062 SCSL-2003-09-PT
C748 – 748

THE PROSECUTOR -vs- MORRIS KALLON (RESPONDENT)
AUGUSTINE BAO INTERVENING (APPELLANT)

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

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

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

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

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

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the

Frontières and the Government of the United States of America, to whom it expresses its gratitude.

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

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

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

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

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

A. Meaning Of Jurisdiction

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

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

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

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

matter of the plea as a "political question" and, as such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

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

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

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

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

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

any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

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

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

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

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

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

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

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970),

occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

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

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

This dictum applies almost literally to the present case.

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

C. The Issue Of Constitutionality

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

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

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never

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

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

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

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

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

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

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

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security

of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are

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

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

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

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

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

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg

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

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

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

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

"Concurrent jurisdiction

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

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

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

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

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

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

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

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

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

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

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

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

Appellant added that:

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

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also

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

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

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

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

> a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
>
> b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
>
> c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

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

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

> "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely

> the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.
>
> [. . .]
>
> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

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

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

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

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

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

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

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

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

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

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

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

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

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is

Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

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

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

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

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

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

The same provision specifies in paragraph 2 that:

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

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

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

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

warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

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

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

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

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

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

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

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

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

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

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

3. Logical And Systematic Interpretation Of The Statute

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acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

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

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of

humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above,* para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

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

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

(b) Article 3

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

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

wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

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

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

The American delegate stated the following:

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

The British delegate stated:

Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

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

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

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

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

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

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

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

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally

civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

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

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

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

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

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

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

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

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

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

term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

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

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

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

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

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

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

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading

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

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

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

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

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

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

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

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

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by

(Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions,* Moniteur Belge, (5 August 1993).)

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

(v) **Conclusion**

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

(c) Article 5

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

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts."

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

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation

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

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

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

V. DISPOSITION

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

The Appeals Chamber

(1) By 4 votes to 1,

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

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

AGAINST: *Judge* Li

(2) Unanimously

1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).
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2 ."..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

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

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

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

6 "Dentro de esta l'nea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a&uacuten no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, comœn a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."
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7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."
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8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
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SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

United Nations Charter

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

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

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

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United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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Appendix A: Chronology of Events

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 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.

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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.

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

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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 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.

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

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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 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.**

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,

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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 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

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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

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

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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

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 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. [...]

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.

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 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: 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

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.

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 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 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 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 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 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:

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 Presiding

Mohamed Shahabuddeen

Lal Chand Vohrah

Wang Tieya

Rafael Nieto-Navia

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

[Seal of the Tribunal]

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

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	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.
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.

Bennett v Horseferry Road Magistrates' Court and another

HOUSE OF LORDS

LORD GRIFFITHS, LORD BRIDGE OF HARWICH, LORD OLIVER OF AYLMERTON, LORD LOWRY AND LORD SLYNN OF HADLEY

3, 4, 8, 9 MARCH, 24 JUNE 1993

Extradition – Disguised extradition – Deportation to United Kingdom – Applicant arrested in South Africa and put on aircraft bound for England – Applicant arrested on arrival in England and charged – Applicant alleging that he was brought within jurisdiction by improper collusion between South African authorities and English police – Whether alleged collusion between South African authorities and English police amounting to abuse of process of court – Whether court having power to inquire into circumstances in which applicant brought within jurisdiction.

Criminal law – Committal – Preliminary hearing before justices – Abuse of process – Power of justices – Justices having power to refuse to commit for trial on grounds of abuse of process in matters directly affecting fairness of trial – Extent of power – Whether appropriate for justices to decide questions involving deliberate abuse of extradition procedures – Whether proper court to decide such matters is Divisional Court.

The appellant, a New Zealand citizen, was alleged to have purchased a helicopter in England in 1989 by a series of false pretences and then to have taken it to South Africa. In November 1990 he was arrested in South Africa. The English police, who wished to arrest him, were informed but in the absence of an extradition treaty between the United Kingdom and South Africa no proceedings for the appellant's extradition were ever initiated. Instead, the appellant was put on an aircraft bound for London by the South African police and when he arrived in England on 28 January 1991 he was arrested. He was subsequently brought before magistrates who committed him to the Crown Court for trial. The appellant sought judicial review of the magistrates' decision to commit him for trial, claiming that he had been forcibly returned to England against his will and brought within the jurisdiction as a result of disguised extradition or kidnapping. He alleged that the South African police had indicated that he would be repatriated to New Zealand but had then arranged with the English police that he would travel via England to enable him to be arrested and tried in England. He contended that the subterfuge and complicity between the English police and the South African police to obtain his presence within the jurisdiction to enable him to be arrested amounted to an abuse of the process of the court and that it would be wrong and improper for him to be tried in England. The Divisional Court held that, even if there was evidence of collusion between the English police and the South African police in kidnapping the appellant and securing his enforced illegal removal from South Africa, the court had no jurisdiction to inquire into the circumstances by which he came to be within the jurisdiction and accordingly dismissed his application for judicial review. The appellant appealed to the House of Lords.

Held (Lord Oliver dissenting) – The maintenance of the rule of law prevailed over the public interest in the prosecution and punishment of crime where the

prosecuting authority had secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him or having him abducted from within the jurisdiction of some other state in violation of international law, the laws of the state from which he had been abducted and his rights under the laws of that state and in disregard of available procedures to secure his lawful extradition to the jurisdiction of the court from the state where he was residing. It was an abuse of process for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom and the High Court had power, in the exercise of its supervisory jurisdiction, to inquire into the circumstances by which a person was brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures by a process to which the police, prosecuting or other executive authorities in the United Kingdom were a knowing party the court could stay the prosecution and order the release of the accused. The appeal would therefore be allowed and the case remitted to the Divisional Court for further consideration (see p 150*e* to *h*, p 151*cd*, p 152*hj*, p 155*e* to p 156*a*, p 160*h*, p 162*e*, p 162*j* to p 163*a*, p 163*g*, p 164*h* and p 169*ghj*, post).

R v Hartley [1978] 2 NZLR 199, dictum of Woodhouse J in *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 475–476, *R v Bow Street Magistrates, ex p Mackeson* (1982) 75 Cr App R 24, *S v Ebrahim* 1991 (2) SA 553 and dictum of Stevens J in *US v Alvarez-Machain* (1992) 119 L Ed 2d 441 at 466–467 applied.

R v Plymouth Magistrates' Court, ex p Driver [1985] 2 All ER 681 overruled.

Per curiam. Justices, whether sitting as examining magistrates or exercising their summary jurisdiction, have power to exercise control over their proceedings through an abuse of process jurisdiction in relation to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. In the case of the deliberate abuse of extradition procedures the proper forum is the Divisional Court and if a serious question as to such a matter arises justices should allow an adjournment so that an application can be made to the Divisional Court (see p 152*e* to *h*, p 156*a*, p 160*g*, p 166*e* and p 169*ghj*, post).

Decision of the Divisional Court [1993] 2 All ER 474 reversed.

Notes

For seizure of persons in violation of international law, see 18 *Halsbury's Laws* (4th edn) para 1534.

For committal proceedings generally, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 824–827, and for cases on the subject, see 15(1) *Digest* (2nd reissue) 139–142, *12772–12802.1*.

Cases referred to in opinions

Atkinson v US Government [1969] 3 All ER 1317, [1971] AC 197, [1969] 3 WLR 1074, HL.

Brown v Lizars (1905) 2 CLR 837, Aust HC.

Chu Piu-wing v A-G [1984] HKLR 411, HK CA.

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.

DPP v Crown Court at Manchester and Ashton [1993] 2 All ER 663, [1993] 2 WLR 846, HL.

DPP v Humphrys [1976] 2 All ER 497, [1977] AC 1, [1976] 2 WLR 857, HL.

Frisbie v Collins (1952) 342 US 519, US SC.

Grassby v R (1989) 168 CLR 1, Aust HC.

Ker v Illinois (1886) 119 US 436, US SC.

Lam Chi-ming v R [1991] 3 All ER 172, [1991] 2 AC 212, [1991] 2 WLR 1082, PC.
McC v Mullan [1984] 3 All ER 908, [1985] AC 528, [1984] 3 WLR 1227, HL.
Mills v Cooper [1967] 2 All ER 100, [1967] 2 QB 459, [1967] 2 WLR 1343, DC.
Moevao v Dept of Labour [1980] 1 NZLR 464, NZ CA.
R v Bow Street Magistrates, ex p Mackeson (1981) 75 Cr App R 24, DC.
R v Brentford Justices, ex p Wong [1981] 1 All ER 884, [1981] QB 445, [1981] 2 WLR 203, DC.
R v Canterbury and St Augustine's Justices, ex p Klisiak [1981] 2 All ER 129, [1982] QB 398, [1981] 3 WLR 60, DC.
R v Crown Court at Derby, ex p Brooks (1984) 80 Cr App R 164, DC.
R v Croydon Justices, ex p Dean [1993] 3 All ER 129, DC.
R v Forbes, ex p Bevan (1972) 127 CLR 1, Aust HC.
R v Grays Justices, ex p Graham [1982] 3 All ER 653, [1982] QB 1239, [1982] 3 WLR 596, DC.
R v Grays Justices, ex p Low [1988] 3 All ER 834, [1990] 1 QB 54, [1989] 2 WLR 948, DC.
R v Guildford Magistrates' Court, ex p Healy [1983] 1 WLR 108, DC.
R v Hartley [1978] 2 NZLR 199, NZ CA.
R v Horsham Justices, ex p Reeves (1980) 75 Cr App R 236, DC.
R v Lee Kun [1916] 1 KB 337, [1914-15] All ER Rep 603, CCA.
R (Martin) v Mahony [1910] 2 IR 695.
R v Nat Bell Liquors Ltd [1922] 2 AC 128, [1922] All ER Rep 335, PC
R v Northumberland Compensation Appeal Tribunal, ex p Shaw [1952] 1 All ER 122, [1952] 1 KB 338, CA.
R v O/C Depot Battalion RASC Colchester, ex p Elliott [1949] 1 All ER 373, DC.
R v Oxford City Justices, ex p Smith (1982) 75 Cr App R 200, DC.
R v Plymouth Magistrates' Court, ex p Driver [1985] 2 All ER 681, [1986] QB 95, [1985] 3 WLR 689, DC.
R v Sang [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL.
R v Telford Justices, ex p Badhan [1991] 2 All ER 854, [1991] 2 QB 78, [1991] 2 WLR 866, DC.
R v Walton (1905) 10 CCC 269.
R v Watford Justices, ex p Outrim [1983] RTR 26, DC.
R v West London Stipendiary Magistrate, ex p Anderson (1984) 80 Cr App R 143, DC.
R v Whiteside (1904) 8 CCC 478.
Rourke v R [1978] 1 SCR 1021, Can SC.
S v Ebrahim 1991 (2) SA 553, SA App Div.
Scott, Ex p (1829) 9 B & C 446, 109 ER 166.
Sinclair v DPP [1991] 2 All ER 366, [1991] 2 AC 64, [1991] 2 WLR 1028, HL.
Sinclair v HM Advocate (1890) 17 R (J) 38, HC of Just.
US v Alvarez-Machain (1992) 112 S Ct 2188, US SC.
US v Sobell (1956) 142 F Supp 515, US DC SD NY ; *affd* (1957) 244 F 2d 520, US Ct of Apps (2nd Cir); *cert denied* 355 US 873, US SC.
US v Toscanino (1974) 500 F 2d 267, US Ct of Apps (2nd Cir).

Appeal

Paul James Bennett appealed, with the leave of the Appeal Committee of the House of Lords given on 3 December 1992, from the decision of the Divisional Court of the Queen's Bench Division ([1993] 2 All ER 474) given on 31 July 1992 refusing the appellant's application for judicial review by way of (1) an order of certiorari to quash the criminal proceedings preferred against him by the Crown Prosecution Service in the Horseferry Road Magistrates' Court on 22 May 1991

and (2) an order of certiorari to quash the order of the Horseferry Road Magistrates' Court made on 22 May 1991 committing the appellant for trial in the Crown Court at Southwark on those criminal charges. The Divisional Court had refused leave to appeal to the House of Lords but it certified, under s 1(2) of the Administration of Justice Act 1960, that a point of law of general public importance (set out at p 143*bc*, post) was involved in the decision. The facts are set out in the opinion of Lord Griffiths.

Alan Newman QC and *Brian Jubb* (instructed by *Hallinan Blackburn Gittings & Nott*) for the appellant.

Colin Nicholls QC and *Robert Fischel* (instructed by the *Crown Prosecution Service*) for the respondents.

Their Lordships took time for consideration.

24 June 1993. The following opinions were delivered.

LORD GRIFFITHS. My Lords, the appellant is a New Zealand citizen who is wanted for criminal offences which it is alleged he committed in connection with the purchase of a helicopter in this country in 1989. The essence of the case against him is that he raised the finance to purchase the helicopter by a series of false pretences and has defaulted on the repayments.

The English police eventually traced the appellant and the helicopter to South Africa. The police, after consulting with the Crown Prosecution Service, decided not to request the return of the appellant through the extradition process. The affidavit of Det Sgt Martin Davies of the Metropolitan Police, New Scotland Yard, deposes as follows:

> 'I originally considered seeking the extradition of the [appellant] from South Africa. I conferred with the Crown Prosecution Service, and it was decided that this course of action should not be pursued. There are no formal extradition provisions in force between the United Kingdom and the Republic of South Africa and any extradition would have to be by way of special extradition arrangements under section 15 of the Extradition Act 1989. No proceedings for the [appellant's] extradition were ever initiated.'

