 500 F.2d 267 (2d Cir. 1974), p. 275.
[33] *Ibid.*
[34] *Prosecutor v. Slavko Dokmanovi}*, Case No. IT-95-13a-PT, "Decision on the Motion for Release by the Accused Slavko Dokmanovi} Trial Chamber I", 22 October 1997, paras 70-75.
[35] *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, "Decision", 3 November 1999, para 74. The Appeals Chamber applied this principle in ordering the release of the accused where he was the subject of human rights violations, including an excessively long pre-trial detention and the failure to inform the accused of the charges against him. This decision was reviewed by the Appeals Chamber, at the request of the Prosecutor, in its decision of 31 March 2000. In that decision, the Appeals Chamber reversed the remedy it had previously ordered on the basis of new facts put forward by the Prosecution. These new facts presented a different picture of the violations of rights suffered by the accused and of the omissions of the Prosecutor. However, in the March 2000 decision, the Appeals Chamber "confirmed its Decision of 3 December 1999 on the basis of the facts it was founded on" (para 51).
[36] *Soering v. United Kingdom*, ECHR, Judgment of 26 June 1989, para 100.

these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must, therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.

31. In the present case, the Trial Chamber examined the facts agreed to by the parties. It established that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. The Defence has not presented to the Appeals Chamber any alternative or more comprehensive view of the facts that might show that the Trial Chamber erred in its assessment of them. Nevertheless, the Appeals Chamber, in fairness to the Accused, has *proprio motu* reviewed all the facts of this case. Upon this review, the Appeals Chamber concurs with the Trial Chamber that the circumstances of this case do not warrant, under the standard defined above, the setting aside of jurisdiction.

32. In the circumstances, the evidence does not satisfy the Appeals Chamber that the rights of the accused were egregiously violated in the process of his arrest. Therefore, the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction.

33. Thus, even assuming that the conduct of Accused's captors should have been attributed to SFOR and that the latter was as a result responsible for a breach of the rights of the Accused, the Appeals Chamber finds no basis upon which jurisdiction should not be exercised.

IV. Disposition

34. For the foregoing reasons, the Appeal is dismissed.

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

Dated this 5th of June 2003
At the Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]

PROSECUTION INDEX OF AUTHORITIES

ANNEX XIII

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

Case: IT-98-30/1-A 813

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;

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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.

PROSECUTION INDEX OF AUTHORITIES

ANNEX XIV

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

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

ALHAJI AHMAD TEJAN KABBAH,
President.

LS

No. 3 **1999**

Sierra Leone

The Lomé Peace Agreement (Ratification) Act, 1999

Short title.

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

[22nd July, 1999] Date of Commencement.

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

ALHAJI AHMAD TEJAN KABBAH,
President.

LS

No. 3

1999

Sierra Leone

The Lomé Peace Agreement (Ratification) Act, 1999

Short title.

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

[22nd July, 1999] Date of Commencement.

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

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

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

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

Ratification of Peace Agreement

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

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

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

Interpretation.

Act No. 6 of 1991.

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

SCHEDULE *(Section 1)*

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

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

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

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

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

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

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

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

Determined to foster mutual trust and confidence between themselves;

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

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

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

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

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

HEREBY AGREE AS FOLLOWS:

PART ONE

CESSATION OF HOSTILITIES

ARTICLE I

CEASE-FIRE

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

ARTICLE II

CEASE-FIRE MONITORING

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

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

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

PART TWO

GOVERNANCE

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

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

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

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

Article VI Commission for the Consolidation of Peace

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

Article VIII Council of Elders and Religious Leaders.

ARTICLE III

TRANSFORMATION OF THE RUF/SL INTO A POLITICAL PARTY

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

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

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

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

(i) Setting up a trust fund;

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

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

ARTICLE IV

ENABLING MEMBERS OF THE RUF/SL TO HOLD PUBLIC OFFICE

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

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

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

ARTICLE V

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

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

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

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

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

(ii) Three other cabinet positions.

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

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

ARTICLE VI

COMMISSION FOR THE CONSOLIDATION OF PEACE

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

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

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

(ii) the Joint Monitoring Commission;

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

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

(v) the Committee for Humanitarian Assistance;

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

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

(viii) the Human Rights Commission; and

(ix) the Truth and Reconciliation Commission.

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

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

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

(i) Two representatives of the civil society;

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

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

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

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

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

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

ARTICLE VII

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Three representatives of the civil society; and

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

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

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

ARTICLE VIII

COUNCIL OF ELDERS AND RELIGIOUS LEADERS

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

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

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

(iii) One member appointed by ECOWAS.

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

PART THREE

OTHER POLITICAL ISSUES

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

Article IX Pardon and Amnesty

Article X Review of the Present Constitution

Article XI Elections

Article XII National Electoral Commission

ARTICLE IX

PARDON AND AMNESTY

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

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

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

ARTICLE X

REVIEW OF THE PRESENT CONSTITUTION

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

ARTICLE XI

DATE OF NEXT ELECTIONS

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

ARTICLE XII

NATIONAL ELECTORAL COMMISSION

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

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

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

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

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PART FOUR

POST-CONFLICT MILITARY AND SECURITY ISSUES

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

Article XIII Transformation and New Mandate of ECOMOG

Article XIV New Mandate of UNOMSIL and Phased Withdrawal of ECOMOG

Article XV Security Guarantees for Peace Monitors

Article XVI Encampment, Disarmament, Demobilization and Reintegration

Article XVII Restructuring and Training of the Sierra Leone Armed Forces

Article XVIII Withdrawal of Mercenaries

Article XIX Notification to Joint Monitoring Commission

Article XX Notification to Military Commands.

ARTICLE XIII

TRANSFORMATION AND NEW MANDATE OF ECOMOG

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

(i) Peacekeeping;

(ii) Security of the State of Sierra Leone;

(iii) Protection of UNOMSIL.

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

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

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

ARTICLE XIV

NEW MANDATE OF UNOMSIL

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

ARTICLE XV

SECURITY GUARANTEES FOR PEACE MONITORS

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

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

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

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

ARTICLE XVI

ENCAMPMENT, DISARMAMENT, DEMOBILIZATION AND REINTEGRATION

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

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

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

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

ARTICLE XVII

RESTRUCTURING AND TRAINING OF THE SIERRA LEONE ARMED FORCES

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

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

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

ARTICLE XVIII

WITHDRAWAL OF MERCENARIES

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

ARTICLE XIX

NOTIFICATION TO JOINT MONITORING COMMISSION

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

ARTICLE XX

NOTIFICATION TO MILITARY COMMANDS

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

PART FIVE

HUMANITARIAN, HUMAN RIGHTS AND SOCIO-ECONOMIC ISSUES

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

ARTICLE XXI

RELEASE OF PRISONERS AND ABDUCTEES

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

ARTICLE XXII

REFUGEES AND DISPLACED PERSONS

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

ARTICLE XXIII

GUARANTEE OF THE SECURITY OF DISPLACED PERSONS AND REFUGEES

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

ARTICLE XXIV

GUARANTEE AND PROMOTION OF HUMAN RIGHTS

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

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

ARTICLE XXV

HUMAN RIGHTS COMMISSION

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

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

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

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

ARTICLE XXVI

HUMAN RIGHTS VIOLATIONS

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

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

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

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

ARTICLE XXVII

HUMANITARIAN RELIEF

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

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

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

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

ARTICLE XXVIII

POST-WAR REHABILITATION AND RECONSTRUCTION

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

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

ARTICLE XXIX

SPECIAL FUND FOR WAR VICTIMS

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

ARTICLE XXX

CHILD COMBATANTS

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

ARTICLE XXXI

EDUCATION AND HEALTH

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

PART SIX

IMPLEMENTATION OF THE AGREEMENT

ARTICLE XXXII

JOINT IMPLEMENTATION COMMITTEE

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

ARTICLE XXXIII

REQUEST FOR INTERNATIONAL INVOLVEMENT

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

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PART SEVEN

MORAL GUARANTORS AND INTERNATIONAL SUPPORT

ARTICLE XXXIV

MORAL GUARANTORS

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

ARTICLE XXXV

INTERNATIONAL SUPPORT

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

PART EIGHT

FINAL PROVISIONS

ARTICLE XXXVI

REGISTRATION AND PUBLICATION

The Sierra Leone Government shall register the signed Agreement not later than 15 days from the date of the signing of this Agreement. The signed Agreement shall also be published in the Sierra Leone *Gazette* not later than 48 (Forty - Eight) hours after the date of registration of this Agreement. This Agreement shall be laid before the Parliament of Sierra Leone not later than 21 (Twenty - One) days after the signing of this Agreement.

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ARTICLE XXXVII

ENTRY INTO FORCE

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

Done in Lomé this *7th* day of the month of *July, 1999* in (12) twelve original texts in English and French, each text being equally authentic.

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

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

HIS EXCELLENCY GNASSINGBÉ EYADÉMA
PRESIDENT OF THE TOGOLESE REPUBLIC,
CHAIRMAN OF ECOWAS

HIS EXCELLENCY BLAISÉ COMPAORÉ
PRESIDENT OF BURKINA FASO

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

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

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

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

Mr. Roger LALOUPO
REPRESENTATIVE OF THE ECOWAS
EXECUTIVE SECRETARY

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

Ms. Adwoa COLEMAN
REPRESENTATIVE OF THE
ORGANIZATION OF AFRICAN UNITY

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

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ANNEX 1

AGREEMENT ON CEASEFIRE IN SIERRA LEONE

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

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

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

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

— Have jointly decided to:

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

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

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

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

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

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

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

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

For the Government of Sierra Leone

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

For the Revolutionary United Front of Sierra Leone

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

Witnessed by:

For the Government of Togo and Current Chairman of ECOWAS

Gnassingbé EYADÉMA
President of the Republic of Togo

For the United Nations

Francis G. OKELO
Special Representative of the Secretary-General

For the Organization of African Unity

Adwoa COLEMAN
Representative of the Organization of African Unity

US Presidential Special Envoy for the Promotion of Democracy in Africa

Rev. Jesse JACKSON

ANNEX 2

DEFINITION OF CEASE-FIRE VIOLATIONS

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

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

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

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

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

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

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

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

(vii) Air Defence weapon systems of any nature.

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

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

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

d. Troop movements of any nature;

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

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

g. Any other offensive or aggressive action.

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

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

ANNEX 3

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

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

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

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

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

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

Lomé — 2 June, 1999

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ANNEX 4

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

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

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

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

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

Hereby agree as follows:

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

2. In this respect the two parties shall:

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

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

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

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

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

The Implementation Committee will be mandated to:

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

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

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

Issued in Lomé
June 3, 1999

ANNEX 5

DRAFT SCHEDULE OF IMPLEMENTATION OF THE PEACE AGREEMENT

I. ACTIVITIES WITH SPECIFIC TIMING:

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 1	Signing of the Peace Agreement		
	Amnesty	The Government to grant absolute and free pardon to the RUF Leader Foday Sankoh through appropriate legal steps	
	Transformation, new mandate, and phased withdrawal of ECOMOG	Request to ECOWAS by the parties for revision of the mandate of ECOMOG in Sierra Leone Request to the UN Security Council: (i) to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the present Agreement; Request to the international community to provide substantial financial and logistical assistance to facilitate implementation of the Peace Agreement. Request to ECOWAS by the parties for contribution of additional troops	

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TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
	Transformation of the RUF into a political party	RUF/SL to commence to organize itself to function as a political party	
	Encampment, disarmament, demobilization and reintegration (DDR)	Request for international assistance in adapting and extending the existing DDR programme	
	Withdrawal of mercenaries	Supervision by Joint Monitoring Commission	
	Notification to Joint Monitoring Commission	Communication by the parties of positions and description of all known warlike devices/materials	
	Notification to Military Commands	Communication by the parties of written orders requiring compliance	
DAY 15	Enabling members of the RUF/SL to hold public office, and to join a broad-based Government of National Unity through Cabinet appointments	Removal by the Government of all legal impediments	
	Commission for the Consolidation of Peace (CCP)	Creation of the Commission to implement a post-conflict reconciliation and welfare programme	Mandate of the Commission to terminate at the end of next General Elections Jan.–Feb., 2001

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TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 15 (cont.)	Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD	Ban on all exploitation, sale, export, or any transaction of gold and diamonds except those sanctioned by the CMRDD	
DAY 22	Enabling members of the RUF/SL to hold public office	Discussion and agreement between both parties on the appointments of RUF/SL members to positions in parastatal, diplomacy and any other public sector	For a period of fourteen days
DAY 31	Transformation of the RUF into a political party Commission for the management of Strategic Resources, National Reconstruction and Development (CMRRD) Transformation, new mandate, and phased withdrawal of ECOMOG	Necessary legal steps by the Government for registration of the RUF as a political party Preparation and submission by Government to the Parliament of relevant bills for enabling legislation commitments made under the Peace Agreement Deployment of troops from at least two additional countries	
DAY 60	Completion of encampment, disarmament and demobilization	Restriction of SLA soldiers to the barracks and storage of their arms and ammunition under constant surveillance by the Neutral Peace-Keeping Force during the disarmament process Monitoring of disarmament and demobilization by UNOMSIL	

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION,
DAY 90	Human Rights Commission	Creation of an autonomous quasi judicial national Human Rights Commission Request for technical and material assistance from the UN High Commissioner for Human Rights, the African Commission on Human and Peoples Rights and other relevant organizations Creation of a Truth and Reconciliation Commission	
	Elections	Establishment of a new independent National Electoral Commission (NEC), in consultation with all political parties including the RUF/SL Request for financial and logistical support for the operations of the NEC Request for assistance from the international community in monitoring the next presidential and parliamentary elections in Sierra Leone	