It is the appellant's case that, having taken the decision not to employ the extradition process, the English police colluded with the South African police to have the appellant arrested in South Africa and forcibly returned to this country against his will. The appellant deposes that he was arrested by two South African detectives on 28 January 1991 at Lanseria, South Africa, who fixed a civil restraint order on the helicopter on behalf of the UK finance company and told the appellant that he was wanted by Scotland Yard and he was being taken to England. Thereafter he was held in police custody until he was placed on an aeroplane in Johannesburg ostensibly to be deported to New Zealand via Taipei. At Taipei when he attempted to disembark he was restrained by two men who identified themselves as South African police and said that they had orders to return him to South Africa and then to the United Kingdom and hand him over to Scotland Yard. He was returned to South Africa and held in custody until he was placed, handcuffed to the seat, on a flight from Johannesburg on 21 February arriving at Heathrow on the morning of 22 February, when he was immediately arrested by three police officers including Det Sgt Davies

that he was placed on this flight in defiance of an order of the Supreme Court of South Africa obtained by a lawyer on his behalf on the afternoon of 21 February.

The English police through Det Sgt Davies deny that they were in any way involved with the South African police in returning the appellant to this country. They say that they had been informed that there were a number of warrants for the appellant's arrest in existence in Australia and New Zealand and that they requested the South African police to deport the appellant to either Australia or New Zealand and it was only on 20 February that the English police were informed by the South African police that the appellant was to be repatriated to New Zealand by being placed on a flight to Heathrow from whence he would then fly on to New Zealand. Det Sgt Davies does, however, depose in a second affidavit as follows:

> '1. Further to my affidavit sworn in the above mentioned proceedings on 29 November 1991, my earliest communications with the South African authorities following the [appellant's] arrest were with the South African police with a view to his repatriation to New Zealand or deportation to Australia and his subsequent extradition from one of those countries to England. I discussed with the South African police the question as to whether the [appellant] would be returned via the United Kingdom and I was informed by them that he might be returned via London. I sought advice from the Crown Prosecution Service and from the Special Branch of the Metropolitan Police as to what the position would be if he were so returned. I informed the South African police by telephone that if the [appellant] were returned via London he would be arrested on arrival. Subsequently I was informed by the South African police that the [appellant] could not be repatriated to New Zealand via Heathrow ...
>
> 4. I now recollect that it was on 20 February and not on 21 February as I stated in my previous affidavit, that the South African police informed me on the telephone that the [appellant] was to be returned to New Zealand via Heathrow. On the same day I consulted the Crown Prosecution Service and it was decided that the English police would arrest the [appellant] on his arrival at Heathrow.'

It is not for your Lordships to pass judgment on where truth lies at this stage of the proceedings, but for the purpose of testing the submission of the respondents that a court has no jurisdiction to inquire into such matters it must be assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he is alleged to have committed in 1989. I shall also assume that the Crown Prosecution Service were consulted and approved of the behaviour of the police.

On 22 May 1991 the appellant was brought before a stipendiary magistrate for the purpose of committal proceedings. Counsel for the appellant requested an adjournment to permit him to challenge the jurisdiction of the magistrates' court. The application was refused and the appellant was committed for trial to the Crown Court at Southwark on five offences of dishonesty. The appellant obtained leave to bring proceedings for judicial review to challenge the decision of the magistrate. On 22 July 1992 the Divisional Court ruled that as a

in the Divisional Court to inquire into the circumstances by which the appellant had come to be within the jurisdiction of the courts of England and Wales.

On 31 July 1992 the Divisional Court ([1993] 2 All ER 474) held that even if the evidence showed collusion between the Metropolitan Police and the South African police in kidnapping the appellant and securing his enforced illegal removal from the Republic of South Africa there was no jurisdiction vested in the court to inquire into the circumstances by which the appellant came to be within the jurisdiction and accordingly dismissed the application for judicial review. The Divisional Court has certified the following question of law:

> 'Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction.'

The Divisional Court in this case was faced with conflicting decisions of the Divisional Court in earlier cases. In *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24 the facts were as follows. The applicant was a British citizen who had left this country at the end of 1977 and in 1979 was working as a schoolteacher in Zimbabwe-Rhodesia. In May 1979 he was wanted by the Metropolitan Police for offences of fraud that he was alleged to have committed before he left this country. The Metropolitan Police were aware that no extradition was lawfully possible at that time because the Zimbabwe-Rhodesia government was in rebellion against the Crown. The Metropolitan Police therefore told the authorities in Zimbabwe-Rhodesia that the applicant was wanted in England in connection with fraud charges, with the result that he was arrested and a deportation order made against him. The applicant brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside which succeeded at first instance but the decision was set aside on appeal. No attempt was made to use the extradition process to secure the return of the applicant when Zimbabwe-Rhodesia returned to direct rule under the Crown in December 1979. On 17 April 1980 the applicant was placed on a plane by the police in Zimbabwe-Rhodesia and arrested on his arrival at Gatwick by the Metropolitan Police on 17 April 1980. No evidence was offered in respect of the fraud charges but further charges were alleged against him under the Theft Acts. The applicant applied for an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates court on those charges.

On these facts Lord Lane CJ, giving the judgment of the Divisional Court, held, on the authority of *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373, that the court had jurisdiction to try the applicant. He said (75 Cr App R 24 at 32):

> 'Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court. That aspect of the matter is simple.'

On the question of whether the court could or would exercise a discretion in favour of the applicant to order his release from custody Lord Lane CJ relied upon a passage in the judgment of Woodhouse J in *R v Hartley* [1978] 2 NZLR 199, a decision of the New Zealand Court of Appeal. In that case the New Zealand

police had obtained the return of a man named Bennett from Australia to New Zealand, where he was wanted on a charge of murder, merely by telephoning to the Australian police and asking them to arrest Bennett and put him on an aeroplane back to New Zealand, which they had done. Lord Lane CJ cited (75 Cr App R 24 at 32–33) the following extract from the judgment of Woodhouse J ([1978] 2 NZLR 199 at 216–217):

> 'There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised Court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith CJ referred to extradition as a "great prerogative power, supposed to be an incident of sovereignty" and then rejected any suggestion that it "could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished": *Brown v Lizars* ((1905) 2 CLR 837 at 852). The reasons are obvious. We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the Courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the Judge would probably have been justified in exercising his discretion under s 347(3) [of the Crimes Act 1961] or under the inherent jurisdiction to direct that the accused by discharged.'

Lord Lane CJ followed that passage and exercised the court's discretion to order prohibition against the magistrates' court and to discharge the applicant.

Ex p Mackeson was followed by the Divisional Court in *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108.

In *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95 a differently constituted Divisional Court, after hearing argument containing more elaborate citation of authority, declined to follow *Ex p Mackeson* and held that the court had no power to inquire into the circumstance in which a person was found within the jurisdiction for the purpose of refusing to try him.

The Divisional Court regarded the law as settled by a trilogy of cases: *Ex p Scott* (1829) 9 B & C 446, 109 ER 166, *Sinclair v HM Advocate* (1890) 17 R (J) 38 and *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373. These cases undoubtedly show that at the time they were decided the judges were not prepared to inquire into the circumstances in which a person came within the jurisdiction. In *Ex p Scott* Lord Tenterden CJ granted a warrant for the apprehension of Scott so that she might appear and plead to a bill of indictment charging her with perjury. Ruthven, the police officer to whom the warrant was directed, arrested Scott in Brussels. She applied to the British ambassador for assistance but he refused to interfere and Ruthven brought her to Ostend and then to England. A rule nisi was obtained for a habeas corpus to bring up Scott in order that she might be discharged. In giving judgment Lord Tenterden CJ said (9 B & C 446 at 448, 109 ER 166 at 167):

> 'The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.'

In *Sinclair v HM Advocate* (1890) 17 R (J) 38 the sheriff substitute of Lanarkshire granted a warrant to a Glasgow sheriff officer to arrest Sinclair for breach of trust and embezzlement and to receive him into custody from the government of Spain. The accused was brought before the sheriff substitute on this warrant and committed to prison to await his trial. He brought a bill of suspension and liberation in which he alleged that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant, that he had been put by them on board an English ship in the Tagus and there had been taken into custody by a Glasgow detective officer without the production of a warrant, but during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours, that the complainer had demanded to be allowed to land there but had been prevented by the officer, that on arriving in London he was not taken before a magistrate, nor was the warrant indorsed, but he was brought direct to Scotland, and there committed to prison, and no warrant was ever produced or exhibited to him. It was held that these allegations did not set forth any facts to affect the validity of the commitment by the sheriff substitute, which proceeded upon a proper warrant.

In the course of his judgment the Lord Justice Clerk (Macdonald) said (at 40–42):

> 'There are three stages of procedure in this case—first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings. In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mouth of the

Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement. If there was any irregularity in the granting or execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong. It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the Court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the Court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here ... No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a Court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign Government, and irregularly dealt with by a subordinate officer.'

Lord M'Laren stated his view in the following terms (at 43–44):

'With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody ... I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction. In a case of substantial infringement of right this Court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention.'

In *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373 a deserter from the RASC was arrested in Belgium by British officers accompanied by two Belgian police officers. He was brought to this country, where he was charged with desertion and detained in Colchester barracks. He applied for a writ of habeas corpus, which was issued, and on the return of the writ he submitted that his arrest was illegal because the British authorities had no power to arrest him in Belgium and his arrest was contrary to Belgian law. Dealing with this submission Lord Goddard CJ said (at 376):

'The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested." He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest.'

Lord Goddard CJ then reviewed the decisions in *Ex p Scott* and *Sinclair v HM Advocate* and after citing the first part of the passage in the speech of Lord M'Laren which I have already cited Lord Goddard CJ continued (at 377–378):

'That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court.'

There were also cited to the Divisional Court a number of authorities from the United States which showed that United States courts have not regarded the constitutional right to 'due process' as preventing a court in the United States from trying an accused who has been kidnapped in a foreign country and forcibly abducted into the United States (see *Ker v Illinois* (1886) 119 US 436 and *US v Sobell* (1956) 142 F Supp 515; *affd* (1957) 244 F 2d 520).

Relying on this line of authority the Divisional Court declined to follow *Ex p Mackeson* (1982) 75 Cr App R 24 and held that it had no power to inquire into the circumstances in which the applicant was brought within the jurisdiction.

In the present case the Divisional Court approved the decision in *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95 and in giving the leading judgment of the court Woolf LJ said ([1993] 2 All ER 474 at 479):

'However, quite apart from authority, I am bound to say it seems to me that the approach of Stephen Brown LJ [in *Ex p Driver*], in general, must be correct. The power which the court is exercising, and the power which the court was purporting to exercise, in *Ex p Mackeson* is one which is based upon the inherent power of the court to protect itself against the abuse of its own process. If the matters which are being relied upon have nothing to do with that process but only explain how a person comes to be within the jurisdiction so that that process can commence, it seems to me difficult to see how the process of the court (and I emphasise the word "court") can be

abused by the fact that a person may or may not have been brought to this country improperly.'

However, in a later passage Woolf LJ drew a distinction between improper behaviour by the police and the prosecution itself. He said ([1993] 2 All ER 474 at 479–480):

'Speaking for myself, I am not satisfied there could not be some form of residual discretion which in limited circumstances would enable a court to intervene, not on the basis of an abuse of process but on some other basis which in the appropriate circumstances could avail a person in a situation where he contends that the prosecution are involved in improper conduct.'

Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of its submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair; but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process. In support of this submission your Lordships have been referred to *R v Sang* [1979] 2 All ER 1222 esp at 1230, 1245–1246, [1980] AC 402 esp at 436–437, 454–455 where Lord Diplock and Lord Scarman emphasise that the role of the judge is confined to the forensic process and that it is no part of the judge's function to exercise disciplinary powers over the police or the prosecution.

The respondents have also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution: see in particular the majority opinion in *US v Alvarez-Machain* (1992) 112 S Ct 2188 reasserting the *Ker-Frisbie* rule (see *Ker v Illinois* (1886) 119 US 436 and *Frisbie v Collins* (1952) 342 US 519). I do not, however, find these decisions particularly helpful because they deal with the issue of whether or not an accused acquires a constitutional defence to the *jurisdiction* of the United States courts and not to the question whether, assuming the court has jurisdiction, it has a discretion to refuse to try the accused (see *Ker v Illinois* 119 US 436 at 444).

The respondents also cited two Canadian cases decided at the turn of the century, *R v Whiteside* (1904) 8 CCC 478 and *R v Walton* (1905) 10 CCC 269 which show that the Canadian courts followed the English and American courts accepting jurisdiction in criminal cases regardless of the circumstances in which the accused was brought within the jurisdiction of the Canadian court. We have also had our attention brought to the New Zealand decision in *Moevao v Dept of Labour* [1980] 1 NZLR 464, in which Richmond P expressed reservations about the correctness of his view that the prosecution in *R v Hartley* [1978] 2 NZLR 199 was an abuse of the process of the court and Woodhouse J reaffirmed his view to that effect.

The appellant contends for a wider interpretation of the court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J in *R v Hartley*, the powerful dissent of the minority in *US v Alvarez-Machain* (1992) 112 S Ct 2188 and the decision of the South African Court of Appeal in *S v Ebrahim* 1991 (2) SA 553, the headnote of which reads:

'The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the Court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued. The Court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial Court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The Court further held that the above rules embodied several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders. It was accordingly held that the Court *a quo* had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the Court *a quo*, the consequences of the trial had to be undone and the appeal disposed of as one against conviction and sentence. Both the conviction and sentence were accordingly set aside.'

In answer to the respondent's reliance upon *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 the appellant points to s 78 of the Police and Criminal Evidence Act 1984, which enlarges a judge's discretion to exclude evidence obtained by unfair means.

As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *R v Crown Court at Derby, ex p Brooks* (1984) 80 Cr App R 164 at 168–169 Sir Roger Ormrod said:

'The power to stop a prosecution arises only when it is an abuse of the process of the court. 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

has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable ... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution ...'

There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In *Chu Piu-wing v A-G* [1984] HKLR 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence. McMullin V-P said (at 417–418):

'there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'

And in a recent decision of the Divisional Court in *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129 the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to s 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354:

'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Sinclair v DPP* [1991] 2 All ER 366, [1991] 2 AC 64 and *Atkinson v US Government* [1969] 3 All ER 1317, [1971] AC 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court.

Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. Although doubts were expressed by Viscount Dilhorne as to the existence of such a power in *DPP v Humphrys* [1976] 2 All ER 497 at 510–511, [1977] AC 1 at 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467 Lord Parker CJ, hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the court, said:

'So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.'

Diplock LJ expressed his agreement with this view (see [1967] 2 All ER 100 at 105, [1967] 2 QB 459 at 470).

In *R v Canterbury and St Augustine's Justices, ex p Klisiak* [1981] 2 All ER 129 at 136, [1982] QB 398 at 411 Lord Lane CJ was prepared to assume such a jurisdiction. In *R v West London Stipendiary Magistrate, ex p Anderson* (1984) 80 Cr App R 143 at 149 Robert Goff LJ, reviewing the position at that date, said:

'There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see D.P.P. *v.* HUMPHRYS ([1976] 2 All ER 497 at 504–505, [1977] AC 1 at 19) *per* Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular BRENTFORD JUSTICES, *Ex parte* WONG ([1981] 1 All ER 884 at 888, [1981] QB 445); WATFORD JUSTICES, *Ex parte* OUTRIM ([1983] RTR 26); GRAYS JUSTICES, *Ex parte* GRAHAM ([1982] 3 All ER 653, [1982] QB 1239). The power has, however, been described by the Lord Chief Justice as being "very strictly confined": see OXFORD CITY JUSTICES, *Ex parte* SMITH ((1982) 75 Cr App R 200 at 204).'

The power has recently and most comprehensively been considered and affirmed by the Divisional Court by *R v Telford Justices, ex p Badhan* [1991] 2 All ER 854 at 862, [1991] 2 QB 78 at 89.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning (see, for example, Lord Lane CJ in *R v Oxford City Justices, ex p Smith* (1982) 75 Cr App R 200 and Ackner LJ in *R v Horsham Justices, ex p Reeves* (1980) 75 Cr App R 236), it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court, who are daily in much closer touch with the work in the magistrates' court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court, which I regard as the proper forum in which such a decision should be taken.

I would answer the certified question as follows. The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.

Accordingly, I would allow this appeal and remit the case to the Divisional Court for further consideration.

LORD BRIDGE OF HARWICH. My Lords, this appeal raises an important question of principle. When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing? This is to state the issue very starkly, perhaps some may think tendentiously. But, because this appeal has to be determined on the basis of assumed facts, your Lordships, as it seems to me, cannot avoid grappling with the issue in this stark form.

In this country and in Scotland the mainstream of authority, as the careful review in the speech of my noble and learned friend Lord Griffiths shows, appears to give a negative answer to the question posed, holding that the courts have no power to examine the circumstances in which a prisoner was brought within the jurisdiction. I fully recognise the cogency of the arguments which can be adduced in support of this view, sustained as they are by the public interest in the prosecution and punishment of crime. But none of the previous authorities is binding on your Lordships' House and, if there is another important principle of law which ought to influence the answer to the question posed, then your Lordships are at liberty, indeed under a duty, to examine it and, if it transpires that this is an area where two valid principles of law come into conflict, it must, in my opinion, be for your Lordships to decide as a matter of principle which of the two conflicting principles of law ought to prevail.

When we look to see how other jurisdictions have answered a question analogous to that before the House in terms of their own legal systems, the most striking example of an affirmative answer is the decision of the South African Court of Appeal in *S v Ebrahim* 1991 (2) SA 553 allowing an appeal against his conviction for treason by a member of the African National Congress on the sole ground that he had been abducted from Swaziland, outside the jurisdiction of the South African court, by persons acting as agents of the South African state. This decision, as the summary in the headnote shows, resulted from the application of—

> 'several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the State was involved in the abduction of persons across the country's borders.'

In the United States, the authorities reveal a conflict of judicial opinion. The doctrine established by Supreme Court decisions in 1886 of *Ker v Illinois* 119 US 436 and in 1952 of *Frisbie v Collins* 342 US 519 accords substantially in its effect with the doctrine of the early English authorities. But more recently this doctrine has been powerfully challenged. In *US v Toscanino* (1974) 500 F 2d 267 at 268 the defendant, an Italian citizen, who had been convicted in the New York District Court of a drug conspiracy, alleged that the court had 'acquired jurisdiction over him unlawfully through the conduct of American agents who kidnapped him in

Uruguay ... tortured him and abducted him to the United States for the purpose of prosecuting him' there. The lower court having held that these allegations were immaterial to the exercise of its jurisdiction to try him, provided he was physically present at the time of trial, he appealed to the United States Court of Appeals for the Second Circuit. The effect of the court's decision is sufficiently summarised in the headnote. The court held:

> '... that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice, so that defendant was entitled to a hearing on his allegations ... Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the Government's exploitation of its own misconduct.'

The most recent decision of the United States Supreme Court in *US v Alvarez-Machain* (1992) 112 S Ct 2188 concerned a Mexican citizen indicted for the murder of an agent of the Drug Enforcement Administration (the DEA). The district court had held that other DEA agents had been responsible for the defendant's abduction from Mexico, that this had been in violation of the extradition treaty between Mexico and the United States and that the accused should be discharged and repatriated to Mexico. This decision was affirmed by the United States Court of Appeals for the Ninth Circuit but reversed by the Supreme Court by a majority of 6 to 3. The opinions related primarily to the question whether the abduction was a breach of the treaty. The majority held that the abduction, although 'shocking', involved no breach of the treaty and relied on the earlier decisions in *Ker v Illinois* 119 US 436 and *Frisbie v Collins* 342 US 519 for the view that the abduction was irrelevant to the exercise of the court's criminal jurisdiction. The dissenting opinion of Stevens J, in which Blackmun and O'Connor JJ joined, held that the abduction was both in breach of the treaty and in violation of general principles of international law and distinguished the earlier authorities as having no application to a case where the abduction in violation of international law was carried out on the authority of the executive branch of the United States government. The minority opinion was that this was an infringement of the rule of law which it was the court's duty to uphold. After referring to the South African decision in *S v Ebrahim*, Stevens J writes in the final paragraph of his opinion (at 2206):

> 'The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the "monstrous" decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.'

In the common law jurisdiction closest to our own, the opinion expressed by Woodhouse J in the New Zealand case of *R v Hartley* [1978] 2 NZLR 199, in which he describes the issue as 'basic to the whole concept of freedom in society', has already been cited by my noble and learned friend Lord Griffiths and I need not repeat it. In the later case of *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 475–476 Woodhouse J cited the relevant passage from his own judgment in *R v Hartley* and added:

> 'It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. And in this regard the Courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the *Connelly* case [*Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1353] Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the Courts accepting what he described as their "inescapable duty to secure fair treatment for those who come or are brought before them". He said that "the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused" ... Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is "the process of law", to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase "abuse of process" by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general. It is for reasons of this kind that I remain of the opinion that the trial Judge would have been entirely justified in the *Hartley* case in stopping the prosecution against the man Bennett.'

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse J in *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 476, as an 'abuse of the criminal jurisdiction

in general' or indeed, in the language of Mansfield J in *US v Toscanino* (1974) 500 F 2d 267 at 276, as a 'degradation' of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.

For these reasons and for the reasons given in the speech of my noble and learned friend Lord Griffiths, with which I fully agree, I would allow the appeal.

LORD OLIVER OF AYLMERTON. My Lords, a citizen whose rights have been infringed by unlawful or overenthusiastic action on the part of an executive functionary has a remedy by way of recourse to the courts in civil proceedings. It may not be an ideal remedy. It may not always be a remedy which is easily available to the person injured. It may not even, certainly in his estimation, be an adequate remedy. But it is the remedy which the law provides to the citizen who chooses to invoke it. The question raised by this appeal is whether, in addition to such remedies as may be available in civil proceedings, the court should assume the duty of overseeing, controlling and punishing an abuse of executive power leading up to properly instituted criminal proceedings not by means of the conventional remedies invoked at the instance of the person claiming to have been injured by such abuse but by restraining the further prosecution of those proceedings. The results of the assumption of such a jurisdiction are threefold; and they are surprising. First, the trial put in train by a charge which has been properly laid will not take place and the person charged (if guilty) will escape a just punishment; secondly, the civil remedies available to that person will remain enforceable; and, thirdly, the public interest in the prosecution and punishment of crime will have been defeated not by a necessary process of penalising those responsible for executive abuse but simply for the purpose of manifesting judicial disapproval.

It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression 'a criminal court'), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case. I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.

I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Griffiths and I gratefully acknowledge and adopt his recitation of the relevant authorities and the conflict of judicial opinion which arises from them. Your Lordships have, in addition, been referred in the course of argument to a number of reports of civil cases of respectable antiquity in which

persons originally unlawfully detained have been released from custody in the exercise of the court's undoubted jurisdiction to prevent abuses of its own process. But those were cases in which parties to civil proceedings had sought to take advantage of their own wrong in securing the unlawful detention of another party by serving proceedings for civil arrest upon him whilst unlawfully detained. In the case of a person charged with the commission of a criminal offence following an allegedly irregular initial detention, there was, until *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24, an unbroken line of authority in the United Kingdom dating from the early nineteenth century for the proposition perhaps most pithily expressed by Lord Goddard CJ in *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373 that once a person is in lawful custody in this country the court has no power and is not concerned to inquire into the circumstances in which he may have been brought here. *Ex p Mackeson* and *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108, which impliedly followed it, were to the contrary effect, but in a reserved judgment of the Divisional Court delivered by Stephen Brown LJ in *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95, in which all the relevant authorities were fully reviewed, that court followed the earlier line of authority and rejected the decision in *Ex p Mackeson* as having been decided per incuriam. *Ex p Driver* was followed by the Divisional Court in the instant case in rejecting the appellant's claim that the criminal court had jurisdiction to consider and pass judgment upon the circumstances in which he had been brought within the jurisdiction.

The appellant invites this House now to say that the decision in *Ex p Mackeson* is to be preferred and that a criminal court's undoubted jurisdiction to prevent abuses of its own process should be extended, if indeed it does not already extend, to embrace a much wider jurisdiction to oversee what is referred to generally as 'the administration of justice', in the broadest sense of the term, including the executive acts of law-enforcement agencies occurring before the process of the court has been invoked at all and having no bearing whatever upon the fairness of the trial.

I have to say that I am firmly of the opinion that, whether such a course be properly described as legislation or merely as pushing forward the frontiers of the common law, the invitation is one which ought to be resisted. For my part, I see neither any inexorable logic calling for such an extension nor any social need for it; and it seems to me to be a course which will be productive of a good deal of inconvenience and uncertainty.

I can, perhaps, best explain my reluctance to embark upon such a course by postulating and seeking to answer two questions. First, does a criminal court have, or should it have, any *general* duty or any power to investigate and oversee executive abuses on the part of law-enforcement officers not affecting either the fairness of the trial process or the bona fides of the charge which it is called upon to try and occurring prior to the institution of the criminal proceedings and to order the discontinuance of such proceedings and the discharge of the accused if it is satisfied that such abuses have taken place? Secondly, if there is no such general jurisdiction and if the executive abuse alleged consists of the repatriation of the accused from a foreign country through acts which are unlawful in the country in which they occurred, is there some special quality in this form of executive abuse which gives rise to or which calls for the creation of such a jurisdiction in this particular case?

So far as the first question is concerned, I know of no authority for the existence of any such general supervisory jurisdiction in a criminal court. It is

not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively—for instance if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not for a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129, where the court quashed committal proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the bona fides of the prosecution and on the fairness of the process to an accused who has been invited to prejudice his own position on the faith of the undertaking. Where, however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention. That is not for a moment to suggest that such abuses, if they occur, are unimportant or are to be lightly accepted; but they are acts for which, if they are unlawful, the accused has the same remedies as those available to any other citizen whose legal rights have been infringed. If they are not only unlawful but are criminal as well, they are themselves remediable by criminal prosecution. That a judge may disapprove of or even be rightly outraged by the manner in which an accused has been apprehended or by his treatment whilst in custody cannot, however, provide a ground for declining to perform the public duty of insuring that, once properly charged, he is tried fairly according to law.

In *R v Sang* [1979] 2 All ER 1222 at 1245, [1980] AC 402 at 454 Lord Scarman observed:

> 'Judges are not responsible for the bringing or abandonment of prosecutions; nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury.'

Those words were used in the context of a suggested discretion to prevent a prosecution because of judicial disapproval of the way in which admissible evidence had been obtained, but they are equally applicable to other executive acts which may incur judicial disapprobation. Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. They may take the form of allegations of illegal entry on private premises, of damage to property, of the use of excessive force or even of ill-treatment or violence whilst in custody. So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused, having no bearing upon the fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of executive power entitles the accused to be exonerated. But then at what point and at what degree of outrage is the criminal court to undertake an inquiry and, if satisfied, to take upon itself the responsibility of refusing further to try the case?