TIMING	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
DAY 456	Human Rights Violations	Submission by the Truth and Reconciliation Commission of its report and recommendation to the Government for immediate implementation	
II. ACTIVITIES WITHOUT SPECIFIC TIMING: (SHORT/MEDIUM/LONG TERM):			
SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
1.	Ceasefire monitoring (Ceasefire Agreement signed on 18 May, 1999	Establishment of Ceasefire Monitoring Committees at provincial and district levels Request for international assistance in providing funds and other logistics for the operations of the JMC	JMC already established and operational
2.	Review of the present Constitution	Establishment of a Constitutional Review Committee	
3.	Mediation by the Council of Elders and Religious Leaders	Appointment of members of the Council by the Inter-Religious Council, the Government, the RUF and ECOWAS	
4.	Timetable for the phased withdrawal of ECOMOG	Formulation of the timetable in connection with the phased creation and deployment of the restructured armed forces	

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SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
5.	Security guarantees for peace monitors	Communication, in writing, of security guarantees to UNMILOBs	
6.	Restructuring and training of the SLA	Creation by the Government of truly national armed forces reflecting the geo-political structure of Sierra Leone within the established strength	
7.	Release of prisoners of war and abductees	Establishment of a Committee on the Release of Prisoners of War and Non-combatants	Operation under-way. Parties to be encouraged to continue vigorously
8.	Refugees and displaced persons	Formulation of plan of voluntary repatria-tion and reintegration of Sierra Leonean refugees and IDPs, with the financial assistance and involvement of UN and other agencies and friendly countries	
9.	Guarantee and protection of Human Rights	Respect of the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one's country	

SERIAL NO.	ACTIVITIES	ACTION REQUIRED	FOLLOW-UP ACTION
10.	Guarantee of the security of displaced persons and refugees	Adoption by the parties of effective and appropriate security measures	
11.	Humanitarian relief	Continued delivery of humanitarian assistance with appropriate international support Establishment by the Government of appropriate and effective administrative or security bodies to monitor and facilitate implementation of security guarantees to personnel, goods and areas of operations	
12.	Post-war rehabilitation and reconstruction	Provision by the Government of appropriate financial and technical resources	
13.	Special Fund for war victims	Formulation and implementation by the Government of a programme for the rehabilitation of war victims	
14.	Child combatants	Mobilization of internal and international resources by the Government to address the needs of child combatants	
15.	Education and Health	Mobilization of adequate funding for free compulsory basic education and primary health care	
16.	Amnesty	The Government to grant amnesty and pardon to RUF and AFRC personnel through appropriate legal steps.	

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PASSED IN Parliament this *15th* day of *July,* in the year of our Lord one thousand, nine hundred and ninety-nine.

J. A. CARPENTER,
Clerk of Parliament.

THIS PRINTED IMPRESSION has been carefully compared by me with the Bill which has passed Parliament and found by me to be a true and correctly printed copy of the said Bill.

J. A. CARPENTER,
Clerk of Parliament.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTING DEPARTMENT, SIERRA LEONE.
GAZETTE NO. 34 OF 22ND JULY, 1999.

PROSECUTION INDEX OF AUTHORITIES

ANNEX XV

Archbold's Criminal Pleading, Evidence and Practice, 2002, pp. 333-340.

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ARCHBOLD

CRIMINAL PLEADING, EVIDENCE AND PRACTICE

2002

LONDON
SWEET & MAXWELL

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justices to enquire fully into the cause of the delay that had occurred and the question of whether a fair trial could take place notwithstanding that delay.

As to the desirability of the same justices hearing an abuse argument and then conducting any ensuing committal proceedings, see *R. v. Worcester Magistrates' Court, ex p. Bell*, 157 J.P. 921, DC, *ante*, § 1–51.

When giving judgment on an application to stay proceedings, a few sentences showing the judge's command of the law on the topic will usually suffice, followed by a summary of the reasons for rejecting or granting the application: *ex p. Cunningham, ante*. See also *R. v. Dutton* [1994] Crim.L.R. 910, CA, as to the desirability of some explanation of reasons being given; and *R. (Ebrahim) v. Feltham Magistrates' Court; Mouat v. DPP* [2001] 1 W.L.R. 1293, DC, as to it being the professional duty of the advocates to take a note of such reasons. As to the giving of reasons generally, see also *ante*, § 2–202, and *post*, § 16–75.

As to the form of the order that should be sought and made if proceedings amount to an abuse of process, see *ante*, §§ 1–192, 1–193.

(c) *Principles governing exercise of jurisdiction*

4–54 The power to stay proceedings for abuse of process has been said to include a power to safeguard an accused person from oppression or prejudice (*Connelly v. DPP, ante*, § 4–48), and has been described as a formidable safeguard, developed by the common law, to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so (*Att.-Gen. of Trinidad and Tobago v. Phillip* [1995] 1 A.C. 396, PC). An abuse of process was defined, in *Hui Chi-Ming v. R.* [1992] 1 A.C. 34, PC, as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding."

In *Re Barings plc and others (No. 2); Secretary of State for Trade and Industry v. Baker and others* [1999] 1 All E.R. 311, CA (Civ. Div.), it was said (in the context of proceedings under section 6 of the *Company Directors Disqualification Act* 1996) that a court may stay proceedings where to allow them to continue would bring the administration of justice into disrepute among right thinking people and that this would be the case if the court was allowing its process to be used as an instrument of oppression, injustice or unfairness.

It may be an abuse of process if either: (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution: *R. v. Derby Crown Court, ex p. Brooks*, 80 Cr.App.R. 164, DC, as qualified by *Att.-Gen.'s Reference (No. 1 of 1990)* [1992] Q.B. 630, 95 Cr.App.R. 296, CA.

4–55 In *Att.-Gen.'s Reference (No. 1 of 1990)*, *ante*, the court referred to *R. v. Heston-Francois* [1984] Q.B. 278, 78 Cr.App.R. 209, CA, and adopted the point made therein that the trial process itself is equipped to deal with the bulk of complaints which "in recent Divisional Court cases founded applications for a stay" (at pp. 642, 301). In *Heston-Francois*, it was held that the court's jurisdiction to order a stay does not include an obligation upon the judge to hold a pre-trial inquiry into allegations such as improper obtaining of evidence, tampering with evidence or seizure of a defendant's documents prepared for his defence. Such conduct is not ordinarily an abuse of the court's process. It is conduct which falls to be dealt with at the trial itself by judicial control on admissibility of evidence, the judicial power to direct a verdict of not guilty (usually at the close of the prosecution's case), or by the jury taking account of it in evaluating the evidence before them. See also *R. v. L.P.B.*, 91 Cr.App.R. 359, CCC (Judge J.), *post*, § 4–70; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. DPP*, 95 Cr.App.R. 9, DC (failure to caution defendants before interview); *Chan Wai-keung v. R.* [1995] 2 Cr.App.R. 194, PC, *post*, § 4–63, and *R. v. MacDonald and others* [1998]

Crim.L.R. 808, CA (*post*, § 4–63b). In *DPP v. Hussain, The Times*, June 1, 1994, the Divisional Court reiterated the exceptional nature of an order staying proceedings on the ground of abuse of process and stated that such an order should never be made where there were other ways of achieving a fair hearing of the case, still less where there was no evidence of prejudice to the defendant.

4–56 The majority decision in *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 A.C. 42, HL, has now made it clear that the doctrine of abuse of process is not limited to situations where the defendant could not receive a fair trial. The accused had been brought to this country as a result of collaboration between authorities here and abroad and in disregard of extradition procedures. The doctrine was held to apply in such a situation, even though the matters complained of would not prevent a fair trial and even though it would not be unfair to try the accused if he had been returned to this country through lawful extradition procedures. Lord Griffiths said that the court had the power to interfere with the prosecution because the judiciary accepted a responsibility for the maintenance of the rule of law that embraced a willingness to oversee executive action and to refuse to countenance behaviour that threatened either basic human rights or the rule of law. It was the function of the High Court to ensure that executive action was exercised responsibly and as Parliament intended. If, therefore, it came to the attention of the High Court that there had been a serious abuse of power it should express its disapproval by refusing to act on it. Lord Bridge said that there is no principle more basic to any proper system of law than the maintenance of the rule of law itself.

In *R. v. Mullen* [1999] 2 Cr.App.R. 143, CA, *post*, § 4–72a, it was said that the speeches in *ex p. Bennett*, *ante*, conclusively establish that proceedings may be stayed in the exercise of the court's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. Guidance was also given as to the sort of matters that may affect the exercise of the discretion whether to stay the proceedings where there has been an abuse of the system by the authorities. See also the analysis of *Connelly* (*ante*, § 4–48) in *R. v. Beedie* [1997] 2 Cr.App.R. 167, CA, *post*, §§ 4–58, 4–118, for further express acknowledgment that there are situations where proceedings should be stayed although a fair trial could be conducted; and various of the authorities at §§ 4–62, 4–63, *post*.

The present boundaries of the doctrine are apparent from *R. v. Beckford* [1996] 1 Cr.App.R. 94, in which the Court of Appeal identified two types of case where proceedings may be stayed on the basis that their continuance would be an abuse of process, namely (a) where the defendant would not receive a fair trial, and/or (b) where it would be unfair for the defendant to be tried. In the decided cases it is possible to discern an overlap between these categories.

(d) *Application of the principles*

Article 6 of the European Convention on Human Rights

4–57 It should now be borne in mind that the right to a fair trial is a right that is guaranteed by Article 6 of the European Convention on Human Rights, *post*, § 16–57. For examples of situations that have been held to be incompatible with that right, the remedy for some of which may be a stay of proceedings, see *post*, §§ 16–58 *et seq.* See also *post*, § 4–64 for consideration of the Article 6 right to be tried "within a reasonable time" in the context of the doctrine of abuse of process.

Misuse, manipulation, etc., of process of court and unfairness

4–57a Each case will depend on its own facts; the following authorities are merely

The Times, June 1, 1994, the
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examples of the way in which the general principles (*ante*) have been refined and applied in particular circumstances. The further sub-headings are to be taken as no more than pointers to the areas with which this topic is concerned.

Decisions as to the institution/continuation of prosecutions

4–58 The jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with the greatest caution; the fact that a prosecution is ill-advised or unwise is no basis for its exercise; the question whether to prosecute or not is for the prosecutor; if a conviction is obtained in circumstances where the court, on reasonable grounds, feels that the prosecution should not have been brought, this can be reflected in the penalty: *Environment Agency v. Stanford* [1998] C.O.D. 373, DC. See also *DPP v. Humphrys*, *ante*, § 4–49, and *cf. Postermobile plc v. Brent LBC*, *The Times*, December 8, 1997, DC, *post*, § 4–62.

In *Hui Chi-Ming v. R.* [1992] 1 A.C. 34, PC, it was held not to be oppressive or an abuse of the process of the court to prosecute a secondary party for murder when the principal had been convicted of manslaughter and when pleas of guilty to manslaughter had been accepted from other secondary parties. It was noted that: (a) the acquittal of the principal on the charge of murder appeared perverse; (b) there had been abundant evidence of murder against the appellant; and (c) he had chosen to run a defence which would have resulted in his complete acquittal if it had succeeded, rather than accept an offer that had been made to accept a plea of guilty to manslaughter. *Cf. R. v. Richards and Stober*, 96 Cr.App.R. 258, CA (*post*, § 19–87), in which the unsuccessful argument on behalf of the appellants would appear to amount to an allegation of a species of abuse of process, although not advanced as such. See also *R. v. Forsyth* [1997] 2 Cr.App.R. 299, CA, where it was held not to be an abuse of process for the Serious Fraud Office to continue with the prosecution of one defendant, who was involved in an isolated transaction, after the principal defendant had fled the jurisdiction and proceedings against other persons more centrally involved had been abandoned on the ground that they could not be dealt with fairly in his absence.

In *Connelly v. DPP* [1964] A.C. 1254, the House of Lords approved the general rule explained by Lord Cockburn C.J. in *R. v. Elrington* (1861) 1 B. & S. 688, to the effect that no man should be punished twice for an offence arising out of the same or substantially the same set of facts and that to do so would offend the established principle that there should be no sequential trials for offences on an ascending scale of gravity. In *R. v. Beedie* [1997] 2 Cr.App.R. 167, the Court of Appeal confirmed that this general rule is not part of the doctrine of *autrefois* (*post*, §§ 4–116 *et seq.*), but should, in the absence of special circumstances, give rise to the exercise of the wider discretionary power to stay proceedings which constitute an abuse of the process of the court. In the case under consideration, a charge of manslaughter should have been stayed where the accused had already been dealt with for a summary offence relating to the defective state of a gas installation which had resulted in the relevant death; the public interest in a prosecution for manslaughter and the understandable concern of the victim's family did not give rise to special circumstances; the carrying out of a balancing exercise and consideration of the question of whether there could be a fair trial were inappropriate. This principle will not prevent a trial for murder or manslaughter where the victim has died after proceedings for assault: the offences will not arise out of substantially the same set of facts because of the additional fact of the death and/or special circumstances will exist (certain old authorities to this effect, some of which also consider the implications of sections 42 to 46 of the *Offences against the Person Act* 1861 (*post*, § 4–121) in this context, are cited in the 1997 edition of this work, at §§ 4–137, 4–138). Examples of the earlier application of the principle now explained in *Beedie* are also to be found in the 1997 edition of this work (in the paragraphs referred to above) and in *R. v. Moxon-Tritsch* [1988] Crim.L.R. 46, Crown Court (H.H. Judge Faulks) (stay of private prosecution for causing death by reckless driving instituted after

defendant had been dealt with for careless driving and excess alcohol offences). The principle was also analysed in *R. v. Z.* [2000] 2 A.C. 483, HL, *post*, § 4–160.

An acquittal of a particular offence will found the basis of a successful plea of *autrefois acquit* in respect of any subsequent allegation of a more serious offence which includes within its compass the offence in respect of which there was an acquittal: *R. v. G. (Autrefois acquit)*, *The Times*, May 25, 2001, CA (not following *R. v. Brookes* [1995] Crim.L.R. 630, CA).