If, then, it be right, as I believe that it is, that there neither is nor should be any general discretion in a criminal court to inquire into the conduct of executive officers before and leading up to the institution of criminal proceedings, the second question which I have ventured to postulate arises. Where, with the connivance or at the instigation of executive officers in this country, an accused person who has taken refuge in a foreign country is brought as a result of activity unlawful in that country within the jurisdiction of an English court and is then lawfully detained and charged, is there some special quality attaching to the unlawful and abusive activity abroad which confers or ought to confer on the criminal court a discretion which it would not otherwise possess?

The matter can, perhaps, best be illustrated by a hypothetical example of two terrorists, A and B, who, having detonated a bomb in London, make their way to Dover with a view to escaping abroad. A, as a result of a quarrel with a ticket inspector, is wrongfully detained by the railway police and whilst still in wrongful custody is duly arrested for the terrorist offence and subsequently charged. B, having successfully boarded a Channel ferry, is recognised as he steps ashore in Calais by two off-duty constables returning from holiday who seize him on the quayside and take him back on board keeping him under restraint until the ferry returns to Dover where he is arrested and charged. Now nobody would, I think, suggest for a moment that the trial of A should not proceed, simply because, as a result of a wrongful arrest and detention, he has been prevented from making good his escape, although he has in fact been put in the position of being charged and brought to trial only by reason of an unlawful abuse of executive power. What, then, distinguishes the case of B and confers on the criminal court in his case a discretion to stay his trial and discharge him which the court which does not possess in the case of A? I can see only two possible justifications for the suggestion that the court ought, in B's case, to have such a discretion. First, it may be argued that, as a matter of international comity, an English court ought to signify its disapproval of the invasion of the protective rights of a foreign state over those who come within its jurisdiction by declining to try a person who has been wrongfully removed from the protection of that state through the instrumentality of persons for whose actions the authorities of this country are responsible. I do not find this argument persuasive. An English criminal court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state is, as it seems to me, a matter which can only properly be pursued on a diplomatic level between the government of the United Kingdom and the government of that state.

Secondly, it may be argued that the unlawful activity of which complaint is made, because it results in the accused being brought within a jurisdiction from which he would otherwise have escaped, is invested with a special character because it infringes some 'right' of the accused in English law to be repatriated only through a process of extradition by the state under whose protection he has succeeded in placing himself. Now it is, of course, perfectly true that the Extradition Act 1989 contains, in s 6(4), an inhibition upon extradition from the United Kingdom unless provision is made by the receiving state that the person extradited will not, without the consent of the Secretary of State, be dealt with for (in broad terms) offences other than those in respect of which his extradition has been ordered. That provision is mirrored in s 18 of the Act, which provides that the person extradited to the United Kingdom from a foreign state will not be

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triable for (again in board terms) offences other than those for which he has been extradited unless he has first had an opportunity of leaving the United Kingdom. Thus a person who is returned only as a result of extradition proceedings enjoys, as a result of this statutory inhibition, an advantage over one who elects to return voluntarily or who is otherwise induced to return within the jurisdiction. But these are provisions inserted in the Act for the purpose of giving effect to reciprocal treaty arrangements for extradition. I cannot, for my part, regard them as conferring upon a person who is fortunate enough successfully to flee the jurisdiction some 'right' in English law which is invaded if he is brought or induced to come back within the jurisdiction otherwise than by an extradition process, much less a right the invasion of which a criminal court is entitled or bound to treat as vitiating the process commenced by a charge properly brought. It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad—for instance in securing the deportation of the accused without proper authority—in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage in which the accused might have derived from the extradition process is likewise destroyed. No 'right' of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

I would only add that if, contrary to my opinion, such an extended jurisdiction over executive abuse does exist, I entirely concur with what has fallen from my noble and learned friend Lord Griffiths with regard to the appropriate court to exercise such jurisdiction. I would dismiss the appeal and answer the certified question in the negative.

LORD LOWRY. My Lords, having had the advantage of reading in draft the speeches of your Lordships, I accept the conclusion of my noble and learned friends Lord Griffiths and Lord Bridge of Harwich that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities. Recognising, however, the clear and forceful reasoning of my noble and learned friend Lord Oliver of Aylmerton to the contrary, I venture to contribute some observations of my own.

The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. *Archbold's Pleading Evidence and Practice in Criminal Cases* (44th edn, 1992) p 430, para 4.44 calls it 'a misuse or improper manipulation of the process of the court'. In *Rourke v R* [1978] 1 SCR 1021 at 1038 Laskin CJC said: '[The court] is entitled to protect its process from abuse' and also referred to 'the danger of generalizing the application of the doctrine of abuse of process' (at 1041). In *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 476 Woodhouse J spoke approvingly of 'the much wider and more serious abuse of the criminal jurisdiction in general', whereas Richmond P (at 471), giving expression to reservations about the view in which he had concurred in *R v Hartley* [1978] 2 NZLR 199, referred to the need to establish 'that the process of the Court is itself being wrongly made use of'. I think that the words used by Woodhouse J involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by Richmond P. The question still remains: what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds?

Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *R v Grays Justices, ex p Low* [1988] 3 All ER 834, [1990] 1 QB 54 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *R v Horsham Justices, ex p Reeves* (1980) 75 Cr App R 236 it was held to be an abuse of process to pursue charges when the magistrates had already found 'no case to answer'. It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the ground of abuse of process.

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider 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. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely 'pour encourager les autres'.

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The court in *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24, while quite clear that there was jurisdiction to try the applicant, relied on *R v Hartley* [1978] 2 NZLR 199 for the existence of a discretion to make an order of prohibition. Woodhouse J in *R v Hartley* (at 217) had also recognised the *jurisdiction* to try the accused Bennett, but expressed the court's conclusion that to do so in the circumstances offended against 'one of the most important principles of the rule of law'. The court's decision in *R v Plymouth Magistrates'*

Court, ex p Driver [1985] 2 All ER 681, [1986] QB 95 to the contrary effect was influenced by *Ex p Scott* (1829) 9 B & C 446, 109 ER 166, *Sinclair v HM Advocate* (1890) 17 R (J) 38 and *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373. *Ex p Scott* and *Sinclair v HM Advocate* were decisions on jurisdiction and formed the basis of the decision in *Ex p Elliott*, in which there was an application for a writ of habeas corpus, based on the allegation that the applicant was not subject to military law and that he was wrongfully held in custody. My noble and learned friend Lord Griffiths has described the argument advanced by the applicant and the manner in which Lord Goddard CJ dealt with that argument in the court's judgment by reference to *Ex p Scott* and *Sinclair v HM Advocate*. Then, having disposed of an argument based on provisions of the Army Act ... relating to arrest, Lord Goddard CJ came to 'The only point in which there was any substance ... whether there has been such delay that this court ought to interfere' (see [1949] 1 All ER 373 at 379). Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it (at 379):

> 'What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him.'

This brief review strengthens my inclination to prefer *Ex p Mackeson* to *Ex p Driver* and to the Divisional Court's judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *R v Hartley*. My noble and learned friend Lord Griffiths has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of *jurisdiction* and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondents: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process ('the fruit of the poisoned tree'), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore a fortiori the view in this jurisdiction ought to favour trying such accused persons, having regard to the more tolerant common law attitude here to unlawfully obtained evidence, as shown by *R v Sang* [1979] 2 All ER 1222, [1980] AC 402. My answer is that I would consider it a dangerous and question-begging process to rely on this chain of reasoning, particularly where the constitutional meaning of 'due process' is one of the factors. As your Lordships have noted, the respondents also relied on *R v Sang* directly in order to support the argument that it does not matter whether the accused comes to be within the jurisdiction by fair means or foul.

The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial.

The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law. For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading CJ in a different context in *R v Lee Kun* [1916] 1 KB 337 at 341, [1914-15] All ER Rep 603 at 605:

> '... the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State.'

If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety.

I regard it as essential to the rule of law that the court should not have to make available its process and thereby indorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty, the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting. Nor do I consider that your Lordships ought to be deterred from deciding in favour of discretion by the difficulty, which may sometimes arise, of proving the necessary facts.

I would now pose and try to answer three questions.

(1) What is the position if without intervention by the British authorities a 'wanted man' is wrongfully transported from a foreign country to this jurisdiction? The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved and the question of staying criminal proceedings, as proposed in a case like the present, does not arise. It seems to me, however, that in practice the transporting of a wanted man to the United

Kingdom from elsewhere (by whatever method) will nearly always take place in consequence of a request by the executive here.

(2) Why should the court not stay for abuse of process if the accused has been wrongfully arrested in the United Kingdom (which is not alleged to have happened in the instant case)? A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process.

(3) If at common law the rule in *R v Sang* applies to let in admissible evidence obtained by wrongful conduct on the part of the executive, why does similar reasoning not prevail where the presence of the accused has been procured by wrongful conduct in which the executive is involved? *R v Sang* exemplifies a common law rule of evidence, as explained by the speeches in that case, which applied to all admissible evidence except confessions and certain evidence produced by confessions (as to which see *Lam Chi-ming v R* [1991] 3 All ER 172, [1991] 2 AC 212). The abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context. Secondly, although there is no discretion at common law to exclude evidence (except confession evidence) by reason of wrongful conduct, there *is* discretion to stay proceedings as an abuse of process (see *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254) and the alleged facts of the instant case are but one example of the need for that discretion.

It has been suggested that, since the executive conduct complained of invades the rights of other countries and of persons under their protection and detracts from international comity, the remedy lies not with the courts but in the field of diplomacy. I would answer that the court must jealously protect its own process from misuse *by the executive* and that this necessity gives particular point to the observation of Lord Devlin (which my noble and learned friend Lord Griffiths has already noted) in *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354:

> 'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'

I now turn to the question of procedure. The appellant, having been committed for trial, applied for an order of certiorari to quash the order for committal on the ground that the magistrates refused to adjourn the committal proceedings 'to enable the point of abuse of process to be argued', presumably in the Divisional Court of the Queen's Bench Division. Although I feel obliged to consider the procedure which was followed in this case and that which must follow from the conclusion of the majority of your Lordships, I preface my remarks by saying that I agree with the answer to the certified question, and also with the order, which my noble and learned friend Lord Griffiths has proposed.

In *Ex p Mackeson* (1981) 75 Cr App R 24 the applicant applied to the Divisional Court before the day fixed for the committal proceedings for an order of certiorari quashing the charges against him and prohibiting the magistrates from proceeding with the committal proceedings. The Divisional Court, having held that there was jurisdiction to stay the proceedings as an abuse of process, granted prohibition. In *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108, another case of alleged 'disguised extradition', the single lay justice hearing the committal proceedings was invited to decide the abuse of process point and to stay the proceedings. After a five-day hearing she decided the point against the accused, who then applied for an order of certiorari. I have difficulty in seeing how the magistrate's decision on a question of fact could have been attacked by certiorari but in any event the Divisional Court rejected the application on the merits. So the committal stood. In his judgment Griffiths LJ, as my noble and learned friend then was, said (at 111–112):

> 'This court considers that it was wrong to invite a single lay justice to consider a matter such as this. Whether or not there has been an abuse of process of the sort raised in these proceedings is a matter far more fitting to be inquired into by the Queen's Bench Divisional Court than by a single justice. If a point such as this is to be taken in future it should be taken in the form in which it was in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*; that is, there should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition. That is not to say that we have any criticism whatsoever of the way in which the justice approached her task in this case. Both the defence and the prosecution asked her to decide the question; she clearly went into it with the greatest care and we are quite unable to find any fault or criticism with any of the conclusions of fact at which she arrived. In the opinion of this court, having been asked to undertake a task which we do not think was appropriate for a single lay justice, she discharged her duties quite admirably ... Accordingly, I have come to the conclusion that there is no merit or substance in this application and it will be refused. As I say, if this question is to be raised in further cases the proper procedure is to use that in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, so that the Divisional Court may be seised of the matter, and not bring it up before a lay justice on committal proceedings. However, we anticipate that cases of this nature are likely to be very rare.'

McCullough J, concurring, said (at 113):

> 'Whether this was an application properly made to the justice or whether it was one that should properly have been made in the first place to the Divisional Court, I am in no doubt that no order of certiorari should go. Despite the admirable way in which this justice dealt with the matter, I share the concern of Griffiths L.J. that a single lay justice should be asked to grapple with questions of this kind. It is better I think that the question should be dealt with as in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, even although such a course may leave one wondering precisely how a justice in such circumstances can be said to have acted in excess of jurisdiction or made an error of law.'

In *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95 the applicant sought prohibition in accordance with the *Mackeson* procedure, as recommended in *Ex p Healy*, but the order sought was refused on the ground that there was no jurisdiction to stay for the reasons relied on.

The *Driver* doctrine therefore held sway when the present case came before the magistrates with a view to committal. Accordingly, it is understandable that the magistrates rejected the request of the accused to adjourn while he made a *Mackeson* application and instead proceeded to commit him for trial.

My Lords, I am satisfied that, on the facts found in *Ex p Mackeson*, it was both lawful and appropriate to make an order of prohibition directed to the magistrates' court. While that court had *jurisdiction* to entertain committal

against the accused to continue would be an abuse of process of the court (or trial); it would therefore be equally an abuse of process to permit proceedings in the magistrates' court to be conducted (or, once embarked on, continued) with a view to committing the accused to the Crown Court for trial, which would be oppressive to the accused and a waste of the court's time. A parallel is found in the order made in *R v Telford Justices, ex p Badhan* [1991] 2 All ER 854, [1991] 2 QB 78, where the Divisional Court prohibited the magistrates from further hearing committal proceedings on the ground that, by reason of the prejudice caused by delay, to proceed against the accused would amount to an abuse of process. In my view the fact that the decision and order are made by the High Court, although the Crown Court is the proposed court of trial, makes no difference. It is the function of the High Court to exercise supervisory jurisdiction over inferior courts, including the magistrates' court. It is, moreover noteworthy that the function of directing or giving consent to preferment of a 'voluntary' bill of indictment can only be performed by a *High Court judge* in England and Wales (or by the direction of the Criminal Division of the Court of Appeal): see the Administration of Justice (Miscellaneous Provisions) Act 1933, s 2(2), which continues in force unamended since the transfer of criminal jurisdiction on indictment to the Crown Court in 1971. What I have said is not of course intended to detract from the power of the court of trial itself, as the primary forum, to stay proceedings as an abuse of process, but the convenience of staying the proceedings at an earlier stage is obvious, when that can properly be done.

Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear. In any event, notwithstanding dicta to the contrary, I would, on the authority of *Grassby v R* (1989) 168 CLR 1, a decision of the High Court of Australia, and of cases there cited (to which I shall presently refer), not be easily persuaded that *examining magistrates* have jurisdiction to stay committal proceedings for abuse of process. (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in *Mills v Cooper* [1967] 2 All ER 100, [1967] 2 QB 459.)

My Lords, as I have said, the remedy sought is an order of certiorari. I prefer to consider that remedy according to the conventional, perhaps now 'old-fashioned', principles enunciated in *R (Martin) v Mahony* [1910] 2 IR 695, *R v Nat Bell Liquors Ltd* [1922] 2 AC 128, [1922] All ER Rep 335 and *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122, [1952] 1 KB 338, without seeking to justify the making of an order in this case by reference to more recent views, including views based on dicta uttered in this House. As I see it, the magistrates here, understandably but erroneously relying on *Ex p Driver* [1985] 2 All ER 681, [1986] QB 95, acted prematurely and therefore without jurisdiction when they proceeded to hear and determine the committal proceedings without first allowing the appellant to make to the Divisional Court an application which (subject to *Ex p Driver*) was on its face at least worthy of consideration. Having, however innocently, neglected an essential preliminary step (namely the adjournment decreed by *Ex p Healy* [1983] 1 WLR 108), the magistrates incurred the liability to have their order of committal quashed. For an example of proceedings in which a condition precedent to jurisdiction was omitted I refer to *McC v Mullan* [1984] 3 All ER 908, [1985] AC 528. I would be in favour of remitting the case to the Divisional Court to reconsider it in the light of your Lordships' opinions, since one alternative would be to refuse an order of certiorari because an application to stay the proceedings can perfectly well be made to the court of trial, and the decision (relating to trial on indictment) would not be reviewable: *DPP v Crown Court at Manchester and Ashton* [1993] 2 All ER 663, [1993] 2 WLR 846. The other, and perhaps more convenient, course would be for the Divisional Court now to hear the application for a stay. If that were decided in favour of the appellant, the court could make an order of certiorari and such other order, if any, as might be needed to prevent the proceedings in the magistrates' court from going ahead. It seems to me that, by analogy with proceedings which are terminated by reason of irregular extradition procedures, the appellant, if he succeeds, would have to be given an opportunity to 'escape' but, subject to that, I can see nothing to prevent him from being properly pursued in the future, for example by ad hoc extradition under s 15.

Since the resolution of the point is not essential to your Lordships' decision of the appeal, I shall be brief in my discussion of whether the examining magistrates can stay committal proceedings as an abuse of process.

In *Grassby v R* (1989) 168 CLR 1 the accused was charged with criminal defamation and the examining magistrate stayed the committal proceedings on the ground of abuse of process. The Crown appealed to the Court of Criminal Appeal of New South Wales, which set aside the stay. The accused sought special leave to appeal from that decision. The High Court granted special leave but dismissed the appeal (which involved another point, namely the refusal of a member of the Court of Criminal Appeal to disqualify himself). Dawson J delivered the leading judgment, holding that a committing magistrate has no power to stay the proceedings as an abuse of process. All the other members of the court, presided over by Mason CJ, agreed except Deane J, who considered that, if the magistrate concluded (in the words of the Justices Act 1902 (NSW)) that 'a jury would not be likely to convict' because the *trial court* was likely to stay the proceedings for abuse of process, he should then discharge the accused. The judge, however, agreed in the result on the facts and his dissent was based only on his interpretation of s 41(6) of the Justices Act.

Dawson J said that the magistrate's power to stay for abuse of process 'has been denied upon the highest authority in the United Kingdom' (see 168 CLR 1 at 10). He referred to *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254 and continued:

> 'See also *Mills v. Cooper* ([1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467), per Lord Parker C.J. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (see *Reg. v. Humphrys* [1976] 2 All ER 497, [1977] AC 1), per Viscount Dilhorne, *per* Lord Salmon; to the contrary *Reg. v. West London Stipendiary Magistrate; Ex parte Anderson* ((1984) 80 Cr App R 143 at 149), but it is clear that they do not extend to a magistrate hearing committal proceedings. In *Atkinson v. Government of the United States of America* [1969] 3 All ER 1317 at 1321–1322, [1971] AC 197 at 231–232 Lord Reid (with whom Lords MacDermott and Guest agreed) said: "The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires. 'The appellant argues that this was established, if it had been in doubt, by the decision of this House in *Connelly v. Director of Public Prosecutions* ... Whatever may be the proper interpretation of the speeches in *Connelly's* case with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would

no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial." '

In *Sinclair v DPP* [1991] 2 All ER 366 at 375, [1991] 2 AC 64 at 78, another extradition case, Lord Ackner in his illuminating speech pointed out that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was obiter. None the less a view expressed by such a high authority commends respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power.

Dawson J observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued (168 CLR 1 at 11–12):

'The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 [1 & 2 Ph & M c 13, 2 & 3 Ph & M c 10], they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial. With the establishment of an organized police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in *The Indictable Offences Act* 1848 (U.K.) [11 & 12 Vict c 42], "Sir John Jervis' Act", which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel.'

After an interesting and valuable historical review the judge said (at 15–16):

'The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In *Reg. v. Forbes; Ex parte Bevan*((1972) 127 CLR 1 at 7), Menzies J. pointed out that: " 'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'." '

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J observed (at 17–18):

'The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s. 41 of the *Justices Act*. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial.'

Having referred to s 41 of the Justices Act, Dawson J then said (at 18):

'There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform.'

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates *could not* stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial if the Attorney General were to prefer a voluntary bill.

For the reasons already mentioned and also for the reasons given by my noble and learned friends I would allow the appeal.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Griffiths, Lord Bridge of Harwich and Lord Oliver of Aylmerton. Despite the powerful reasons adverted to by Lord Oliver of Aylmerton I agree with Lord Griffiths that the question should be answered in the way he proposes. It does not seem to me to be right in principle that, when a person is brought within the jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, the court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality to refuse to proceed to trial. I would accordingly allow the appeal.

Appeal allowed. Case remitted to Divisional Court for further consideration.

Celia Fox Barrister.

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R v Hartley

Court of Appeal, Wellington

[1978] 2 **NZLR 199;** 1977 NZLR LEXIS 595

14, 15, 16 March, 5 August 1977

DECIDED-DATE: 5 August 1977

CATCHWORDS:
[*1]

Criminal law -- Man killed by firearm during gang raid -- Whether Court has jurisdiction to commit an accused for trial if he has been illegally brought back to New Zealand by the police -- Discretion of Court to prevent abuse of its own process -- Whether an accessory under s 66(2) of the Crimes Act 1961 may be convicted of a lesser crime than the principal offender -- Whether an accomplice warning is necessary as a matter of law when a coaccused gives evidence in his own defence implicating another.

HEADNOTES:
Members of a motorcycle gang made a retaliatory raid on a house believed to be occupied by members of a rival gang. Those making the raid armed themselves with metal tools, bars and wooden staves, and two firearms were carried. Several of the occupants of the house were assaulted and required minor medical attention. One young man was killed by a shotgun fired by Hartley. After the shot had been fired the gang members dispersed, and one of the men (Bennett) went to Australia. Hartley was charged with murder and 11 others (including Bennett whom the police had brought back from Australia) were charged under s 66(2) of the Crimes Act 1961 with being parties to that offence. Hartley **[*2]** and eight of those charged were convicted of manslaughter. The Judge had directed the jury that no accused charged with being an accomplice could be convicted of a greater or lesser crime than the principal offender. Some of the accused had given evidence at the trial in their own defence implicating others and the Judge's summing up was challenged inter alia on the ground that it lacked an accomplice warning. Bennett appealed on two grounds: first, that the Court had no jurisdiction to try him because he had been illegally brought back to New Zealand. The police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne police by telephone to put Bennett on the next plane to New Zealand; a request which they had complied with. Second, oral and written statements made by Bennett to the police after his return should have been excluded either because of breach of the Judges' Rules or because of the illegality in bringing him back to New Zealand.

Held: 1 An accomplice may be convicted of a lesser crime than the principal offender, though he could never be convicted of a greater crime than the principal offender (see p 203 line 46).

R v Malcolm [1951] **[*3]** NZLR 470 referred to.

2 It was not desirable for the Court to lay down a rigid rule that an accomplice warning was required whenever one accused gave evidence in his own defence implicating

another. It was a rule of practice that usually such a warning would be given to a jury, but in exceptional circumstances the Judge may justifiably, in his discretion, omit any warning altogether or give one in terms that might not satisfy the fairly strict requirements that have to be observed when an accomplice had been called by the Crown (see p 206 line 45).

R v Te Whiu [1965] NZLR 420, 424 and R v Terry [1973] 2 NZLR 620, 623 considered.

3 The Court had jurisdiction to try Bennett on the indictment because, although he was unlawfully brought back to New Zealand, he was then lawfully arrested within the country and by due process of law brought before the Court. But where there was evidence of improper dealings by the authorities the Court had a discretion to discharge the accused under either s 347(3) of the Crimes Act 1961 or its inherent jurisdiction to prevent abuse of its own process. This was a case in which if asked to exercise its discretion on that ground, the trial Judge would **[*4]** probably have been justified in doing so (see p 215 line 42, p 217 line 18).

R v O/C Depot Battalion, RASC, Colchester, ex parte Elliott [1949] 1 All ER 373 applied.

Connelly v Director of Public Prosecutions [1964] AC 1254; [1964] 2 All ER 401 considered.

4 The statements made by Bennett to the police had been obtained by means of a persistent and unsatisfactory form of cross-examination during a prolonged period, in serious breach of the Judges' Rules, and should not have been used against him. In the absence of these statements the Crown had insufficient evidence against Bennett and his conviction was accordingly quashed (see p 219 line 24).

R v Convery [1968] NZLR 426 considered.

NOTES:
Refer 3 Abridgement 468; 4 Abridgement 29, 215, Perm Supp (1962-1973) 158.

CASES-REF-TO:
Other cases mentioned in judgment
Brown v Lizars (1905) 2 CLR 837.
Davies v Director of Public Prosecutions [1954] AC 378; [1954] 1 All ER 507.
Kelleher v The Queen (1974) 131 CLR 534.
R v O'Connor (Court of Appeal, Wellington, CA 161/76, 4 May 1977).
R v Royce-Bentley [1974] 1 WLR 535; [1974] 2 All ER 347; (1974) 59 Cr App R 51.
R v Rowley [1948] 1 All ER 570; (1948) 32 Cr **[*5]** App R 147.
R v Russell (1968) 52 Cr App R 147.
R v Teitler [1959] VR 321.
R v Terry (1961) 45 Cr App R 180.
Scott, ex parte (1829) 9 B & C 446; 109 ER 166.
Sinclair v H M Advocate (1890) 17 R (Ct of Sess) 38.
Taylor v Attorney-General [1975] 2 NZLR 675.

INTRODUCTION:
Appeals
These were appeals by nine accused. Six of them (Bennett, Brown, MacKay, Moore, Nolan and Simmons) appealed against conviction for manslaughter. Hartley and Brown sought leave to appeal against a sentence of 10 years imprisonment for manslaughter (Hartley's appeal was discontinued during the hearing). The remaining seven accused sought leave to appeal against a sentence of seven years imprisonment for manslaughter.

COUNSEL:
G F Little for Bennett and Hartley.

P C East for Brown.

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K Ryan for Moore.

B J Hart for Simmons and MacKay.

A S Vlatkovich for Dalhousie, Nolan and Wickman.

D S Morris and S B Grieve for the Crown.

JUDGMENT-READ: Cur adv vult

JUDGES: Richmond (P), Woodhouse and Cooke JJ

JUDGMENT BY: WOODHOUSE J.

JUDGMENTS: WOODHOUSE J. (Delivered the judgment of the Court). At about 5 am on 29 December 1975 fourteen or more members or ex members of the so-called Hells Angels motorcycle gang burst into a residence in Prospect Terrace, Auckland. They carried weapons with them **[*6]** in the form of metal tools, bars and wooden staves; and two firearms were brought to the place -- a 0.22 rifle and a sawn-off shotgun. Several of the occupants of the house were assaulted and required minor medical attention. But there was a fatality. A young man named Haora who had been asleep in one of the rooms was struck about the body and kicked. Then, probably while he was half crouching on the floor, he was killed when the shotgun was placed against, or very close to, his head and fired by the appellant Hartley. The intruders then fled.

Hartley was apprehended and charged with murder. Eleven others were eventually jointly charged with him as being parties to that offence in terms of s 66(2) of the Crimes Act 1961. They all faced an alternative charge of breaking and entering the premises. All pleaded not guilty. In the result Hartley and eight others (being the present nine appellants) were convicted of manslaughter. Two of those charged were acquitted. During the trial a youth named Lazarus manifested serious symptoms of mental illness and he was discharged and sent by the Judge to a mental institution. Hartley and Brown were sentenced to 10 years imprisonment. **[*7]** The other seven were sentenced to imprisonment for seven years. All the appellants appeal against sentence but during the hearing of the appeal counsel for Hartley informed the Court that he was instructed not to proceed with the latter's appeal against sentence. Application for leave to appeal against sentence in his case is refused accordingly. In addition to the appeals against sentence all the appellants, other than Hartley, Dalhousie and Wickman, appeal against conviction on grounds associated with the summing up.