It is not necessarily an abuse of process to prosecute a person for an offence which could have been included in a previous indictment on which he was acquitted; it is important to scrutinise the true nature of the second set of proceedings; where the first trial would have been significantly delayed if the second matter had been joined, and the evidential overlap was not great, no principle of fairness or propriety had been flouted: *R. v. South East Hampshire Magistrates' Court, ex p. CPS* [1998] Crim.L.R. 422, DC.

In *R. v. Forest of Dean JJ., ex p. Farley* [1990] R.T.R. 228, DC, it was held to be an abuse of process to pursue a charge of driving with excess alcohol before the trial of a charge of causing death by reckless driving based on the allegation of excess alcohol. The purpose of the course proposed by the prosecution, and explained in the judgment, amounted to a misuse of the process of the court. Reference was also made to the well established practice of dealing with offences in descending order of gravity.

See also *R. v. Riebold* [1967] 1 W.L.R. 674 (leave refused to proceed on substantive counts after conspiracy conviction quashed), and *R. v. Thomson Holidays Ltd* [1974] Q.B. 592, 58 Cr.App.R. 429, CA (two prosecutions on basis of one false statement in brochure, not oppressive). In *R. v. Grays JJ., ex p. Low* [1990] Q.B. 54, 88 Cr.App.R. 291, DC, it was held that it would be an abuse of process to permit a private prosecutor to pursue a summons that charged the defendant with a matter in respect of which an earlier summons had been withdrawn by the CPS when the defendant had agreed to be bound over to keep the peace. A private prosecution, launched as a device to disrupt a conference, was held to be an abuse of process in *R. v. Horseferry Road Magistrates' Court, ex p. Stephenson* [1989] C.O.D. 470, DC.

In *R. v. Belmarsh Magistrates' Court, ex p. Watts* [1999] 2 Cr.App.R. 188, DC, it was held that a private prosecution for libel and misfeasance in a public office brought by a convicted cannabis trafficker against an investigator who had prepared a report referring to him as a cocaine dealer should have been stayed (even though it did not in fact violate the rule in *Hunter v. Chief Constable of the West Midlands* [1982] A.C. 529, HL, against collateral challenge) in that it was an affront to the court's sense of justice and propriety to entertain proceedings that were admittedly brought with a view to clearing the prosecutor's name, rather than prosecuting alleged criminals to conviction. Further, the delay of four-and-a-half years in commencing the prosecution amounted to an abuse where civil proceedings for the same alleged libel had been brought, but not prosecuted with due diligence.

As to the pursuit of charges in respect of offences taken into consideration, see *post*, § 4–129.

4–59 In *R. v. Horsham JJ., ex p. Reeves*, 75 Cr.App.R. 236, DC, it was held that it would be vexatious and oppressive to permit the prosecution to pursue charges which were basically the same as those on which the justices had found there to be no case to answer in previous committal proceedings against the same defendant. This was so even though the previous finding could not give rise to a plea of *autrefois acquit*. *Cf. R. v. Manchester City Magistrates, ex p. Snelson* [1977] 1 W.L.R. 911, DC (matter of degree whether repeated committal proceedings amount to abuse of process), and see *ante*, § 1–217. See also *Brooks v. DPP* [1994]

1 A.C. 568, PC (*ante*, § 1–213), where Ackner L.J.'s observation in *ex p. Reeves* that there have to be exceptional circumstances to warrant prosecuting a defendant after committal proceedings have concluded with a ruling that there is no case to answer, was adopted.

As to the application of the doctrine of abuse of process where fresh proceedings are instituted after the dismissal of an information under section 15 of the *Magistrates' Courts Act* 1980 (non-attendance of prosecutor), see *Environment Agency v. Campbell, The Times*, May 18, 1998, DC (*post*, 4–143).

In *R. v. Faversham JJ., ex p. Stickings, The Times*, May 9, 1996, DC, magistrates who had given a considered ruling in favour of the defence, as to the admissibility of certain evidence, subsequently changed that ruling, following inappropriate communication between their clerk and the prosecutor. They had then directed a retrial before a different bench. The Divisional Court prohibited the retrial on the basis that, in the circumstances, it would be unjust to permit the prosecution to proceed.

In *R. v. Brentford JJ., ex p. Wong*, 73 Cr.App.R. 65, DC, it was held an abuse of process where the prosecutor, without having then reached a final decision to prosecute the defendant, laid an information just within the time limit for commencing a prosecution, so as to keep his options open, and did not serve the summons for some months thereafter. See also *R. v. Newcastle upon Tyne JJ., ex p. Hindle* [1984] 1 All E.R. 770, DC.

In *R. v. Lincoln Magistrates' Court, ex p. Wickes Building Supplies Ltd, The Times*, August 6, 1993, DC, it was held that the laying of a multiplicity of charges in respect of each Sunday trading breach under section 47 of the Shops Act 1950, when the lawfulness of that section was being challenged in the European Court of Justice, was not an abuse of process. It had been argued that the deliberate stacking up of informations by the prosecutor during a time when: (a) the law was uncertain, (b) there was no possibility of immediate conviction, pending clarification of the law, and (c) the prosecuting local authority would not risk seeking an injunction from the civil courts to prevent the continuation of the acts that gave rise to the charges, was oppressive and vexatious and amounted to a manipulation of the process that would make it unfair to try the accused.

It is not an abuse of process to institute a private prosecution against a person who has been cautioned in respect of the offence (having been told at the time of the caution that it did not bar a private prosecution): *Hayter v. L. and another* [1998] 1 W.L.R. 854, DC.

See also *ante*, § 1–263 as to the means by which, and the circumstances in which, a decision to commence or continue a prosecution may be challenged.

Manipulation of particular procedures

4–60 In *R. v. Rotherham JJ., ex p. Brough* [1991] C.O.D. 89, DC, the Crown Prosecution Service had deliberately taken steps to ensure that a defendant who was charged with an offence that would be triable only on indictment in the case of an adult did not appear before the court until he had reached the age where the justices ceased to have a discretion whether or not to deal with him themselves. Although the court viewed the procedure as incorrect, it was held not to amount to an abuse of process because, on the facts, the conduct of the prosecution showed, at most, a lack of judgment rather than misconduct or mala fides. Furthermore, there was no prejudice to the defendant because the delay involved had been minimal, the justices would probably have committed the case to the Crown Court anyway, and in the event of conviction the judge would undoubtedly take account of the defendant's age at the time of the offence and the circumstances of his committal.

See *ante*, §§ 1–49, 1–50 as to the propriety of substituting summary only charges for charges triable either way, or of adding charges triable only on indictment, so as to ensure that the trial takes place at a particular level of court.

In *R. v. Simpson* [1998] Crim.L.R. 481, CA, the original trial of the appellant on a

charge of causing grievous bodily harm had been aborted when he and a number of witnesses were arrested for conspiracy to pervert the course of justice in respect of the defence case at that trial. The prosecution had known of the likelihood of such a situation arising and in an *ex parte* hearing prior to the commencement of the trial had obtained a ruling from the trial judge that the situation need not be disclosed to the defence. Following his conviction on the subsequent retrial, the appellant appealed on the basis that it had been an abuse of process to embark on a trial with no intention or, at least, little likelihood of reaching a verdict. It was held that there had been no improper manipulation of the process of the court, that it had been fair to re-try the appellant, and that the trial which had resulted in his conviction had been fair.

4–61 Where a summary trial is adjourned part-heard before the conclusion of the case for the prosecution and, at the adjourned hearing, the prosecution propose to call a witness whom they had not intended to call at the original hearing but of whose existence they had always been aware, any objection based on an assertion that unfair advantage had been taken of the adjournment should be dealt with by reference to section 78 of the *Police and Criminal Evidence Act* 1984, and not by reference to the power to stay the proceedings as an abuse of process; as a matter of general principle, however, there is nothing improper about the taking of further statements during an adjournment and thereafter calling the makers as witnesses; on the contrary, the interests of justice may demand such a course: *DPP v. Jimale* [2001] Crim.L.R. 138, DC. However, it is submitted that it may be appropriate to exclude such new evidence, or order a retrial, if the defence case already put might have been put differently in the event that advance notice of the evidence had been given and if the defence case has, thereby, been improperly prejudiced.

It was an abuse of process for the prosecution, upon realising, after the magistrates had retired to consider sentence, that the charge was punishable only by way of a fine, to invite the magistrates back into court and then invite them to substitute a charge in respect of the same facts which carried the possibility of a custodial sentence: *R. v. Harlow Magistrates' Court, ex p. O'Farrell* [2000] Crim.L.R. 589, DC.

In *R. v. Piggott and Litwin* [1999] 2 Cr.App.R. 230, CA, it was held to be an abuse of process to prosecute an indictment that had been amended at a previous trial so as to substitute a charge that could not be tried fairly at the time of its substitution. See further *ante*, § 1–153.

Where one magistrates' court has refused to issue a summons in respect of an information alleging an offence, it is an abuse of process to apply for a summons to a second magistrates' court in respect of an identical information without disclosing the fact of the first court's refusal to issue a summons: *Gleaves v. Insall*; *Dore v. Insall*; *Bolton v. Insall*; *Gleaves v. Insall* [1999] 2 Cr.App.R. 466, DC.

It is not in the public interest to pursue criminal proceedings if both the police and the individual are prepared to proceed by way of caution, but the individual is entitled to informed legal advice as to whether to accept a caution; where, therefore the police refused to disclose the terms of an interview to the individual's solicitors, with the result that the solicitor felt unable to advise acceptance of the caution that was offered, it had been open to the Magistrates' Court to stay the subsequent prosecution as an abuse: *DPP v. Ara*, *The Times*, July 16, 2001, DC.

As to the application of the doctrine of abuse of process in circumstances where a new charge is brought for the purpose of avoiding the effect of the expiration of a custody time limit, see *R. (Wardle) v. Crown Court at Leeds* [2001] 2 W.L.R. 865, HL, *ante*, § 1–270.

As to abuse of process in the context of the re-institution of proceedings against a young person following the expiry of an overall time limit, see *R. (DPP) v. Croydon Youth Court*, 165 J.P. 181, DC, *ante*, § 1–269d.

As to abuse of process and retrials, see *ante*, § 4–45.

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Prosecution going back on promise, etc.

4–62 The prosecution of a person who, in exchange for his co-operation, has received an undertaking, promise or representation from the police that he would not be charged with an offence, is capable of amounting to an abuse of process. It is not necessary for the applicant to show that the police had the power to make the decision not to prosecute; nor is it necessary for him to show that the case was one of bad faith: *R. v. Croydon JJ., ex p. Dean*, 98 Cr.App.R. 76, DC. Breach of a promise not to prosecute does not necessarily and *ipso facto* give rise to abuse, but the longer that a person is left to believe that he will not be prosecuted the more unjust it becomes for the prosecution to renege on its promise and any manifest prejudice to him resulting from his co-operation will make it inherently unfair to proceed: *R. v. Townsend and others* [1997] 2 Cr.App.R. 540. In *Att.-Gen. of Trinidad and Tobago v. Phillip* [1995] 1 A.C. 396, PC, it was said that it could well be an abuse of process to seek to prosecute those who have relied on an offer or promise of a pardon and complied with the conditions subject to which that offer was made, even though the pardon was invalid.

Where a defendant had received a letter constituting a "final decision not to prosecute" in respect of an allegation of sexual offences against a 10-year-old boy, the re-institution of proceedings many years later could not be justified by reference to the fact that a second boy had more recently made a complaint, nor by reference to the fact that the original decision had been taken in the light of the then rule of evidence requiring corroboration; the prosecution should have been stayed as an abuse; and the conviction was quashed as unsafe on account of the prejudice arising from the non-availability of various materials from the original investigation: *R. v. D.* [2000] 1 *Archbold News* 1, CA.

In *R. v. Bloomfield* [1997] 1 Cr.App.R. 135, CA, it was held to have been an abuse of process to proceed with a prosecution where, at a previous plea and directions hearing, counsel for the Crown had indicated informally to defence counsel that it was proposed to offer no evidence against the defendant because it was accepted that he had been "set-up" by the police, where this proposal had been repeated before the judge in his room, and where the matter had then, at the request of the prosecution, been adjourned to another day for no evidence to be offered. It would bring the administration of justice into disrepute to allow the prosecution to revoke its original decision, without any reason being given as to what was wrong with it; the fact, if it were the fact, that the decision had been made without authority was irrelevant as the court and the defence were entitled to assume in ordinary circumstances that counsel had authority. To similar effect, see *R. v. Hyatt* [1997] 3 *Archbold News* 2, CA (96 6237 Z2).

In *R. v. Horseferry Road Magistrates' Court, ex p. DPP* [1999] C.O.D. 441, DC, a prosecution had been instigated despite an assurance of no prosecution given by the police to the defendant's solicitor, and after some delay. A stipendiary magistrate concluded that it would, *ipso facto*, be unfair to try the defendant in such circumstances and stayed the proceedings. The Divisional Court quashed the stay and remitted the matter for reconsideration; breach of an assurance not to prosecute cannot *per se* justify a stay; the situation straddled the two categories of abuse; in such a situation it is incumbent on the court to investigate what, if any, prejudice to the defendant would result from pursuit of the proceedings (bearing in mind the exceptional circumstances that must exist before delay can be seen to result in prejudice such as to justify a stay), and the court must consider whether there are special circumstances present, as in *R. v. Croydon JJ., ante* (where special factors were defendant's youthfulness and the assistance he had given subsequent to the assurance) and *R. v. Bloomfield, ante* (where special factor was that the assurance had been given to the court and would already have been acted upon but for an adjournment to suit the convenience of the prosecution). As to the propriety of such matters being dealt with in the magistrates' court, see *ante*, § 4–50.

Where there was an agreement between the prosecution and the defence that the defendant would plead guilty to two out of three charges and the prosecution would withdraw the third charge, which then happened, it was open to justices to adjudge it an abuse of process for the prosecution to seek to reinstate the third charge before the conclusion of the proceedings, but after the justices had retired to consider sentence, upon realising that what had been thought to be a legal impediment to a successful prosecution of the third charge was in fact no impediment: *DPP v. Edgar*, 164 J.P. 471, DC.

Where a citizen engaged in certain conduct, in reliance on the (mistaken) opinion of a public official that such conduct would be lawful and without any long term effects, it was held to be an abuse of process to permit the continuance of a prosecution in respect of that conduct: *Postermobile plc v. Brent LBC, The Times*, December 8, 1997, DC.

Prosecution/investigators contributing to commission of offence

4–63 Where a defendant has been trapped by the deception of police or customs officers into committing an offence which he would not otherwise have committed, the trial judge, when exercising his discretion whether to stay the prosecution as an abuse of process, must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing interest in not conveying the impression that the end justifies any means: *R. v. Latif and Shahzad* [1996] 2 Cr.App.R. 92, HL (judge justified in refusing stay where defendant had been an organiser in the heroin trade who had taken the initiative in proposing an importation of drugs and where the conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed). *Cf.* the facts in *R. v. Horseferry Road Magistrates' Court, ex p. Bennett (No. 2)* [1995] 1 Cr.App.R. 147, DC, *ante*, §§ 1–104a and 4–56, and *R. v. Mullen* [1999] 2 Cr.App.R. 143, CA, *post*, § 4–72a. In this area, there is an overlap with the power to exclude evidence pursuant to section 78 of the *Police and Criminal Evidence Act* 1984, and in *R. v. Bailey and others* [2001] 5 *Archbold News* 1, CA, it was said that such cases usually require the application of that section, rather than the abuse of process jurisdiction: see further *post*, §§ 15–491 *et seq.* The activities of an *agent provocateur* or entrapment may, in some circumstances, provide mitigation: see *post*, § 15–493. As to the significance of such matters in respect of the right, under Article 6(1) of the European Convention on Human Rights, to a fair trial, see *post*, § 16–68a.

Where a prosecution under the *Dangerous Dogs Act* 1991 was not proceeded with (because of the non-availability of a witness) and the dog was returned to the defendant in anticipation that he would take the dog out of police custody and into a public place unmuzzled, which he did, and it had already been decided that if he did so his conduct would form the basis of a further charge, the new proceedings should have been stayed because the prosecution's conduct in contributing to the commission of the offence could not be taken into account in mitigation of sentence (as would be the case with almost any other offence) as the penalty under the law at the time was mandatory destruction of the dog: *R. v. Liverpool Magistrates' Court, ex p. Slade* [1998] 1 W.L.R. 531, DC.

Matters relating to complainant or witnesses

4–63a An abuse of process exists where the plaintiff in civil proceedings is in effective control of criminal proceedings against the same defendant to the extent that the prosecution are unable to exercise independently their prosecutorial duties: *R. v. Leominster Magistrates' Court, ex p. Aston Manor Brewery Co., The Times*, January 8, 1997, DC. *Cf. R. v. Milton Keynes Magistrates' Court, ex p. Roberts* [1995] Crim.L.R. 224, DC (no evidence of control sufficient to justify a stay).

A complainant's unreliability as a witness and his obsession about his cause do

PROSECUTION INDEX OF AUTHORITIES

ANNEX XVI

R v. Townsend [1997] 2 CrAppR 540 (Court of Appeal (England and Wales))

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1 of 2 DOCUMENTS

R v Townsend; R v Dearsley; R v Bretscher

COURT OF APPEAL (CRIMINAL DIVISION)

[1997] 2 Cr App Rep 540, (Transcript: Smith Bernal)

HEARING-DATES: 8 MAY 1997

8 MAY 1997

CATCHWORDS:

Criminal law - Trial - Stay of proceedings - Abuse of process - Appellant prosecution witness - Crown Prosecution Service deciding to prosecute - Whether decision abuse of process

Indictment - Joinder of charges - Practice - Whether prohibition on joining committed and transferred indictments - Whether prejudice by joinder (Administrative of Justice (Miscellaneous Provisions) Act 1933, s 2(2)

HEADNOTE:

This judgment has been summarised by Butterworths' editorial staff.

The Appellants T, D and B were all charged on two counts of conspiracy. Count one involved T and B and count two involved T and D. T and B bought a wholesale market business H co, after placing an advertisement in the Fresh Produce Journal. However, the company, although presented as being good standing, was close to collapse. Following the purchase B withdrew large amounts of cash, some of which was paid to a company that B owned in the Virgin Islands. T hat company collapsed and B was arrested and questioned. Although he denied dishonesty, he failed to answer bail and was arrested again in connection with a fraud concerning a different company, G W co. He subsequently gave evidence for the Crown in that matter. After the collapse of H co., T took over another produce company, F co, again after placing an advertisement in the Fresh Produce Journal. There was a considerable shortfall between cash received and money banked by F co. T was arrested and interviewed in December 1993, but made no comment in relation to H co. In the light of the evidence he gave at the G W trial, it was decided that B would be considered as an "accomplice" prosecution witness. To that end, B was interviewed by the police, not under caution, and although he implicated T and another in the fraud concerning H co, he had not changed his position in reliance on his treatment as a prosecution witness, nor had he further incriminated himself. The statement resulting from that interview was subsequently served on T's lawyers. T then made a statement in which he blamed B for the H co conspiracy. T hereafter, it was decided to prosecute B as he could not be put before the jury as a witness of truth. Charges regarding H co were transferred to the Crown Court under the provisions of s 4 of the Criminal Justice Act 1987 and the charges concerning F co were committed by magistrates. During the trial T admitted that his statement had been 'slanted' against B. B applied to stay the proceedings against himself on the grounds that the decision to prosecute amounted to an abuse of process, and opposed the joinder of the charges claiming that the judge had no power to order such a joinder. The judge also rejected an application to serve the trials of T and B. The Appellants were convicted and T and B appealed against conviction. B complained that proceedings against him should have stayed as an abuse of process. T complained that the two sets of charges should not have been joined and the trials of T and B should have been severed.

Held: (1) Where a defendant had been included to believe that he would not be prosecuted, that was capable of founding a stay for abuse. Further, where a defendant had been told that he would be called for the prosecution, the longer he was left in that belief, the more unjust it would become for the prosecution to renege on their promise. Moreover, where a defendant who was interviewed without caution and made a witness statement, and steps were then

taken which resulted in manifest prejudice to him, it would be inherently unfair to proceed against him. There could be cases of abuse outside the categories of fairness or prejudice, and that breach of a promise not to prosecute did not necessarily, and ipso facto, give rise to abuse, but might do so if circumstances had changed. On the facts of the instant case, the making of B's statement had not resulted in prejudice, as B's position had not changed. However, prejudice was caused to B by the disclosure of that statement to T's lawyers. That was a factor in causing T, who had previously said nothing to the police, to give a statement incriminating B which, if T's evidence at trial was to be believed, was "slanted". It followed that B's appeal would be allowed.

(2) The presence at T's trial of B's counsel, putting forward B's case, which was necessary hostile to T in light of his statement could not be ignored. Further if proceedings had been stayed against B, B would not have been present and T would have had a freer hand to blame B. It followed that the conviction with respect to H co was unsafe. Further, given, inter alia, the similarities in modus operandi between the two sets of charges the convictions concerning F co was also unsafe and as such T's appeal would be allowed and both convictions quashed.

(3) Section 2(2) of the Administrative of Justice (Miscellaneous Provisions) Act 1933 imposed no prohibition on joinder of committed and transferred charges. As it was permissible to join in one indictment counts founded upon separate committals, despite the fact that an indictment in respect of any one of those committals had already been signed, that practice should apply a fortiori in relation to one defendant who forced separate signed indictments in respect of separate committals and, by analogy, indictments based on separate committals and transfers. On the fact of the instant case, no prejudice had arisen from the joinder and as such the judge was correct to permit the joinder.

COUNSEL:

P Shears QC and A Weitzman for the Crown; T Culver for the Appellant Townsend; Z Johnson for the Appellant Dearsley; D Desilva QC and K Hollis (7/5/97), and P Mylwagan for the Appellant Bretscher

PANEL: ROSE LJ, KEENE J AND JUDGE HYAM

JUDGMENTBY-1: ROSE LJ

JUDGMENT-1:

ROSE LJ (reading the judgment of the court): On 18 November 1996, at Portsmouth Crown Court, after a trial before his Honour Judge Selwood, the Appellants were convicted of offences of conspiracy, Townsend and Bretscher of conspiracy to defraud on Count 1, and Townsend and Dearsley of conspiracy to steal on Count 5. No verdicts were taken on Counts 2 and 3, which alleged respectively conspiracy to steal and trading with intent to defraud a creditor, against Townsend and Bretscher. On Count 4, conspiracy to defraud, Townsend was acquitted by the jury and Dearsley on the direction of the judge. No verdict was taken on Count 6, fraudulent trading, which was an alternative count against Townsend and Dearsley. Counts 1 to 3 related to the business of J Harrop & Co Ltd in Liverpool between May 1990 and March 1992. Counts 4 to 6 to the business of AG Fehrenbach Limited in Portsmouth between July and September 1992. Townsend was sentenced to four years' imprisonment on each of Counts 1 and 5 concurrently, and disqualified for ten years under the Company Directors Disqualification Act 1986. Bretscher was sentenced to three years on Count 1 and disqualified for ten years. Dearsley was sentenced to 15 months and disqualified for five years. Townsend and Bretscher appeal against conviction by leave of the Single Judge, who referred their applications for leave to appeal against sentence to the Full Court. Dearsley appeals against sentence by leave of the Single Judge.

There were three co-accused, Burraway, Joanne Douglas Maitland and Craig Douglas Maitland, who all pleaded guilty to conspiracy to defraud on Count 4. Burraway had been indicted but was not proceeded against on Counts 1 and 2.

Burraway was sentenced to 18 months, subsequently reduced by a differently constituted division of this Court to nine months, consecutively to a sentence of five years which he was then serving in relation to other matters. Joanne Douglas Maitland was sentenced to 12 months, subsequently reduced on appeal to six months, consecutively to the sentence she was then serving of 12 months in relation to other matters. Craig Douglas Maitland was sentenced to three years, reduced on appeal to two years, consecutive to the sentence he was then serving for other matters, and he was disqualified as a director for ten years.

The three Harrop counts and the three Fehrenbach counts had originally been the subject of separate indictments. The Harrop charges had been the subject of transfer to the Crown Court under s 4 of the Criminal Justice Act 1987. The Fehrenbach charges had been committed to the Crown Court by the Magistrates.

On 18 March 1996 the trial judge gave leave to prefer a single indictment containing both groups of counts. On 25 April and on 2 August 1996 he rejected applications made on behalf of Bretscher that he should stay the proceedings against him as an abuse of process. On 13 August he ruled against applications on behalf of Townsend and Bretscher that the indictment should be severed so that they be tried separately. Each of these matters gives rise to a ground of appeal, and we shall return to them later.

The prosecution case, in essence, was that there were conspiracies in which the Appellants took part in relation to two separate businesses, those of Harrop and Fehrenbach, which were well-established fruit and vegetable wholesale companies, whereby the companies and their creditors were defrauded by dissipation for personal benefit rather than use for proper company purposes of the company's assets, stock and banking facilities.

In outline, what occurred was this. In relation to the Harrop counts, in October and November 1991 the Appellant Bretscher placed advertisements in the 'Fresh Produce Journal' offering to buy a wholesale market business and giving an address in Gloucestershire where he could receive mail. In consequence Peter Moss, who was then managing director of Harrops, replied, and subsequently entered into negotiations with Bretscher, Townsend and Burraway, all of whom were using false names. There was eventually an agreement in December 1991 for the purchase of the company for the sum of £ 40,000 plus a further £ 15,000 for Moss' shares. Townsend and Burraway were to provide the money, though only some of it was actually paid, and Bretscher was to run the company.

Although, for the purpose of negotiations, Harrops was presented as a company in good standing, it was, in fact, close to insolvency. For example, cheques for invoices were being written but put in a cupboard and not sent, and although the bank accounts appeared to be in credit, the company was in dispute with the Liverpool Council over unpaid rent and service charges for pitches leased in Liverpool Market, and a sum in excess of £ 70,000 was owed to a man called Carr. The extent to which these matters were described to the purchasers was a matter of dispute in the course of the trial.

Following the purchase, the Appellant Bretscher was able to, and did, withdraw large amounts of cash from the company's bank account. In particular, although suppliers were being favoured with increasing orders, they were being paid at roughly half the rate prior to the purchase. Over £ 55,000 was paid to a company called CSS, incorporated in the Virgin Islands, of which the Appellant Townsend was the beneficial owner and sole signatory on the bank accounts, and from where Townsend's funds for his contribution to the purchase had apparently come.

Bretscher's explanation to Mr Moss and others still involved in the running of the company, for the late payment of bills, was that a big customer had failed to pay, and there were expenses being incurred in setting up a depot in Leicester which would serve satellite tracking stations and thereby produce big business. Bretscher ordered £ 80,000 worth of produce, which was sent to Conecroft, a storage depot in Leicester, and thence on to Covent Garden. One importer who had supplied melons to Harrops and had not been paid for them was surprised to see them being sold from the back of a trailer in Covent Garden.

In mid January 1992 the business collapsed with liabilities which exceeded assets by over £ 370,000. At the end of January 1992 Bretscher was arrested and interviewed in the name, at that time of 'Gordon Lord'. He claimed to have been misled at the time of the purchase of the company. He said he had a large contract to supply fruit and vegetables but he would not say to whom. He denied telling people that he was going to supply satellite tracking bases. The premises in Leicester, he said, were a distribution warehouse, though he would not say where the distribution was to. He claimed to have been set up by Mr Moss, and said that he intended to pay the company's creditors. He did not admit any dishonesty.