The reason advanced for the raid on the house at Prospect Terrace was bad feeling that had arisen between members of the Hells Angels gang and a rival motorcycle gang describing itself as Highway 61. It was alleged as an example of provocation by the second group, that a motorcycle owned by the appellant Moore had been stolen on some day in December 1975 and that they were responsible for that theft. In addition there had been some incident at a house at Bellwood Avenue occupied by two young women named Cora and Dallas Burridge who were closely associated with Brown (one of the appellants) and Zidich (who was acquitted). It was said in the evidence that earlier **[*8]** in December some members of the Hells Angels gang had been attacked at the place by members of the Highway 61 group. Then at about 8 pm on 28 December a much more serious offence took place. A petrol bomb was flung at the wall of the Bellwood Avenue house. The young {202} women communicated with Brown and messages were quickly sent to other members of the gang concerning the matter. Before long a number of them gathered together at a flat at Paice Avenue occupied by the appellant Nolan. They went there for the purpose of considering who had been responsible for the bombing of the Burridge premises and to consider reprisals. There is evidence that all the appellants were at this meeting (or at least at some stage of it) and during the discussion that took place the two girls were present in the flat. There seems to have been much debate as to what should be done but it is clear enough that there was general agreement that the Highway

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61 gang had been responsible for the attempted arson. During the meeting there was also discussion of the loss of Moore's motorcycle and of other reasons for grievance felt by the Hells Angels group.

It was decided that action was required. **[*9]** It was thought that some of the rival gang were living at the Prospect Terrace house and it was agreed to go there for the purpose of attack by way of reprisal upon those of the occupants who were members of the other gang. There is evidence given by one of the girls that at some stage the appellant Brown went off to borrow a 0.22 rifle which he brought back to Paice Avenue. Hartley obtained the sawn-off shotgun which had been in his possession for some time. Others armed themselves with bars or tools and similar weapons. Then all concerned went to the place in Prospect Terrace. Two cars were certainly used, one driven by Nolan and the other by Wickman and there was possibly a third vehicle as well. Moore claimed that he and Lazarus used such a third vehicle in order to go to the property independently. Moore said that he got there before the main body arrived and went to the back of the house for the single purpose of recovering his, or a similar, motorcycle; and that he left the premises before any of the others had entered the house. In any event upon arrival some of the attacking force burst in the front door while others went to the back and used the rear entrance. The **[*10]** raid probably had not lasted more than two or three minutes before Hartley fired the shot which killed Haora. Then they all made off and scattered. Brown and Zidich, for example, rejoined the two Burridge girls and went by motor vehicle on a journey about the North Island. The appellant Bennett was seen by the police. He was allowed to leave their presence and went for a short holiday out of Auckland. On his return he took the opportunity to travel by air to Melbourne in Australia. Bennett was brought back in circumstances which will need to be described in some detail. As time went by all those concerned were interviewed at various times by various police officers and then charges laid as indicated.

The Crown case was that Hartley committed murder in a direct sense by firing the shotgun after placing the muzzle against Haora's head. All the others were charged as parties to that offence and the common purpose provisions of s 66(2) of the Crimes Act 1961 were relied upon. In the circumstances it was necessary to prove that all concerned had joined in a common intention to assist one another to break into the Prospect Terrace house for the purpose of violent assault. And, **[*11]** of course, since the charge was murder it was also necessary for the Crown to prove that such a crime was known to each of the accused to be a probable consequence of the prosecution of the common purpose. In this regard the jury was asked in effect to act on a clear inference that everybody realised either that firearms were to be taken to the Prospect Terrace house or certainly putting the matter at its lowest, that a good number of offensive and dangerous weapons of a different sort would be taken and probably used there. In addition there was evidence given by each of the two girls which was intended to provide a clear picture of what had occurred at the Paice Avenue meeting. But also, in the case of nine of {203} those accused out of the 11 who remained after Lazarus had been discharged to a mental institution, importance was attached by the Crown to written or oral statements made to the police. Then during the trial some of those accused gave evidence on their own behalf. Parts of that evidence so given at the trial have been described at the hearing of the appeal as adversely affecting one or more of the other accused persons.

At the end of the trial which lasted for **[*12]** just over three weeks, Mahon J gave directions to the jury in a comparatively short summing up. It clearly was designed to bring to their minds the salient features of the case, while avoiding any unnecessary complication in a trial which involved the individual interests of as many as 11 persons being tried together. The general pattern adopted by the Judge in summing up was to give the jury usual directions as to onus of proof and similar matters of a formal kind. Then he went on to indicate in relation to the first count that it was open to the jury as an alternative finding to return a verdict of manslaughter; he explained the implications of s 66 of the Crimes Act, and in fact left with the jury for consideration during their deliberations a copy of that section; and after providing a short outline of the Crown case and the defence that had been raised in respect of each of the individual accused he indicated that the second count of burglary could be looked at as an alternative charge if

the jury should decide that verdicts of not guilty should be returned in respect of the first count raising murder or manslaughter. When dealing with the Crown case against each of the accused **[*13]** the Judge was careful to explain that it was essential that any evidence given by the police of an oral or written statement made outside the trial by any of the accused should be used only against the person so making that statement. Then he added, quite rightly of course, that where an accused person had given evidence in Court "his evidence is admissible for and against his co-accused". However, concerning that sort of evidence, given in Court by those who were standing trial, he did not go on to give an accomplice warning in terms of the corroboration concept. Nor did he make any comment upon the possibility that one or other of the girls had been so implicated as an accessory as to require that evidence to be evaluated against a similar warning. The absence of any reference to the possible need for corroboration is one of the broad grounds for the various appeals.

At the outset it should be mentioned that in dealing with the first count and after referring to the possible alternative verdicts of murder or manslaughter, the Judge directed the jury by reference to s 66(2) of the Crimes Act that no one of the accused could be found guilty of a greater or a lesser crime than **[*14]** the principal offender Hartley: that if the jury found Hartley to be guilty of murder then they could not find the others, or any of them, guilty of manslaughter; "it must be murder or nothing" the Judge indicated. And similarly if the verdict in respect of Hartley was manslaughter. The point was not debated during the appeal but it should be said that such a direction may be open to question. The Judge may understandably have had in mind what was said in R v Malcolm [1951] NZLR 470, 485, but that is not necessarily the last word on the subject. Obviously an accessory could not be guilty of a greater crime than that committed by the principal offender. But if, in such a case as this, murder were proved against the principal offender a jury might still find that although a probable known consequence of the common purpose had included culpable homicide there was no anticipation of a killing done with murderous intent. In those circumstances it is likely that the accessory could properly be convicted of manslaughter. In this regard see Adams on Criminal Law (2nd ed) para 664.

It is convenient to deal seriatim with the broad grounds of appeal that {204} are common to several of **[*15]** the appellants and then to describe the individual arguments which each has advanced.

Direction as to criminal negligence

On behalf of MacKay, Nolan and Simmons there was a suggestion that the Judge had failed to direct the jury that if they felt death may have resulted from an act of criminal negligence done by Hartley not as part of any joint enterprise but while embarked on an independent adventure of his own, then the fatal act or omission could not be regarded as a product of the alleged common purpose. The submission had reference to evidence given by Hartley in cross-examination where he agreed to suggestions put to him that he had been told to put the shotgun aside and not to go into the house after he had got out of the car on arrival at the place: that instead he had gone inside but on an expedition of his own. In so far as that evidence is concerned the submission is really a complaint of non-direction upon the facts. But be that as it may, once the jury had accepted that there was a common purpose, as they clearly did, the evidence overwhelmingly supported a purpose which would involve contemplated injury by the use of solid weapons such as the bars and tools that were **[*16]** carried there, whatever may have been the intent in relation to firearms. There can be no reasonable doubt on the evidence that the sort of force contemplated during this sudden raid by night would probably end in serious injury and even homicide unless the weapons were applied to the occupants with unlikely discrimination and restraint. So if it could be said that Hartley acted independently at all, then, against the verdict of manslaughter it was simply that he carried a firearm which he handled inside the house with criminal negligence rather than one of the other types of weapon which had been taken to the place and which in his, or any other hands, could easily have produced the same result. The jury had been given a clear direction as to what is embraced by the words in s 66(2) which refer to offences "known to be a probable consequence of the prosecution of the common purpose". Section 66(2) is designed to

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deal inter alia with the very type of conduct that can so suddenly erupt on the sort of confused occasion under review in the present case. We are satisfied that there is nothing in this ground of appeal.

Non-direction

On behalf of the appellant Nolan it was said that **[*17]** the Judge had failed to give the jury an adequate explanation of the concept of proof beyond reasonable doubt by failing to contrast the civil with the criminal onus of proof. But the case is not one in our opinion which required any particular elaboration upon the point and we are satisfied that the jury was left with an accurate understanding concerning onus of proof. It was also said in support of Nolan's appeal that the Judge erred in putting before the jury a copy of s 66 of the Crimes Act and we were referred to R v Terry (1961) 45 Cr App R 180. There is nothing in this complaint. The summing up includes a detailed explanation of the meaning of the section by reference to the way in which it could be applied to the facts of the case. Against that explanation the jury could not have been left in any doubt as to its ambit or effect.

Then in a submission adopted by the various appellants it was said that insufficient attention was given in the summing up to the alternative count of burglary so that effectively the jury was left to decide the issue in terms of the first count alone. It is true that the Judge felt it necessary to deal quite briefly **[*18]** with the issue of burglary; but he made it perfectly plain towards the end of the summing up that the second count had been put forward as an {205} alternative charge. We are satisfied that the jury was well able to appreciate that it was there to be considered as an alternative and capable of application one way or the other in the case of any accused person found not guilty in respect of count number one.

A different submission was advanced on behalf of the appellant Brown. It was said that his defence was not adequately or accurately put to the jury. He had said in evidence that he had not intended to go to Prospect Terrace as a member of a raiding party and that any agreement regarding a concerted assault on the place had been made during his absence from the meeting at Paice Avenue. In the course of an interview with one of the detectives he had been asked about the part he played and had given an explanation to the same general effect. He indicated that he had wished to deal himself with the other gang. But the detective in his evidence described a number of questions and answers which he had noted during the interview with Brown and in the course of which Brown had **[*19]** said that he had been at the front of the house at the critical time and could see right down the hallway; that he had been armed; and that when he was asked what type of firearm did he have he had replied "a 0.22 Winchester". However Brown gave evidence in Court and then he explained that he had endeavoured to persuade Hartley not to take the shotgun to Prospect Terrace and he said that he himself had not taken the 0.22 rifle there: that he had found Lazarus with it at the front entrance to the place and had actually disarmed Lazarus. The criticism of the summing up can be explained on the basis that the Judge interpreted the answers given to the detective during the interview as an admission by Brown that he had gone to Prospect Terrace armed with the rifle. It is contended that this interpretation of what the detective had said was misleading especially as it was accompanied by a somewhat elliptical reference by the Judge to Brown's evidence in the course of which the Judge indicated that Brown "says he gave the rifle to Lazarus and indeed disarmed Lazarus at the scene". However even if it be assumed that the explanation given to the detective was misconstrued by the Judge we **[*20]** do not think there could have been any possibility of misunder-standing by the jury as to what Brown himself intended to say about the matter in Court. They had heard his evidence and no doubt submissions of counsel upon it and we are satisfied that the way in which the point was discussed by the Judge in the summing up could not by itself have led to any possible miscarriage of justice.

Evidence of Cora and Dallas Burridge

On behalf of Brown, Nolan and Simmons the point is taken that one or other of the

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Burridge witnesses are to be regarded as accomplices by reason either of s 66 or s 71 of the Crimes Act. The argument as it relates to s 66 is concerned with the events immediately leading up to the meeting at Paice Avenue and the presence of the two girls at that meeting. In effect it is said that one or other or both of them had encouraged or incited the decision which led to the raiding party setting off for the attack upon the Prospect Terrace house and that there was sufficient evidence upon which a reasonable jury could find them to have been participants in that sense. But the Judge aparently thought otherwise and in our opinion it is not possible on the evidence to get **[*21]** beyond the area of speculation as to what may have been the attitude of the two young women to the talk of reprisals following the fire bomb attack. Certainly there is nothing which would enable a jury to think that they may have been lending their active support and agreement to any contemplated criminal purpose of the members of the Hells Angels gang let alone the concentrated attack with weapons which was actually decided upon at the meeting.

{206} Then there is s 71 of the Crimes Act. It was submitted that by joining Brown and Zidich immediately after the assault on the house and then taking steps to abandon a few articles of disguise that had been used there one or each of them had become an accessory after the fact. But s 71 speaks of an accessory after the fact as one who, knowing any person has been a party to the offence, takes certain action to aid or assist that person; and here the only evidence concerning the articles said to have been abandoned was given by Dallas Burridge and she said she had been given them by Zidich: that it was he who had told her to throw them away. And Zidich was acquitted: cf R v Rowley [1948] 1 All ER 570; (1948) 32 Cr App R 147. **[*22]** So that even if the rather casual and slight action taken to destroy or part with the evidence in question could be regarded as assistance significant enough to come within the ambit of s 71(1) of the Act it certainly does not appear that the action was taken to aid or assist a person who can be regarded as a party to the offence.