Twelve months later, in January 1993, having, in the intervening period, failed to answer his bail, he was interviewed again, this time in his correct name, about a fraud in connection with Greens Wine. He said that he had used the name Lord in relation to Harrops to avoid the mother of his children, and that Townsend had used a false name because a previous company of his called Greenleaves had gone into liquidation. He was re-interviewed about Harrops, and he said that that company had 'gone bust', not because he was taking money, but because, as he put it, 'of the timing'. He reasserted that Mr Moss had set him up, and denied that Harrops in Leicester was anything to do with him and his associates. He had fled bail and gone to the United States in order to avoid maintenance proceedings against him by the mother of his children.

In circumstances to which we shall return later, Townsend was interviewed in November 1995 and read from a prepared statement. He said that he and Burraway had been approached by Bretscher to invest in Harrops, and although he had not been involved in the negotiations, he had invested £ 17,500. He was unaware that creditors were unpaid or that Bretscher had withdrawn substantial amounts of crash, and he made a variety of allegations against Bretscher, which it is unnecessary to itemise.

In the course of the trial Townsend gave evidence. He had apparently been a butler and, at the same time, a director of Greenleaves wholesalers in Covent Garden which went into liquidation in May 1991 because, he said, it had expanded too quickly. He and Burraway, with whom he had been co-director of another company ten years before, had agreed to invest £ 20,000 each in Harrops. The books shown to him disclosed losses by Harrops for the last two years, but this had not put him off. He knew nothing of Bretscher's cash withdrawals. He looked only for the repayment of his investment. He had drawn two £ 10,000 cheques on the CSS account in favour of Burraway, and he had paid some bills for Burraway. He played, he said, no part in the running of Harrops or Conecroft. It looked, he said, as though Bretscher was being used by Burraway.

Bretscher did not give evidence. His case was that Harrops was run lawfully, that he had been deceived by Burraway and Moss, and he had only used company money to pay legitimate expenses, and he still expected payment to be forthcoming from Leicester.

In relation to the Fehrenbach accounts, it was the prosecution case that after the collapse of Harrops, Townsend, Burraway and others took over Fehrenbachs, this time with Craig Douglas Maitland as the front man. He, in July 1992, placed an advertisement in the Fresh Produce Journal similar to that which had initiated the Harrops' enterprise. Mr Webb, who was chairman and company secretary of Fehrenbachs, replied, and met Douglas Maitland, who was using a false name and claiming to act for a Dutch company. He also met Douglas Maitland's wife, who took notes of the meeting. It was agreed that Douglas Maitland would replace Webb as chairman and he, Douglas Maitland, took over responsibility for the accounts and invoices of the company.

At the beginning of August 1992 Craig Douglas Maitland introduced to the company the Appellant Dearsley, who was also using a false name. It was said that he was to boost the company's turnover and collect difficult debts. He, Dearsley, was in the office daily. Douglas Maitland failed to bank all the money that he was given. It was admitted that in August and September 1992 there was a shortfall of almost £ 19,000 between the cash received by the company and that paid into the bank accounts. Hotels were used, cars bought, offices rented and a chauffeur employed part-time for the two Douglas Maitlands and Dearsley. All these were paid for by Fehrenbach cheques which had not been discussed with Mr Webb. £ 60,000 worth of goods were bought by Douglas Maitland but not paid for. They were delivered to Birmingham and Covent Garden where Burraway, working for Townsend, went round the market. Dearsley was Douglas Maitland's right hand man. He took instructions for him and was less involved in the running of the company. He made some of the deliveries.

Townsend was in the background at Fehrenbachs. Together with Douglas Maitland and Burraway they leased offices, including one in New Kings Road in London for Quality Flowers, of which Townsend was chairman. Fehrenbachs paid cheques to Townsend's companies. Townsend also wrote a delivery note for bananas to Birmingham. He, Townsend, was arrested in relation to this matter in December 1993, and he made no comment at that time when he was interviewed.

At about the same time Dearsley was confronted by the police at home. After initially denying who he was, he was arrested for conspiracy to steal from Fehrenbachs. He, too, made no comment in interview.

Townsend, as we have said, gave evidence in the course of the trial in relation to the Fehrenbach matters. He said that he had first met Douglas Maitland at a cash and carry, and he had told him that he and Burraway had been put into Fehrenbachs by Barclays Bank to sort out the business. He said he had met Dearsley at the London House offices of his company, Quality Flowers, which offices Burraway also used. He said that Burraway often used false names and gave him, Townsend, bills to pay, and he had signed the banana delivery note to Birmingham because Burraway was dyslexic. Townsend's off-licence company called Watersons received Fehrenbach money through Douglas Maitland.

On behalf of Bretscher Mr De Silva QC submits that the judge wrongly exercised his discretion in refusing to stay the proceedings against Bretscher as an abuse of process. In order to understand that submission, it is necessary, first, to trace the chronology of material events as they are set out in an agreed schedule.

As we have said, Bretscher was first arrested as Lord in January 1992, and was then interviewed for the first time about Harrops. He was released on bail without charge, subsequently failed to answer his bail, and was then, on 25

January 1993, arrested, as we have said, in relation to the Greens Wine fraud in which Burraway was also a suspect, and at that time he made a witness statement against Burraway in relation to that matter.

On the following day, 26 January 1993, he was rearrested in relation to Harrops, and there was a very substantial second interview of him in relation to that. Again he was thereafter bailed and not charged.

In July 1993 Bretscher gave evidence for the Crown in committal proceedings against Burraway and others in relation to the Greens Wine fraud.

In December 1993, as we have said, Townsend was arrested, as was Burraway, and the two Douglas Maitlands and Dearsley were all arrested and charged in relation to the Fehrenbach matters.

On 16 December 1993 Townsend was interviewed and made no comment in relation to Harrops.

In January 1994 Bretscher gave evidence for the Crown at the Crown Court trial of the Greens Wine fraud matter.

A week or two later there was a conference between police officers, counsel and others where Bretscher's position was discussed, and the conclusion was reached that, even though he was the front man at Harrops, it was difficult to see how he could be prosecuted consistently with the view taken of him at the Greens trial. Given that there was little prospect of him being prosecuted, it was agreed that it would be useful to seek a witness statement from him in relation to both Harrops and Greenleaves. The decision at that time was to consider using Bretscher as an 'accomplice' prosecution witness. On 6 June 1994, by which time the investigation of a variety of fruit and vegetable fraudulent conspiracies had been centralised and a considerable number of prosecution statements in relation to these matters accumulated, a letter was written by the senior Crown prosecutor indicating that Bretscher was to be used 'as a prosecution witness warts and all'. A message to that effect was passed to the Merseyside Fraud Squad.

On 5 September 1994 the Fraud Investigation Group, which was by then seized of these matters, decided that the Harrop fraud should be prosecuted, as should other frauds involving Townsend and others, and in October 1994 statements from Harrops' staff, creditors and haulage contractors and from the police were sent to the Fraud Investigation Group.

On 25 October 1994 Bretscher was interviewed by police and the interview was taped. He was told that he was to be a prosecution witness and, as a result of that interview, on 17 November 1994 he approved a draft statement prepared from that interview in relation to Harrops, implicating Townsend and Burraway as being behind that fraud.

In March 1995 there were committal proceedings in relation to Fehrenbach. Between April and October 1995 the two Douglas Maitlands and Dearsley were tried for mortgage frauds unrelated to the matters presently under consideration, and that trial finished on 19 October. During the course of that trial statements in relation to the Harrops matter were, probably in June, sent to Mr Shears QC, counsel who appears for the prosecution before us.

In October 1995 the prosecution served on Townsend's lawyers the witness statements made by Bretscher as unused material, and on 2 November, that material having been served on those advising him, Townsend made the statement to which we have earlier referred, based on a written statement which he had prepared in which he blamed Bretscher in relation to Harrops.

On 14 November Mr Shears took the view that it would be impossible to put Bretscher forward as a prosecution witness on whom the jury could rely at the Harrops trial, bearing in mind that, although he had made many admissions in relation to his role in the running of that company, he consistently denied dishonesty.

On 14 December 1995 Harrops' case was transferred to the Crown Court.

Mr De Silva submits that there is a strong public interest in people giving evidence for the Crown, and if the prosecution renege on promises not to prosecute, such people will be reluctant to come forward. He says that, in the present case, there was a blatant and flagrant abuse of process by breach of assurances and undertakings not to prosecute. The present case, he submits, is on all fours with R v Croydon Justices, ex parte Dean [1993] QB 769, [1993] 3 All ER 129, which was approved by all members of the House of Lords in R v Horseferry Road Magistrates Court, ex parte Bennett [1994] 1 AC 42, [1993] 3 All ER 138, see per Lord Griffiths, with whom others of the majority agreed at p 61D to F of the former report, and Lord Oliver, who dissented, at p 70F. The judge, submits Mr De Silva, was wrong to distinguish ex parte Dean as having been decided on its own facts, because it disclosed a principle approved by the House of Lords.

In the light of the judge's findings that from mid-October 1994 until November 1995 Bretscher knew he was being treated by the Crown Prosecution Service as a prosecution witness and must have inferred that he would not be prosecuted in relation to Harrop and that his position was the same as if an express promise not to prosecute him had been made, the judge was wrong to conclude that there was no prejudice to Bretscher. Furthermore, submits Mr De Silva, although this aspect was not identified before the trial judge, there was serious prejudice to the defendant because, his November 1994 witness statement having been served on Townsend's legal advisors in October 1995, the consequence was that Townsend, on 2 November, gave the interview in which, for the first time, he blamed Bretscher, and did so in terms which he subsequently, in evidence, described as being 'slanted' against Bretscher. The decision to prosecute Bretscher rapidly followed on 14 November, Townsend's interview being on 2 November.

In any event, submits Mr De Silva, as Bennett, particularly per Lord Lowry at p 74G and R v Schlesinger [1995] Crim LR 137, make plain there are two categories of abuse, namely as appears in Schlesinger at p 138:

"The first was where there had been prejudice to a defendant or a fair trial could not be had. The second was where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible."

The present case, submits Mr De Silva, is in the second category, in which prejudice to the defendant does not have to be shown. He referred also to R v Bloomfield [1997] 1 Cr App Rep 135, at p 139D and 143A, and R v Wyatt, (CA(Criminal Division) transcript 28 January 1997, unreported), and Auld LJ's reference at p 11G of the transcript to a defendant's 'sense of grievance'.

It is, submits Mr De Silva, in reliance on those words of Auld LJ, and on what Staughton LJ said at p 782 in ex parte Dean, the effect on the defendant of the course taken by the prosecution which has to be considered.

In summary, Mr De Silva advances three propositions. First, where a defendant has been induced to believe he will not be prosecuted, this is capable of founding a stay for abuse: see Bloomfield. Secondly, where, in addition, a defendant has been told he will be called for the prosecution, the longer he is left in that belief the more unjust it becomes for the prosecution to renege on their promise. Thirdly, where, as here, the defendant, cooperating as a potential prosecuting witness, was interviewed without caution and made a witness statement, and steps were then taken which resulted in manifest prejudice to him, it becomes inherently unfair to proceed against him.

For the Crown, Mr Shears QC accepts, in the light of ex parte Dean, that breach of a promise not to prosecute is capable of being abuse, and that legitimate expectation of a defendant that he will not be prosecuted may be worthy of protection. However, the matter has to be decided on the facts of the particular case, to which the judge was not only entitled, but bound, to have regard. The investigations into Harrops and Fehrenbachs were part of a much wider nation-wide investigation into seven or eight apparently fraudulent company activities in the fruit and vegetable market with common features and a changing team.

The decision to prosecute Bretscher in November 1995 must be set in this context. It then became apparent that, in the light of his denials of dishonesty and his claim to be an innocent dupe of Townsend and Burraway, he could not be placed before the jury as a witness of truth. The judge, says Mr Shears, was referred to the relevant authorities. These, he submits, disclose these principles. First, the court will stay a prosecution if it considers that acts or omissions of the Crown have either severely prejudiced a defendant or prevented a fair trial of the issues. Secondly, where a fair trial is still possible the court will stay a prosecution where it considers the actions of the prosecuting authority to be so unfair that, despite there being no prejudice, the proceedings should not continue: see per Lord Griffiths at p 61E in Bennett. Thirdly, since the stay of proceedings is an exercise of judicial discretion, the court will consider each case on its own facts: see Bennett per Lord Lowry at p 77C and Bloomfield at p 143B. Mr Shears distinguishes Bloomfield, which was a case in which the court was much influenced by that which had occurred in the face of the court. In giving the judgment of the court in that case Staughton LJ, at p 143C, pointed out that the court was not seeking to establish any precedent or any general principle in regard to abuse of process, but found that in the exceptional circumstances of that case an injustice had been done to the Appellant.

Mr Shears submits that there is no principle that if there has been a breach of a promise not to prosecute, this itself gives rise to an abuse. It all depends on the circumstances. Mr Shears also drew the court's attention to the speech of Lord Steyn in R v Latif [1996] 1 All ER 353, [1996] 1 WLR 104, at p 360 of the former report, where the following passage occurs, by reference to the legal framework of abuse of process:

"If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice

system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have tried stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed."

Lord Steyn then refers to Bennett.

He goes on below C:

"The speeches in Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

Mr Shears submits that in ex parte Dean Staughton LJ made it plain at p 84 that the facts of that case were 'quite exceptional' and Mr Shears, as did the trial judge in the present case, distinguished ex parte Dean from the present case on its facts.

Mr Shears further submits that the circumstances of the present case were not so exceptional as to amount to an abuse. The decision to make Bretscher a prosecution witness took place prior to the collection of the bulk of the prosecution evidence. The Appellant's interview in October 1994 and witness statement in November 1994 took place either very shortly after, or at the same time, as the witness evidence from other sources was delivered to the Crown Prosecution Service by the police. The Crown Prosecution Service were not aware of the true extent of the central role that the Appellant had played in the defrauding of Harrops, and there was no decision to take a statement from Bretscher when it was plain to the CPS and police that he would subsequently be prosecuted.