In this part of the case there remains an argument that at least the young women should be regarded as sufficiently on the periphery as to require that their evidence should be the subject of a warning as a matter of mere prudence; and we were referred to R v Terry [1973] 2 NZLR 620, 623. However, as is made plain in that case, a warning in such circumstances is within the exercise of judicial discretion and we do not think it can be said in all the circumstances of the case that the discretion must necessarily have been exercised in favour of a warning on the present occasion.

Evidence of co-accused

When an accomplice has given evidence for the prosecution it is well settled that the Judge has a duty to warn the jury that although they may convict upon his evidence, it is dangerous to do so without corroboration. Since Davies v Director of Public Prosecutions **[*23]** [1954] AC 378; [1954] 1 All ER 507 that requirement has been treated as a rule of law. But there Lord Simonds LC said that the rule applied only to witnesses for the prosecution and that their Lordships were not concerned with the proper procedure as to warning and the like where one defendant gives evidence implicating another. The latter class of case was considered by this Court in R v Te Whiu [1965] NZLR 420, and at p 424 it was said:

"For ourselves we cannot see why, if a warning is necessary when a coaccused is called for the Crown, the same warning should not be required when a co-accused gives evidence on his own account and the effect of that evidence is to incriminate the accused. We think that the giving of such a warning is a practice which should be followed in this country."

In R v Terry [1973] 2 NZLR 620, 623, this Court returned to the subject, saying as to a warning in the case of evidence given by a co-accused, "Since Davies v Director of Public Prosecutions there has been some movement in England towards this extended requirement".

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We do not regard those two New Zealand decisions as going as far as to lay down that an accomplice warning **[*24]** is required as a matter of law when one accused gives evidence implicating another. Nor do we think it desirable to lay down such a rigid rule. Our reasons for these views are as follows.

As to what was said in Te Whiu it is significant that the very words used by McCarthy J in delivering the judgment of the Court were a practice which should be followed in this country; and he did not repeat what he had said earlier in the same judgment about the ordinary case of an accomplice giving evidence for the prosecution, namely "The rule which was once a rule of practice had hardened into a rule of law". It may also be significant that in {207} citing R v Teitler [1959] VR 321, evidently as supporting the approach that the Court was adopting in New Zealand, McCarthy J described that case as establishing that in Victoria

". . . a warning should be given where a co-accused gave evidence; and that where there was a failure to give the required warning, the conviction would be quashed unless there was, apart from the evidence of the accomplice, substantial evidence implicating the accused and upon which the jury could properly have convicted, even if they had **[*25]** disregarded the evidence of the accomplice".

That reflects the majority opinion in Teitler. The test for quashing so propounded by the majority is less strict from the prosecution's point of view than the test established in New Zealand for applying the proviso -- whether a reasonable jury, being properly directed, would, on the evidence properly admissible, without doubt convict. The proviso test would be appropriate, however, if the rule were one of law. In the end the Court in Te Whiu disposed of the case by applying the proviso; so it must be acknowledged that the judgment left the precise status of the rule somewhat open. When the majority judgment in Teitler is examined it becomes apparent that, while no distinction seems to be there drawn according to whether the accomplice has been called for the Crown or has given evidence in his own defence, the same test for quashing is treated as appropriate in either situation; and this is said to be a matter on which Victorian practice differs from English practice. But again the position is perhaps left not entirely clear, as the judgment also speaks of the requirement in the case of a prosecution witness as one which although "a **[*26]** rule of practice, now has the force of a rule of law". More recently, in Kelleher v The Queen (1974) 131 CLR 534, a majority of the High Court of Australia, on an appeal from New South Wales, have held that a conviction of a sexual offence secured on the evidence of the prosecutrix will not be quashed on the ground of failure by the trial Judge to warn the jury of the danger of acting on the word of the woman alone, if there is in fact substantial corroboration of her evidence. The tenor of the majority judgments is that in Australia the requirements as to warnings in sexual cases, and possibly accomplice cases also, are less absolute and more related to the precise circumstances of the case than in England.

As to what was said in Terry, mention was there made of some movement in England since Davies v Director of Public Prosecutions; but the cases cited in Terry and subsequent cases show that even in England any extended requirement is not a rule of law: see R v Russell (1968) 52 Cr App R 147, 150, per Diplock LJ delivering the judgment of the Court of Appeal.

As to what is desirable, the trend in both England and Australia is against formulating any **[*27]** new rule of law in this field. And in R v O'Connor (CA 161/76, decided on 4 May 1977), a case about evidence from the wife of an accomplice, we have said that we would be reluctant to add another hard-and-fast requirement to the task of a Judge summing up to a jury. Nor did we think that the interests of justice required such an addition in that kind of case. The same applies, we think, to the question of a warning when one defendant has given evidence inculpating another. Probably it is regrettable that the requirement of a warning when an accomplice has been called for the Crown hardened into a rule of law. We see no need to take the rigidity further. Certainly a co-defendant may have no less strong a motive for giving false evidence, if it helps to pass the blame from himself; but that danger tends to be more obvious to the jury than with a Crown

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witness.

Among the consequences of treating the rule as one of practice are these. When one accused has given evidence having an adverse effect on the defence {208} of another, failure to give an accomplice warning must be recognised to be unusual and to be likely in many cases to give rise to a significant risk of a miscarriage **[*28]** of justice. But in exceptional cases the Judge may justifiably in his discretion omit any warning altogether or give one in terms that might not satisfy the fairly strict requirements that have to be observed when an accomplice is called by the Crown. For example, much of an accused's evidence may have been favourable to his co-accused; and as to any unfavourable part there may be no substantial reason for suspecting that he has distorted the facts either intentionally or otherwise, against the co-accused. In a borderline case of evidence partly favourable and partly unfavourable, the practice of consulting counsel before finally deciding whether or not to give a warning may be found helpful: see R v Royce-Bentley [1974] 2 All ER 347; [1974] 1 WLR 535. When the Judge has omitted a warning and on that ground his summing up is challenged on appeal, the question will be whether in terms of s 385(1)(c) of the Crimes Act 1961 there was a miscarriage of justice. In considering whether that is made out this Court will be able to take into account all the circumstances of the particular case -- including, but not limited

International Law Commission

Vienna Convention on the Law of Treaties*

The States Parties to the present Convention,

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

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

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

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

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

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

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

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

Have agreed as follows:

PART I
INTRODUCTION



International Law Commission

VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

(21 March 1986)

INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

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SECTION: JUDICIAL AND SIMILAR PROCEEDINGS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: PROSECUTOR V. FURUNDZIJA *

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[*317] **IN THE TRIAL CHAMBER**

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

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgment 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

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[*320] **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", n1 and by the Rules of Procedure and Evidence of the International Tribunal, hereafter "Rules", adopted by the Judges of the International Tribunal on 11 February 1994, as amended. n2 Under the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. n3 Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

n1 S/RES/827 (1993).

n2 IT/32/Rev. 13.

n3 Art. 1 of the Statute.

B. Procedural Background

2. On 10 November 1995 Judge Gabrielle Kirk McDonald confirmed the Indictment against the accused, charging him with a grave breach of the Geneva Conventions and violations of the laws or customs of war. The accused was charged with three individual counts of (a) torture and inhumane treatment; (b) torture; and (c) outrages upon personal dignity including rape. These charges were in respect of acts alleged to have been committed at the headquarters of the Jokers, a

special unit within the armed forces of the Croatian Community of Herzeg-Bosna, known as the Croatian Defence Council, hereafter "HVO". In her Decision confirming the Indictment, Judge McDonald ordered, pursuant to Rule 53 of the Rules, n4 that there be no public disclosure of the Indictment.

> n4 The Rules referred to in this Judgement are those that were in force at the time of the relevant motion, order or decision, in accordance with sub-Rule 6(C).

3. The accused was arrested on 18 December 1997 by members of the multinational Stabilisation Force, hereafter "SFOR", acting pursuant to a warrant for arrest issued by the International Tribunal. The accused was immediately transferred to the International Tribunal and detained in its detention unit in The Hague, the Netherlands. The same day, the President of the International Tribunal assigned this case to Trial Chamber II, comprising Judge Antonio Cassese, presiding, Judge Richard May and Judge Florence Ndepele Mwachande Mumba. The Trial Chamber remained thus constituted throughout the preliminary proceedings before the trial. On 11 March 1998 Judge Mumba replaced Judge Cassese as Presiding Judge.

[*321] 4. The initial appearance of the accused, pursuant to Rule 62 of the Rules, was held on 19 December 1997. The accused, represented on this occasion by Mr. Srdjan Joka, a member of the Bar of the Republic of Croatia, entered a plea of not guilty to all counts of the Indictment and was remanded in detention pending trial. In a subsequent Decision effective from 14 January 1998, made pursuant to the Directive of the International Tribunal on the Assignment of Counsel, as amended, n5 the Registrar of the International Tribunal determined the accused to be indigent and assigned Mr. Luka S. Misetic, practising in Chicago, in the United States of America, as defence counsel to the accused with his fees to be paid by the International Tribunal.

> n5 IT/73/Rev. 5, 17 Nov. 1997.

5. On 13 January 1998 the Prosecution, filed a confidential motion seeking measures for the protection of victims and witnesses. The Defence filed a confidential response on 26 January 1998, opposing the motion, in part on the ground that the measures sought would deny the accused his right to a fair and public hearing as guaranteed by Article 21 of the Statute. Oral argument was heard on the motion during a closed session hearing on 12 February 1998. The Trial Chamber thereupon issued an Order on 13 February 1998 granting the motion in part and deferring consideration of the further measures sought until such time as the Prosecution was able to provide additional information. At a status conference on the same day, the Trial Chamber consulted the parties with a view to enabling it to better manage the case and expedite proceedings. The Prosecution was ordered to provide the Trial Chamber with inter alia the witness statements, other documentary material upon which it intended to rely at trial and a pre-trial brief setting out in full the details of the case and the points at issue. The Order was detailed in a Scheduling Order of 13 February 1998.

6. On 11 February 1998 the Defence filed a confidential motion to compel the production of certain documents by the Prosecution. There followed the Prosecution's confidential response opposing the motion, filed on 23 February 1998. On 4 March 1998 the Trial Chamber instructed the Prosecution to disclose to it the material that was the subject matter of the motion so as to enable the Trial Chamber to adequately consider the matter. The Prosecution, in a confidential and ex parte submission to the Trial Chamber, complied with this Order on 5 March 1998. The following day the Defence filed a confidential reply in support of its motion of 11 February 1998.

7. The Defence, on 26 February 1998, submitted a preliminary motion to dismiss all counts against the accused (Counts 12, 13 and 14), alleging that the Indictment was defective in that it did not contain a concise statement of the facts and the crimes with which the accused was charged. On 27 February 1998 the Defence filed an additional motion to dismiss the count of the Indictment charging the accused with a grave breach of the Geneva Conventions (Count 12), on the ground that the Indictment failed to adequately allege the existence of an international armed conflict. In its response filed on 6 March 1998 the Prosecution opposed the motions; without conceding the arguments of the Defence, the Prosecution declared that it would not pursue Count 12 of the Indictment in the interests of a fair and expeditious trial and the judicial economy of the Trial Chamber.

8. Oral arguments on the three motions were heard in closed session on 9 March 1998 and the Trial Chamber gave its oral ruling on the motions. A closed session status conference was then held, at which the Trial Chamber and the parties discussed discovery matters and the state of preparedness for trial. A written Order confirming the Trial Chamber's oral

Decision was issued on 13 March 1998. The Trial Chamber denied the motion to compel the production of documents on the basis that the requested material was irrelevant to the case against the accused. The Trial Chamber also granted the Prosecution leave to withdraw Count 12 of the Indictment but rejected the motion seeking to dismiss all counts against the accused based on defects in the form of the Indictment. The Prosecution was furthermore ordered to file a document specifying the manner in which the accused was alleged to [*322] have breached Article 7(1) of the Statute. The Prosecution responded to this Order by filing the said document on 31 March 1998.

9. The Trial Chamber issued an Order on 31 March 1998, setting 8 June 1998 as the date for the commencement of trial. Following the Order, the Defence, on 6 April 1998, filed a motion seeking to dismiss Counts 13 and 14 of the Indictment on the basis of defects in the form of the Indictment, lack of subject-matter jurisdiction and failure to establish a prima facie case. This motion was accompanied by a separate motion filed the same day, in which the Defence sought leave to file the former motion instanter. In a response filed out of time on 22 April 1998, the Prosecution opposed the former motion.

10. In a motion filed on 24 April 1998 the Defence sought to preclude the testimony of all witnesses for whom the Prosecution had witness statements in its possession prior to 8 April 1998 and which the Prosecution had failed to disclose to the Defence. In the motion the Defence noted the Prosecution's obligation under sub-Rule 66(A)(ii) of the Rules to provide the Defence with copies of the statements of all witnesses which it intends to call at trial no later than 60 days before the date set for trial. Also on 24 April 1998, the Prosecution filed an ex parte and confidential motion concerning discovery of transcripts of proceedings. A further confidential motion seeking protective measures for a number of witnesses anticipated to be called at trial was submitted by the Prosecution on 29 April 1998.