Bretscher made no clear admissions against interest in interview, and his interviews and witness statements were all substantially the same as those previously given, although there were some additional matters later introduced in October 1994.

There was no deliberate attempt by the prosecuting authority either to mislead the Appellant or to prejudice his position. He had, indeed, been offered legal advice prior to the October 1994 interview. No allegation of mala fides is made against the prosecution in this case. There had been no formal undertaking not to prosecute and no formal offer of immunity, and no indication given to the judge, as occurred in Bloomfield, though none of these matters, Mr Shears accepts, is in itself in any way decisive.

With regard to prejudice in relation to Bretscher, Mr Shears submits that none exists. So far as Townsend's 2 November interview is concerned, that dealt with many matters other than Bretscher's position at Harrops, and with matters with which, sooner or later, Townsend was going to have to deal. In any event, says Mr Shears, it would have been open to Bretscher's advisors at trial to seek to exclude the terms of Townsend's interview, having regard to the provisions of s 78 of the Police and Criminal Evidence Act 1984: (such an application seems unlikely to have merited success).

Mr Shears stresses that, in the course of the trial, no point was made by Mr De Silva on behalf of Bretscher in cross-examination of any witness, or in his submissions, which was not there to be made, and was made, in any event in the light of the evidence and documentation before the jury.

We accept Mr De Silva's three propositions. There is, as it seems to us, no difference, so far as the approach to the relevant principles is concerned, between Mr De Silva and Mr Shears. It is apparent to us that the trial judge found his task in relation to the stay for abuse application far from easy. In the light of the submissions made to him, we do not criticise the conclusion which he reached. On the contrary, he rightly directed himself that there can be cases of abuse

outside the categories of fairness or prejudice, and that breach of a promise not to prosecute does not necessarily and, ipso facto, give rise to abuse, but may do if circumstances have changed. He was also entitled to conclude, having regard to the way in which the matter was presented to him, that Bretscher's case did not fall on the abuse side of the dividing line. Undoubtedly Bretscher knew, from October 1994 to November 1995, that he was being treated by the police and the CPS as a prosecution witness in relation to Harrops, and, as we have said, he had earlier given evidence, apparently quite successfully, in relation to the Greens Wine fraud.

However, there was nothing improper or unfair in the prosecution interviewing Bretscher as a witness in October 1994, at a time when many other witness statements obtained in relation to Harrops had not been collated and considered, or in the mortgage fraud trial in relation to other Fehrenbach defendants being concluded on 19 October 1995 without any further decision being made about Bretscher, or in counsel's decision on 14 November 1995 that Bretscher could not be put before the jury as a prosecution witness or in the rapidity with which events subsequently moved, including the transfer of Harrops' case to the Crown Court on 14 December 1995. There was, as the judge found, and as it seems to us, nothing new of significance in relation to Bretscher's own position in his November 1994 statement as compared with the contents of his 1992 and 1993 interviews. He had not changed his position in reliance on his treatment as a prosecution witness, nor, as the defendant had in ex parte Dean, volunteered information potentially further incriminating himself in reliance on that status.

However, although, as Mr De Silva frankly admits, he did not, at the time of trial, appreciate the significance of this or alert the judge to it, Bretscher's position was, it appears to us, seriously prejudiced by the service on Townsend's advisors of his witness statements in October 1995. For it was this which was a major factor, as is apparent from a part of the summing to which it is unnecessary specifically to refer, in leading Townsend, who had previously said nothing in interview to the police, making the statement implicating Bretscher and doing so, furthermore, if Townsend's evidence before the jury was correct, in a way which was excessively slanted against Bretscher.

If the judge's attention had been drawn to this prejudice, we have little doubt that it would have affected his decision, and he would have been bound to conclude that the prejudice to the defendant arising from his treatment as a prosecution witness, which effectively culminated in Townsend's allegations against him, was such that a stay should have been ordered for abuse of process. In consequence we allow Bretscher's appeal and quash his conviction.

Mr Culver, on behalf of Townsend, submits, first, that the judge exceeded his powers in ordering joinder of the Harrop and Fehrenbach counts. He referred us to R v Cairns (1983) 87 Cr App Rep 287, where it was held that a circuit judge has no power under s 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 to authorise a voluntary bill. Secondly, submits Mr Culver, the judge was wrong in refusing to sever Counts 1 to 3 from Counts 4 to 6, and to sever Townsend's trial from Bretscher's. He accepts that it would be difficult to contend that the judge exercised his discretion improperly were it not for the question of abuse of process in relation to Bretscher.

As to joinder, it is apparent that the judge considered whether he had the appropriate power. He looked at the provisions of s 2(2) of the 1933 Act which, in so far as is material, is in these terms:

"Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either -

(a) the person charged has been committed for trial for the offence; or

(aa) the offence is specified in a notice of transfer under section 4 of the Criminal Justice Act 1987 . . ."

The judge concluded, rightly in our judgment, that that provision imposes no prohibition on joinder of committed and transferred charges. It identifies the circumstances in which a bill of indictment may be preferred, and limits the counts to those disclosed in the documents founding committal or transfer, but it does not deal with joinder.

We do not derive assistance in the present case from this Court's decision in Cairns. Mr Culver referred us to R v Groom [1977] QB 6, [1976] 2 All ER 321. In the practice direction arising from Groom, which is set out at p 251 of the latter report, in relation to different persons separately committed, it is said:

". . . it is permissible to join in one indictment the counts founded upon the separate committals despite the fact that an indictment in respect of any one of those committals has already been signed."

In our judgment that practice must apply a fortiori in relation to one defendant who faces separate signed indictments in respect of separate committals and, by analogy, indictments based on separate committals and transfers.

No possible prejudice could arise, nor did arise, to the defendants in this case from joinder. The judge was, in our view, correct to permit the joinder of the counts, some of which had been the subject of committal, and some of which had been the subject of transfer in a single indictment.

As to severance, the matter was essentially one for the judge's discretion. So far as the impact on Townsend of the judge's refusal to order a stay against Bretscher is concerned, the crucial question is whether Townsend was prejudiced so that the verdicts against him should be regarded by this court as unsafe.

It is to be noted that Townsend made the admissions which he did at a time when it was anticipated that Bretscher would be a prosecution witness not a defendant. In fact, Bretscher gave no evidence in the trial, either as a prosecution witness or as a defendant. Therefore, to that extent, Townsend's position was better than it might have been, and the jury were, as one would expect, directed that the contents of Bretscher's witness statements were not evidence against Townsend.

However, it seems to us that the presence at Townsend's trial of Mr De Silva, on behalf of Bretscher, cross-examining witnesses and Townsend himself, and making submissions to the jury in support of Bretscher's case, which were necessarily hostile to Townsend's case, cannot be ignored by us. Furthermore, had Bretscher been absent from the trial, Townsend would have had free reign to blame Bretscher in a manner which Bretscher's presence at least inhibited.

It is, in our view, impossible to conclude that the jury's verdict against Townsend on the Harrop case would have been the same had he been tried separately from Bretscher, as necessarily he would have been if the proceedings against Bretscher had been stayed.

Accordingly Townsend's conviction on Count 1 must be regarded as unsafe.

The next question is whether, despite the matters to which we have referred, Townsend's conviction on Count 5, in relation to the quite separate Fehrenbach activities, can be regarded as safe. Not without some hesitation, we conclude that it cannot. The similarities in the modus operandi of Harrops and Fehrenbach, which was one of the proper factors properly justifying the two groups of counts being tried together in the first place, and the unquantifable impact which the Harrops' evidence against Townsend may have had on the jury's approach to the Fehrenbach counts against him, means that the verdict on Count 5 in relation to Townsend cannot be regarded as safe.

The appeals against conviction of Bretscher and Townsend are accordingly allowed, and their convictions quashed.

There can be no question of Bretscher being retried. We will, in a moment, hear submissions as to the possibility of a retrial in relation to Townsend.

That leaves the Appellant Dearsley who, as we indicated at the outset, appears by leave of the Single Judge against the sentence of 15 months' imprisonment imposed upon him.

Miss Johnson, in succinct written and oral grounds of appeal, submits that having regard to the reductions in sentence accorded to Dearsley's co-accused in relation to the Fehrenbach activities, the sentence of 15 months on Dearsley must properly be regarded as excessive having regard to the comparatively minor role which he played in these matters.

To that submission this court accedes. His sentence of 15 months will accordingly be quashed and there will be substituted a sentence of eight months' imprisonment.

DISPOSITION:

Appeals allowed; retrial ordered for the Appellant Townsend.

PROSECUTION INDEX OF AUTHORITIES

ANNEX XVII

R v. Latif [1996] 1 WLR 104 (House of Lords (England and Wales))

2 of 2 DOCUMENTS

R v Latif; R v Shahzad

HOUSE OF LORDS

[1996] 1 All ER 353, [1996] 1 WLR 104, [1996] 2 Cr App Rep 92, [1996] Crim LR 414

HEARING-DATES: 24, 25 October 1995, 18 January 1996

18 January 1996

CATCHWORDS:

Criminal law -- Trial -- Stay of proceedings -- Abuse of process -- Entrapment -- Defendant arranging in Pakistan to import drugs into United Kingdom and take delivery there -- Defendant taking initiative in proposing importation -- Informer advising customs officials -- Customs officer bringing drugs to United Kingdom -- Defendant lured to United Kingdom by trickery and deception and charged with fraudulent evasion of prohibition on importation of controlled drug -- Duty of judge in weighing countervailing considerations of public policy and justice in deciding whether to grant stay -- Whether proceedings should be stayed as an abuse of process.

Customs and excise -- Importation of prohibited goods -- Knowingly concerned in any fraudulent evasion or attempt at evasion -- Controlled drug -- Defendant delivering heroin in Pakistan for exportation to United Kingdom -- Defendant arranging to collect drug in United Kingdom for distribution there -- Informer advising customs officials -- Customs officer bringing heroin to United Kingdom -- Defendant coming to United Kingdom to take delivery of heroin -- Whether defendant having committed offence of fraudulent evasion or attempted evasion -- Customs and Excise Management Act 1979, s 170(2).

HEADNOTE:

The first appellant, S, approached H, a shopkeeper in Pakistan who knew local suppliers of heroin but who was also a paid informer of the United States Drugs Enforcement Agency, proposing the export of 20 kg of heroin to the United Kingdom. The arrangement was made that S would deliver the heroin to H in Pakistan, H would arrange for it to be transported to London where he would take delivery of it and then pass it on to S, who would arrange for its distribution. H reported the deal to the local British drugs liaison officer, who arranged for a British customs officer to take delivery of the heroin from H and transport it to London. H then came to London from where he persuaded S that the heroin had arrived safely and that S should come to London to pick it up. S arrived in London and, together with the second defendant, L, arranged to meet H to pick up and pay for the heroin. A customs officer pretending to act on H's behalf came to the meeting and delivered packages got up so as to resemble the original bags of heroin to S, who was immediately arrested. L was also arrested. The defendants were charged with being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to s 170(2) of the Customs and Excise Management Act 1979. At their trial the judge ruled against submissions (i) that the proceedings were an abuse of process and should be stayed since S had been incited to commit the offence by the subterfuge of H and the customs officers who had then lured him into the jurisdiction and (ii) that on the prosecution evidence the appellants were not guilty of the offence charged. The appellants were convicted and their appeals to the Court of Appeal on the ground that the judge's rulings were erroneous were dismissed. They appealed to the House of Lords.

Held -- The appeals would be dismissed for the following reasons --

(1) Where a defendant had been trapped by the deception of police or customs officers into committing an offence which he would not otherwise have committed, the trial judge had to weigh in the balance the public interest in ensuring

that those who were charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court would adopt the approach that the end justified any means when exercising his discretion to decide whether there had been an abuse of process which amounted to an affront to the public conscience and required the criminal proceedings to be stayed. On the facts the judge had not erred in refusing a stay, since he had taken account of the relevant considerations in performing the balancing exercise and was entitled to take the view that S was an organiser in the heroin trade who had taken the initiative in proposing the importation and that the conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed; Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138 applied.

(2) Although S had not committed the full offence of evading the importation of heroin under s 170(2) of the 1979 Act, it was clear that he had committed two attempts at evasion: first in Pakistan, where S had delivered the heroin to H for the purpose of exportation to the United Kingdom, and nothing that the customs office subsequently did could deprive S's conduct of its criminal character; and secondly in London, where he had tried to collect the heroin from H for distribution in the United Kingdom. That was sufficient to prove that S had intended to commit the full offence and was guilty of acts which were more than merely preparatory to the commission of the full offence. Since an offence under s 170(2) of the Act could be committed in one of two ways, namely by evasion or an attempt at evasion, S had correctly been found guilty of an offence under s 170(2); DPP v Stonehouse [1977] 2 All ER 909 and dictum of Lord Griffiths in Liangsiriprasert v US Government [1990] 2 All ER 866 at 877 applied.

NOTES:

For importation of drugs and assisting in offences abroad, see 11(1) Halsbury's Laws (4th edn reissue) para 405, and for cases on the subject, see 14(1) Digest (2nd reissue) 505-510, 4766-4787.

For official collaboration in crime, see 11(1) Halsbury's Laws (4th edn reissue) para 48, and for cases on the subject, see 14(1) Digest (2nd reissue) 137-138, 1112-1116.

For the Police and Criminal Evidence Act 1984, s 78, see 17 Halsbury's Statutes (4th edn) (1993 reissue) 228.

For the Customs and Excise Management Act 1979, s 170, see 13 Halsbury's Statutes (4th edn) (1991 reissue) 426.

CASES-REF-TO:
DPP v Stonehouse [1977] 2 All ER 909, [1978] AC 55, [1977] 3 WLR 143, HL.
Liangsiriprasert v US Government [1990] 2 All ER 866, [1991] 1 AC 225, [1990] 3 WLR 606, PC.
Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, sub nom R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42, [1993] 3 WLR 90, HL.

INTRODUCTION:

Conjoined appeals

Khalid Latif and Mohammed Khalid Shahzad appealed with leave of the Appeal Committee from the decision of the Court of Appeal, Criminal Division (Staughton LJ, Tuckey and Holland JJ) ([1995] 1 Cr App R 270) delivered on 10 March 1994 dismissing their appeals against their conviction on 7 March 1991 in the Crown Court at Southwark before Judge Laurie and a jury of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, Diamorphine, contrary to s 170(2) of the Customs and Excise Management Act 1979, for which Latif was sentenced to 16 years' imprisonment and Shahzad to 20 years' imprisonment. The Court of Appeal had certified that points of law of general public importance were involved in the decision to dismiss the appeals, namely: (1) whether an offence under s 170(2)(b) of the Customs and Excise Act 1979, that is of being knowingly concerned in a fraudulent evasion of a prohibition on the importation of goods, is committed (a) by a person who is knowingly concerned in such evasion but is not himself fraudulent if another person is to his knowledge knowingly concerned in the same evasion and is fraudulent; (b) by a person who is knowingly concerned in fraudulent evasion if in the event the actual evasion of the prohibition is effected by another person who is knowingly concerned but who is not himself fraudulent; (2) whether it is an abuse of process when a prosecutor institutes criminal proceedings against a person (the accused) for a criminal offence and (a) the conduct of a servant or agent of the prosecutor has, to his knowledge and with his consent, constituted part of the actus reus of the crime charged so as to complete its commission; (b) such conduct in any event involved the commission of a criminal offence in another jurisdiction with

the accused as a party thereto; and (c) such and other conduct on the part of servants or agents of the prosecution served to trick the accused into entering the jurisdiction. The facts are set out in the opinion of Lord Steyn.

COUNSEL:

Charles Bloom QC and Andrew Sharpe for Shahzad; David Robson QC and Mohammed Latif for Latif; Alan Moses QC and Seddon Cripps for the Crown.

JUDGMENT-READ:

Their Lordships took time for consideration. 18 January 1996. The following opinions were delivered.

PANEL: LORD KEITH OF KINKEL, LORD JAUNCEY OF TULLICHETTLE, LORD MUSTILL, LORD STEYN, LORD HOFFMANN

JUDGMENTBY-1: LORD KEITH OF KINKEL

JUDGMENT-1:

LORD KEITH OF KINKEL: My Lords, for the reasons given in the speech to be delivered by my noble and learned friend Lord Steyn, which I have read in draft and with which I agree, I would dismiss these appeals.

JUDGMENTBY-2: LORD JAUNCEY OF TULLICHETTLE

JUDGMENT-2:

LORD JAUNCEY OF TULLICHETTLE: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons which he gives I too would dismiss these appeals

JUDGMENTBY-3: LORD MUSTILL

JUDGMENT-3:

LORD MUSTILL: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons which he gives I would dismiss these appeals

JUDGMENTBY-4: LORD STEYN

JUDGMENT-4:

LORD STEYN: My Lords, during February and March 1991, and in the Crown Court at Southwark, the two appellant defendants stood trial on two charges. Count 1 charged the defendants with the offence of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to s 170(2) of the Customs and Excise Management Act 1979. The particulars of the offence asserted that the drug was about 20 kg of diamorphine, and that the defendants committed the offence between 6 February and 20 May 1990 in London and elsewhere in England and Wales. Count 2, which was based on the same events, charged the defendants with the offence of attempting to be knowingly concerned in dealing with goods subject to a prohibition on importation with intent to evade such prohibition, contrary to s 1(1) of the Criminal Attempts Act 1981. After a lengthy trial the jury convicted both defendants on count 1. The judge sentenced Latif and Shahzad to terms of imprisonment of 16 and 20 years respectively. The judge discharged the jury from returning a verdict on count 2.

With the leave of the single judge the defendants appealed against their convictions on the ground of three rulings made by the judge during the course of the trial. First, the judge considered a submission that an informer and customs officers by subterfuge incited Shahzad to commit the offence and then lured Shahzad into the jurisdiction. Counsel for the defendants submitted that in those circumstances it was an abuse of process to institute criminal proceedings against

the defendants and that the proceedings should be stayed. Secondly, and relying on essentially the same assertions of fact, counsel for the defendants invited the judge to exercise his discretion to exclude the central core of prosecution evidence under s 78 of the Police and Criminal Evidence Act 1984 (PACE). Thirdly, counsel for the defendants submitted at the end of the prosecution case that on the prosecution evidence the defendants were not guilty of the offence charged under count 1, which was by then the only count pursued by the prosecution. The judge ruled against the defendants on all three submissions. On appeal to the Court of Appeal ([1995] 1 Cr App R 270), counsel for the defendants challenged each of the judge's rulings. The Court of Appeal rejected the three grounds of appeal and dismissed the appeals of both defendants.

The Court of Appeal refused leave to appeal to your Lordships' House, but certified that certain questions of law of public importance arose. Those questions covered the first and third issues but not the second. The Appeal Committee granted leave to appeal. On the hearing of the appeal, counsel for the defendants challenged the three rulings of the judge, and the conclusions of the Court of Appeal on all three matters.

The undeniable facts

Both defendants gave evidence. In short they testified that they were under the impression that they were dealing with an intended importation of gold. The jury rejected their explanations. Given the verdict of the jury, I need only give a narrative of the essentials of the prosecution case. In 1990 Honi, a shopkeeper in Lahore, Pakistan, was a paid informer employed by the United States Drugs Enforcement Agency. He knew local suppliers of heroin. On 6 February 1990 he met two men who wanted to import heroin into the United Kingdom. Honi reported this to Mr Bragg, the British drugs liaison officer in Rawalpindi. Mr Bragg encouraged Honi to foster the connection with the two men. Honi acted under the instructions of Mr Bragg. Honi suggested to the two men that he knew an airline pilot who could be used as a courier. That was untrue. The two men then introduced the appellant Shahzad to Honi. Shahzad made it clear to Honi that he, Shahzad, was ready and willing to export heroin when the occasion presented itself. At first Shahzad proposed to Honi that he could export heroin from Pakistan to Holland. Honi rejected this idea. All three men then agreed to supply Honi with heroin for exportation to the United Kingdom. That was the historical background to the subsequent and critical dealings between Honi and Shahzad.

A few days later Shahzad alone approached Honi. He proposed an export of 20 kg of heroin on his own, cutting out the other two men. Honi agreed. The arrangement made between them was that Shahzad would deliver the heroin to Honi in Pakistan; Honi would arrange for an airline pilot to carry it to the United Kingdom; Honi would take delivery of the heroin in London; and Shahzad or somebody on his behalf would collect the heroin in London and arrange for its distribution in the United Kingdom. On 1 April 1990 Shahzad delivered 20 kilograms of heroin to Honi. The street value of the drugs in England was £ 372m. In accordance with his instructions Honi delivered the drugs to a Drugs Enforcement Agency officer. On 10 April 1990 Mr Bolton, a customs and excise officer, travelled from England to Pakistan and collected the packages of heroin and on 13 April 1990 he brought them to England. The officer did so on the instructions of his superiors. But he had no licence to do so. The Pakistani authorities had been kept informed of what was going on.

In May 1990 Honi came to England. Customs and Excise officers arranged for Honi to stay in a hotel room under surveillance. The customs officers arranged for Honi's telephone calls to be intercepted. Events in his room were recorded by video camera. Honi did not, however, have possession of the packages of heroin. Honi then set about trying to persuade Shahzad to come to England to take delivery of the drugs. On 19 May 1990 Shahzad arrived in London. During the next two days Shahzad and Honi discussed the details of the delivery of the heroin and payment. On the afternoon of 20 May the defendant Latif joined Honi and Shahzad. Shahzad and Latif knew each other. Latif said words to Shahzad to the effect that Shahzad could tell Islamabad that he (Latif) had arrived. Shahzad and Latif continued to discuss the proposed delivery of the heroin.

A man, who pretended to have possession of the heroin on behalf of Honi, then arrived. He was in fact a customs officer carrying six bags of Horlicks, got up so as to resemble the original bags of heroin. The customs officer delivered the bags to Shahzad who was immediately arrested. Latif had been arrested a little earlier outside the hotel room.

The judge's rulings on abuse of process and exclusion of evidence under s 78 of PACE

The principles applicable to the court's jurisdiction to stay criminal proceedings, and the power to exclude evidence under s 78 of the 1984 Act, in a case such as the present, are not the same. Nevertheless, there is a considerable overlap. It will therefore be convenient to consider the judge's findings under these two headings together.

Before making his rulings at the start of the trial the judge would have studied the depositions. Honi gave evidence on the voire dire. Latif and Shahzad did not testify at that stage. As to the dealings between Honi and Shahzad in Pakistan, the judge summarised the position as follows:

'. . . this is a case in which, as I find, all the suggestions for the crime came from the defendant [Shahzad]. I have to say, having heard the detail of how the arrangement was made in Pakistan, according to Mr Honi, I think it would be a misuse of language to say there was an incitement by Mr Honi of the defendant or a soliciting of the offence. The defendant voluntarily acted to explain his plan to Mr Honi in Pakistan and Mr Honi was merely his agent to arrange the carriage. Of course, Mr Honi told him there was the opportunity to import these drugs to the United Kingdom by means of this carriage. Of course, all that was a deception, but the action all came from the defendant and the defendant . . . voluntarily came to the United Kingdom to deal in drugs here.'

On appeal to the Court of Appeal ([1995] 1 Cr App R 270 at 275) Staughton LJ added to the judge's observations that the importation, which Shahzad had arranged through Honi, would not have taken place when and how it did without the assistance of Honi and the customs officers. The trial judge found that the Customs and Excise lured Shahzad to the United Kingdom by trickery and deception. He also found, however, that he was not brought to England by force: he came voluntarily with a visa he applied for. There was no extradition treaty between the United Kingdom and Pakistan. No breach of extradition laws was involved. Laurie J said that --

'what happened here is that every step the defendant [Shahzad] wished to take was facilitated by the authorities in order to make sure that they could bring a suspected and substantial drugs dealer to book.'

The judge concluded that a stay would not be justified. The gravamen of his reasoning appears in the following passage:

'Though no court will readily approve of trickery and deception being used, there are some circumstances in which one has to recognise, living in the real world, that this is the only way in which some people are ever going to be brought to trial, otherwise the courts will not get to try this sort of offence against people who are seriously involved in it.'

Dealing with the application to exclude the evidence of Honi and others under s 78(1) of PACE the judge concluded:

'To my mind, there is nothing of substance here which is unfair to the defendant in admitting this evidence. The incriminating remarks are on tape, so that proof of them does not depend on recollection of witnesses. He was not deprived of any rights that he had or sought to avail himself of. It is not evident to me that any legislation or rules of practice, designed to protect people from authority, has been infringed. Nor is it evident to me that the defendant is in any way handicapped from conducting his defence, whatever that may be, to this charge.'

The ruling on the submission of no case to answer

It will be convenient to consider the judge's ruling on the submission that the defendants had no case to answer in respect of the first count after I have considered the issues on abuse of process and s 78(1) of PACE.

The abuse of process issue

Both in the Court of Appeal and in your Lordships' House the argument concentrated virtually exclusively on the position of Shahzad. Despite the fact that Latif was separately represented, I will concentrate on the position of Shahzad and turn to Latif at the end of my speech.

At first instance and in the Court of Appeal counsel for Shahzad made much of the undoubted fact that customs officers by deception arranged for Honi to lure Shahzad to this country. Counsel for Shahzad drew your Lordships' attention to observations of Lord Griffiths in Liangsiriprasert v US Government [1990] 2 All ER 866 at 872, [1991] 1 AC 225 at 242-243. Lord Griffiths said:

'It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red-letter day for the drug barons.'

Recognising the force of Lord Griffiths' observations, counsel for Shahzad realistically accepted that there was nothing oppressive about that part of the conduct of the customs officers.

Instead counsel for Shahzad concentrated his argument on two other features of this case. First, he submitted that the customs officers encouraged Shahzad to commit the offence. Secondly, he argued that the customs officer who brought the drugs to England himself committed the offence of which Shahzad was convicted. It is necessary to examine these arguments. As to the first, I approach the matter on the basis that Shahzad took the initiative at the critical meeting between him and Honi. He was 37 years of age. He was not a vulnerable and unwilling person. He was an organiser in the heroin trade. He made clear from the start that he was ready and willing to arrange the export of heroin from Pakistan. But I also accept Staughton LJ's qualification that the particular importation would not have taken place when and how it did without the assistance of Honi and the Customs and Excise. The highest that the argument for Shahzad can be put is that Honi gave him the opportunity to commit or to attempt to commit the crime of importing heroin into the United Kingdom if he was so minded. And he was so minded. That is not necessarily a decisive factor, but it is an important point against the claim of abuse of process.

That brings me to the second matter, ie the question whether the customs officer, who brought the heroin to England, was himself guilty of criminal behaviour. Section 50(3) of the 1979 Act reads:

'If any person imports or is concerned in importing any goods contrary to any prohibition or restriction for the time being in force under or by virtue of any enactment with respect to those goods . . . and does so with intent to evade the prohibition or restriction, he shall be guilty of an offence under this subsection . . .'

It was common ground in argument before your Lordships that the customs officer had committed an offence under this statutory provision. Despite the requirement of 'intent to evade', I incline to the view that this concession was rightly made. In the Court of Appeal ([1995] 1 Cr App R 270) the prosecution accepted that the customs officer had also committed an offence under s 170(2) of the Act. That provision reads:

'. . . if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion . . . (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment . . . he shall be guilty of an offence under this section and may be arrested.'

The Court of Appeal rejected the concession of the prosecution and held that the customs officer did not commit an offence under s 170(2) because he did not act fraudulently. On the appeal, counsel for the prosecution argued that s 170 should be read as if the section provides 'if any person is . . . fraudulently and knowingly concerned in any fraudulent evasion . . .' In my judgment there is no justification for adding the italicised words as an additional ingredient to the offence in s 170(2). Indeed, such a construction may cause practical difficulties in other cases. Having said that, I am prepared to assume, without deciding, that the customs officer was guilty of an offence under s 170(2).

It is now necessary to consider the legal framework in which the issue of abuse of process must be considered. The starting point is that entrapment is not a defence under English law. That is, however, not the end of the matter. Given that Shahzad would probably not have committed the particular offence of which he was convicted, but for the conduct of Honi and the customs officers, which included criminal conduct, how should the matter be approached? This poses the perennial dilemma (see W G Roser 'Entrapment: Have the Courts Found a Solution to this Fundamental Dilemma to the Criminal Justice System?' (1993) 67 ALJ 722 and Andrew L-T Choo 'Halting criminal prosecutions: The abuse of process doctrine revisited' [1995] Crim LR 864). If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed (see Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, sub nom R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42). Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to

how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

In my view the judge took into consideration the relevant considerations placed before him. He performed the balancing exercise. He was entitled to take the view that Shahzad was an organiser in the heroin trade, who took the initiative in proposing the importation. It is true that he did not deal with arguments about the criminal behaviour of the customs officer. That was understandable since that was not argued before him. If such arguments had been put before him, I am satisfied that he would still have come to the same conclusion. And I think he would have been right. The conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed. Realistically, any criminal behaviour of the customs officer was venial compared to that of Shahzad.

In these circumstances I would reject the submission that the judge erred in refusing to stay the proceedings.

Section 78(1) of PACE

By way of alternative submission, counsel for Shahzad argued that the judge erred in not excluding the evidence of Honi and the customs officers under s 78(1) of PACE. Exclusion under s 76, which deals with confessions, does not arise. Section 78(1) reads:

'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

The judge found as a fact that Shahzad was not in any way prejudiced in the presentation of his defence. Counsel found it impossible to challenge that finding. Given that conclusion, counsel accepted that if his submissions on abuse of process failed, his separate argument based on s 78(1) of PACE must inevitably also fail. I need say no more about this aspect of the case.

The submission of no case to answer

At the end of the prosecution case, counsel for Shahzad submitted that on count 1 there was no case to answer. The judge ruled to the contrary. He said that on the prosecution evidence it was a case of knowing evasion of a prohibition rather than attempted evasion. In the Court of Appeal ([1995] 1 Cr App R 270) and in your Lordships' House, counsel for Shahzad submitted that on the prosecution case Shahzad had not committed an offence under s 170(2) of the1979 Act. For convenience I again quote the relevant part of this provision. It reads:

'. . . if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion . . . (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment . . . he shall be guilty of an offence under this section and may be arrested.'

Section 3 of the Misuse of Drugs Act 1971 provides that, with certain exceptions, the importation of a controlled drug (and heroin is a controlled drug) is prohibited. This section creates no offence and imposes no sanction. The relevant offence under s 170(2) of the 1979 Act is created by a combination of s 170(2) and s 3 of the 1971 Act.

The ingredients of that offence are: (a) the goods in question are subject to a prohibition on importation under statutory provision; and (b) a fraudulent evasion or attempted evasion of a prohibition has taken place in relation to those goods; and (c) the accused was concerned in that fraudulent evasion or attempted evasion; and (d) the accused was concerned in that fraudulent evasion or attempted evasion 'knowingly'.

It is inherent in the concept of an evasion of a prohibition on importation that an importation has taken place. If no importation has taken place, no evasion has taken place. On the other hand, if no importation has taken place, there may still be an attempted evasion of a prohibition.

Given this statutory framework, counsel for Shahzad argued before the Court of Appeal and again before your Lordships' House, that Shahzad had not been concerned in the importation carried out by the customs officers. Counsel for Shahzad emphasised that, in full knowledge of the content of the packages, and of the prohibition of the importation of heroin without a licence, the officer arranged an importation. The prosecution argued that despite the fact that the

customs officer and Shahzad did not act in concert there had been an evasion in which Shahzad was concerned. In the alternative, the prosecution submitted in the Court of Appeal that --

'if the full offence had not been committed, then the alternative offence of being knowingly concerned in an attempted evasion of the prohibition was committed.'

That was not a reference to count 2, viz an attempt contrary to s 1(1) of the Criminal Attempts Act 1981. By the end of the prosecution case count 2 had been withdrawn. The prosecution expressly stated in the Court of Appeal that they were referring to an attempted evasion under s 170(2) of the 1979 Act.

Giving the judgment of the court, Staughton LJ observed ([1995] 1 Cr App R 270 at 273-274):

'At first sight one might have thought that there had to be some fraudulent person bringing the goods into this country and deceiving the Customs and Excise in the process. If that be right there was no completed offence in this case, for even without a licence Mr Bolton was not fraudulent and did not deceive anybody. His superiors knew what he was doing. Mr Shahzad and Mr Latif would not be guilty of the complete offence, but it is arguable they would be guilty of an attempt. Such a construction of section 170(2) is not, in our judgment, correct. It would not catch the man who organises an importation by an innocent courier. There would be no fraudulent evasion by anybody in such a case, and the organiser could not therefore be knowingly concerned in the fraudulent evasion. Mr Bloom submitted that the organiser would be liable as the principal of the courier who acted as his agent. We do not find that suggestion of vicarious liability plausible. In our judgment the words "fraudulent evasion" include a good deal more than merely entering the United Kingdom with goods concealed and no intention of declaring them. They extend to any conduct which is directed and intended to lead to the importation of goods covertly in breach of a prohibition on import.'

On appeal to your Lordships' House, the prosecution did not try to support this reasoning. It is established law that the offence charged can be committed through an innocent agent, for example an innocent but duped courier. The foundation of the reasoning of the Court of Appeal was therefore wrong. In any event, in ruling that the offence of evading the prohibition (as opposed to attempting to evade the prohibition) can be committed by any conduct which is directed or intended to lead to the importation of the goods the Court of Appeal went too far. It gave no effect to the fact that an evasion (as opposed to an attempted evasion) necessarily involves an importation. Moreover, this reasoning does not allow for the fact that s 170(2), in so far as it is directed at an attempted evasion, already covers certain pre-importation acts. The reasoning of the Court of Appeal seems to allow little or no scope for an attempted evasion, for which s 170(2) provides (see a commentary on the judgment of the Court of Appeal by Professor Sir John Smith [1994] Crim LR 751-752). For these reasons I am unable to accept the reasoning of the Court of Appeal.

Counsel for the prosecution attempted to support the conviction on a different basis. He submitted that there was in truth a criminal evasion because Shahzad delivered the heroin intending that it should be imported into the United Kingdom; it was imported into the United Kingdom; and Shahzad sought to take delivery in England of the heroin. Counsel emphasised the continuing nature of the offence. He said it did not matter that the customs officers acted for their own purpose. The problem, as Sir John Smith pointed out in his commentary, is one of causation. The general principle is that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is held to relieve the first actor of criminal responsibility (see H L A Hart and T Honori Causation in Law (2nd edn, 1985) pp 326ff; Blackstone Criminal Practice (1995) pp 13-15, para A1.27-A1.29). For example, if a thief had stolen the heroin after Shahzad delivered it to Honi, and imported it into the United Kingdom, the chain of causation would plainly have been broken. The general principle must also be applicable to the role of the customs officers in this case. They acted in full knowledge of the content of the packages. They did not act in concert with Shahzad. They acted deliberately for their own purposes whatever those might have been. In my view consistency and legal principle do not permit us to create an exception to the general principle of causation to take care of the particular problem thrown up by this case. In my view the prosecution's argument elides the real problem of causation and provides no way of solving it.

That is, however, not the end of the matter. There is another principled solution to be considered, namely the alternative argument of the prosecution in the Court of Appeal [1995] 1 Cr App R 270, viz that Shahzad was guilty of an attempted evasion under s 170(2). Initially, counsel for the prosecution did not on the hearing before your Lordships rely on this alternative argument. After your Lordships raised the question counsel for the prosecution did advance this alternative argument. On this question your Lordships heard oral submissions and subsequently received further written submissions.

Shahzad delivered the heroin to Honi in Pakistan for the purpose of exportation to the United Kingdom and subsequently Shahzad tried to collect the heroin from Honi for distribution in the United Kingdom. In these circumstances the guilt of Shahzad of an offence under that part of s 170(2) which creates the offence of an attempt at the evasion of a prohibition is plain. Counsel for Shahzad suggested that the jury might have viewed Shahzad's conduct as mere preparatory steps falling short of an attempted evasion. In my view that would have been a wholly unrealistic suggestion. In common sense and law there was only one possible answer: Shahzad committed attempts at evasion in Pakistan and in England. Indeed I am confident that counsel would not have devalued his speech to the jury with a suggestion that on the prosecution case there was no attempt at evasion. For my part I have no doubt that this case must be approached on the basis that the guilt of Shahzad of an attempt at evasion under s 170(2) cannot seriously be disputed.

Counsel for Shahzad also argued that if the movement of the heroin from Pakistan to England was not a fraudulent evasion, it was impossible for Shahzad to be guilty of an offence of attempt at evasion. It will be recalled that I accepted that the customs officer who brought the heroin to England committed an offence under s 50(3) of the 1979 Act, and further that I assumed that the customs officer also committed an offence under s 170(2) of the same Act. In these circumstances the argument apparently falls away. In any event, Shahzad committed the attempt at evasion in Pakistan and nothing that the customs officer subsequently did could deprive Shahzad's conduct of its criminal character. And Shahzad's attempt at evasion by distribution of heroin in England was an offence. It was sufficient to prove that Shahzad intended to commit the full offence and was guilty of acts which were more than merely preparatory to the commission of the full offence.

Counsel for Shahzad further submitted that in the circumstances of this case an English court would not have had jurisdiction to try an offence of an attempt at evasion under s 170(2) in England. The attempted evasion in Pakistan, as well as the attempted evasion in England, were respectively directed at importation into the United Kingdom and associated with an importation into the United Kingdom. In these circumstances counsel's submission in regard to the attempt at evasion, which Shahzad committed in Pakistan, is destroyed by the decision of the House of Lords in DPP v Stonehouse [1977] 2 All ER 909, [1978] AC 55. The English courts have jurisdiction over such criminal attempts even though the overt acts take place abroad. The rationale is that the effect of the criminal attempt is directed at this country. Moreover, as Lord Griffiths explained in Liangsiriprasert v US Government [1990] 2 All ER 866 at 877-878, [1991] 1 AC 225 at 250, as a matter of policy jurisdiction over criminal attempts ought to rest with the country where it was intended that the full offence should take place (see also A T H Smith Property Offences, The Protection of Property through the Criminal Law (1994) p 23, para 1-37). In any event, in the present case Shahzad also committed an attempt at evasion in England. I have no doubt that counsel's submission is misconceived.

It is true, of course, that the indictment in the first count charges an actual evasion rather than an attempted evasion. That means that the prosecution charged more than was necessary. It is clear that if the prosecution had pinned their colours to an attempt at evasion under s 170(2) exactly the same evidence would have been led, and the speeches would have been the same. I would reject the submission of counsel that the defence of Shahzad might have been conducted differently if the indictment had charged an attempt at evasion under s 170(2). The fact is that Shahzad did testify. And, as the judge observed, in this case 'the factual basis of the prosecution case against these defendants is exactly the same' whether the full offence or an attempt is considered. Moreover, the prosecution submitted in the alternative before the Court of Appeal that Shahzad was at least guilty of an attempt at evasion under s 170(2). Given that there was no prejudice to Shahzad, the Court of Appeal could have upheld that submission. The Court of Appeal found it unnecessary to consider that aspect (see [1995] 1 Cr App R 270 at 274). It is now open to your Lordships to reconsider that issue. In a more formalistic age counsel's complaint that that was not how the prosecution presented the case at first instance might have had a greater appeal. Nowadays, the view of a criminal trial as a sporting contest is a thing of the past. The concentration is on substance rather than form. Given the undeniable guilt of Shahzad of an attempt at evasion under s 170(2), and absence of any prejudice to him, there is no reason why a technical mistake by the prosecution should allow him to go free.

That leaves the question of what order should be made. One possibility is that s 170(2) contains two separate offences. On this supposition it would be permissible to substitute a verdict on the basis that Shahzad was guilty of an offence of an attempt at evasion under s 170(2). In my view this is not the correct view. In my view there is one offence under s 170(2), which can be committed in one of two different ways, namely by evasion or by an attempt at evasion. Shahzad has correctly been found guilty of an offence under s 170(2). Such misdescription as is contained in the indictment can be ignored.

I would dismiss Shahzad's appeal. Given the terms of this judgment it is unnecessary to deal directly with the certified questions of law.

Latif

Counsel for Latif adopted the submissions of counsel for Shahzad. He further sought to argue that on the facts Latif's role was insufficient to constitute an offence under s 170(2). I have already described Latif's role on 20 May 1990 when he and Shahzad attempted to take possession of the drug for distribution in the United Kingdom. In the light of these facts the submissions made on behalf of Latif are without substance. I would dismiss these submissions.

I would dismiss the appeal of Latif against conviction.

JUDGMENTBY-5: LORD HOFFMANN

JUDGMENT-5:

LORD HOFFMANN: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons which he has given, I too would dismiss these appeals.

DISPOSITION:

Appeals dismissed.

SOLICITORS:

Hird Killeen & Co, Birmingham; Mian & Co, Birmingham; Solicitor, Customs and Excise.

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