11. On 29 April 1998, oral arguments were heard in open session on the Defence motion to dismiss Counts 13 and 14 of the Indictment. Thereafter a closed session status conference was held at which, inter alia, matters relating to the Prosecution's failure to comply with its obligations of disclosure under Rule 66 were discussed. On that day the Trial Chamber issued three separate Decisions in which it granted the Prosecution's motion for protective measures; dismissed the Defence motion to preclude the testimony of certain Prosecution witnesses; and dismissed the Defence motion on Counts 13 and 14 of the Indictment. In this Decision the Trial Chamber held that the relevant motion raised substantive legal issues which were only suitable for determination at trial. In a Scheduling Order issued the same day, the Trial Chamber also expressed its grave concern over the Prosecution's failure to comply with its obligations under sub-Rule 66(A)(ii) and ordered it to provide full disclosure to the Defence pursuant to that Rule no later than 1 May 1998. The Prosecution was further ordered to file, by 4 May 1998, a supplementary document specifying inter alia the acts or omissions that were alleged against the accused and the legal grounds upon which the Prosecution would rely at trial. The Defence was also required to inform the Trial Chamber, by 15 May 1998, whether in consideration of the need to ensure an expeditious trial, it would be in a position to waive its right to timely disclosure under sub-Rule 66(A)(ii) and to proceed with the trial on 8 June 1998, keeping in mind that in the circumstances, postponement of the trial date would not be attributed to the Defence.

12. The Prosecution's confidential reply to the Trial Chamber's Order was filed on 1 May 1998, with a further supplemental document submitted three days later. On 6 May 1998, the Trial Chamber issued an Order directing the Prosecution to file its pre-trial brief no later than 22 May 1998. Also on that day, the Defence filed what it termed an emergency petition in which it stated its belief that the Prosecution was in contempt of the International Tribunal and sought a reconsideration of its motion of 6 April 1998 to dismiss Counts 13 and 14 of the Indictment. Following a response filed by the Prosecution on 11 May 1998, the Defence replied on 12 May 1998. In its Decision on the motion, issued on 13 May 1998, the Trial Chamber found that sufficient information regarding the case against the accused had been provided by the Prosecution to enable the accused to develop his defence. In the circumstances, the Trial Chamber found it unnecessary to rule on the allegation that the Prosecution was in contempt of the International Tribunal and also declined to reconsider its previous Decision on the Defence motion to dismiss Counts 13 and 14 of the Indictment.

[*323] 13. On 15 May 1998 the Defence filed its response to the Trial Chamber's Order of 29 April 1998 in which it explained that it intended to proceed with trial on 8 June 1998 and objected to any postponement of that date. The Defence also indicated that it would waive neither its right to full disclosure under sub-Rule 66(A)(ii) nor the right of the accused under Article 21 of the Statute to a trial without undue delay. Also on that day, the Prosecution, pursuant to Rule 67 of the Rules, notified the Defence of the names of the witnesses which it intended to call to testify at trial. On 22 May 1998 the Prosecution's pre-trial brief was filed. The Defence filed a supplemental response to the Trial

Chamber's Order of 29 April 1998 on 22 May 1998. Therein, in view of its earlier stance, the Defence agreed to file all its pre-trial motions by 22 May 1998 provided the Prosecution would respond to all such motions by 27 May 1998. The Trial Chamber granted this request on 22 May 1998 and the Prosecution was ordered to respond accordingly.

14. On 21 May 1998, the Defence filed a preliminary motion seeking to dismiss Counts 13 and 14 of the Indictment on the ground that the International Tribunal lacked subject-matter jurisdiction to try the charges alleged against the accused under Article 3 of the Statute. Following the Prosecution's response opposing the motion, filed on 27 May 1998, the Trial Chamber issued its Decision denying the motion on 29 May 1998. Rejecting the Defence's interpretation of the Appeals Chamber's Decision in the case of Prosecutor v. Dusko Tadic, n6 hereafter Tadic Jurisdiction Decision, the Trial Chamber emphasised that the International Tribunal has jurisdiction over all serious violations of international humanitarian law in accordance with its Statute; that Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved; and that the allegations charged in the Indictment can indeed be prosecuted under Article 3.

> n6 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995.

15. Also on 29 May 1998, the Prosecution filed a confidential motion. The Prosecution sought the Trial Chamber's determination as to its obligations of disclosure in respect of transcripts in any other trial in which its intended witnesses may have testified and which may have been redacted by order of the Trial Chamber before which the trial in question was heard. A status conference was held in closed session the same day, at which this and other matters relating to the Prosecution's fulfilment of its duty of disclosure were discussed. Following its oral ruling on the same day, the Trial Chamber subsequently issued a written Decision. The Prosecution was ordered inter alia, to turn over to the Defence, by 2 June 1998, all trial transcripts in their redacted form, of the testimony in proceedings before other Trial Chambers given by the witnesses it intended to call at this trial; to decide on whether it would call a particular material witness at trial; and by 2 June 1998 to issue a redacted version of the amended Indictment against the accused. In addition, the Defence was ordered to confirm in writing by 4 June 1998 whether it was fully prepared and ready to proceed to trial on 8 June 1998 on Counts 13 and 14 of the Indictment, it being understood that in the circumstances, postponement of the trial date would not be attributed to the Defence. Declaring that it was appalled by what it considered to be conduct close to negligence in the Prosecution's preparation of the case, the Trial Chamber undertook to issue a separate decision on the Prosecution's handling of this matter. Accordingly, on 5 June 1998, the Trial Chamber issued a formal complaint to the Prosecutor concerning the conduct of the Prosecution. In a communication dated 8 June 1998, the Prosecutor acknowledged the complaint and undertook to investigate the matter.

16. Since the Indictment remains sealed against the other indicted persons, it has not been publicly revealed in its entirety and has required redaction. An amended Indictment, hereafter "Amended Indictment", withdrawing the one grave breach count and associated allegations was filed on 2 June 1998 and is set forth in Annex A to this Judgment. The Defence, on 4 June 1998, informed the Trial Chamber that, due to the continued confinement of the accused it wished to proceed with the trial on the scheduled date of 8 June 1998. However, it continued to assert that the proper remedy for the [*324] Prosecution's abuse of the discovery rules was a bar on any witness whose statements had not been supplied to it prior to 8 April 1998. A Prosecution response to this communication was filed on 5 June 1998. On that day the Prosecution also filed a motion in limine regarding the examination of evidence in cases of sexual assault and a further confidential motion requesting protective measures at trial for a number of Prosecution witnesses. Oral arguments on the motions were heard at a closed session hearing on 8 June 1998, during which the Defence presented an oral motion requesting the sequestration of witnesses. Issuing its oral rulings on the motions, which were subsequently confirmed in writing, the Trial Chamber ordered both the Prosecution and the Defence to make every effort to prevent contact between their witnesses prior to and during trial. A number of protective measures at trial, including the use of pseudonyms, were ordered in respect of four Prosecution witnesses, two witnesses being granted leave to testify in closed session and the use of image-distortion being permitted in respect of two others. The Trial Chamber thereafter, in open session, reiterated its willingness to adjourn the proceedings in order to give the Defence such time as it might require and requested the Defence to unequivocally state its readiness to proceed to trial. The Defence informed the Trial Chamber that it was prepared to go forward with the trial.

17. The trial of the accused commenced on 8 June 1998. By then Mr. Sheldon Davidson had been assigned as co-counsel for the Defence. The Prosecution team was lead by Ms. Patricia Viseur-Sellers, assisted by Mr. Michael Blaxill

and Ms. Ijeoma Udogaranya. The presentation of the Prosecution case-in-chief lasted four sitting days. During this time, six witnesses testified before the Trial Chamber and four Prosecution exhibits were admitted into evidence.

18. On 11 June 1998, the Defence filed a confidential motion to dismiss the Indictment or, in the alternative, to preclude the Prosecution from adding the accused to Counts 9, 10 and 11 of the Amended Indictment. Following a response from the Prosecution the Trial Chamber issued a Decision the same day dismissing the motion as being misconceived, the Prosecution having made no application to amend the Indictment. On 12 June 1998, the Trial Chamber granted an oral motion by the Defence to disregard the testimony given by Witness A, a witness for the Prosecution who testified earlier that day, relating to acts with which the accused was not charged in the Indictment. The Trial Chamber held that it would only consider as relevant Witness A's evidence in so far as it related to paragraphs 25 and 26 of the Amended Indictment. Following a confidential request for clarification of that Decision filed by the Prosecution on 15 June 1998, the Trial Chamber on that day issued a confidential Decision detailing the extent to which the evidence given by Witness A was held to be admissible.

19. During the trial, the Prosecution, on 17 June 1998, filed a confidential motion seeking inter alia, protective measures for a witness intended to be called in rebuttal. The Defence filed a response opposing the motion on 19 June 1998. Holding that it would be a misuse of the right of rebuttal under Rule 85 of the Rules to permit the Prosecution to introduce such evidence in this instance, the Trial Chamber, in a confidential Decision issued on 19 June 1998, dismissed the motion.

20. The defence case-in-chief commenced on 15 June 1998 and continued over one and a half sitting days. Two witnesses, one an expert witness, appeared on behalf of the Defence and 22 defence exhibits were admitted into evidence. Upon the request of the Defence, protective measures were granted in respect of one witness who was designated by a pseudonym and permitted to give evidence in closed session. With the agreement of the parties and with a view to issuing a combined judgement on the merits and on sentence, if any, the parties during trial also addressed sentencing matters. The Defence called one witness in this regard. Both parties presented their closing arguments on 22 June 1998, whereupon the hearing was closed with judgement reserved to a later date.

[*325] 21. After the close of the hearings, on 29 June 1998, the Prosecution disclosed two documents to the Defence. One was a redacted certificate dated 11 July 1995 and the other was a witness statement dated 16 September 1995 from a psychologist from the Medica Women's Therapy Centre, hereafter "Medica", in Zenica, Bosnia and Herzegovina, n7 concerning Witness A and the treatment that she had received at Medica.

> n7 After the Dayton Peace Agreement of 1995, the Republic of Bosnia and Herzegovina became Bosnia and Herzegovina. The latter designation is used in this Judgement to refer to the entity that declared itself independent on 6 March 1992.

22. On 10 July 1998 the Defence filed a motion to either strike the testimony of Witness A due to what it considered to be misconduct on the part of the Prosecution or, in the event of a conviction, for a new trial. The Prosecution filed its response to the motion on 13 July 1998. The Trial Chamber, on 14 July 1998, after having heard the oral submissions of the parties, issued an oral Decision re-opening the case. The Trial Chamber rejected the Defence request to reconsider its oral Decision on the grounds that the re-opening of the case was an inappropriate remedy. On 16 July 1998 the Trial Chamber issued its written Decision on the matter. It found that there had been serious misconduct on the part of the Prosecution in breach of Rule 68, and that the Defence consequently was prejudiced. It therefore ordered that the proceedings were to be re-opened only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993, and the Prosecution was ordered to disclose any other connected documents.

23. On 20 July 1998, the Defence filed a confidential request for the production of documents pursuant to sub-Rule 66(B). The Prosecution responded thereto on 31 July 1998. On 23 July 1998 however, the Defence filed an application for leave to appeal the Trial Chamber's Decision of 16 July 1998. On 29 July 1998, it also filed a confidential application for the issuance of a subpoena duces tecum to Medica, to which the Prosecution responded on 12 August 1998. The Trial Chamber, on 10 August 1998, stayed its Decision on these motions pending the Appeals Chamber's Decision on the application for leave to appeal. The Defence also filed two ex parte, in camera and sealed motions on 30 July 1998. The one was a request pursuant to Rule 71 for leave to take the deposition of a certain person, and the other

concerned an application for the issuance of a subpoena ad testificandum and a letter of request to the Government of the USA. On 10 August 1998, the Trial Chamber issued an ex parte and confidential Order in response to these motions, also staying its Decisions thereto pending the Appeals Chamber's Decision on the application for leave to appeal. In a separate Order, on 10 August 1998 the Trial Chamber issued an ex parte and confidential Order staying its Decision relating to the Prosecution's submission of 31 July 1998, for an ex parte review of material pursuant to the Decision of 16 July 1998.

24. On 24 August 1998, the Appeals Chamber unanimously decided to refuse the Defence request for leave to appeal the Trial Chamber's Decision of 16 July 1998. The Appeals Chamber found that the sub-Rule 73(B) requirements for interlocutory appeals had not been met.

25. The Trial Chamber, on 27 August 1998, issued five Orders relating to the matters stayed pending the Appeals Chamber's determination of the application for leave to appeal the Trial Chamber's Decision of 16 July 1998. In a confidential Order the Trial Chamber dismissed the Defendant's request for the production of documents pursuant to sub-Rule 66(B). In another confidential Order the Trial Chamber allowed the application for the issuance of a subpoena duces tecum to Medica, ordering that any information recovered pursuant to the subpoena be submitted to the Trial Chamber for in camera review. The Defendant's ex parte and confidential request to take the deposition of a certain person was dismissed on the basis that the matters on which the person was expected to testify were beyond the scope of the Trial Chamber's 16 July 1998 ruling. The Trial Chamber accepted the Prosecution's submission for an ex parte review of material in another ex parte and confidential Order, holding that certain exhibits should not be disclosed to the Defence. As to the Defendant's application for issuance [*326] of a subpoena ad testificandum and a letter of request to the Government of the USA, the Trial Chamber issued an ex parte and confidential Order dismissing the application.

26. On 9 September 1998 the Defence filed an ex parte, in camera and sealed application for the issuance of a subpoena duces tecum and a letter of request to the Government of Bosnia and Herzegovina. The Trial Chamber issued an Order in response on 21 September 1998, in which the application to issue a subpoena duces tecum to a certain person and the corresponding request for assistance to the Government of Bosnia and Herzegovina was allowed. It also ordered that any information recovered pursuant to the subpoena must be submitted to the Trial Chamber for in camera review to determine its relevance and whether it should be disclosed to the parties. The confidential subpoena duces tecum and the confidential and ex parte request for assistance were issued on 21 September 1998 as well.

27. The reply of Medica in connection with the subpoena duces tecum of 27 August 1998 was filed on 22 September 1998. The Trial Chamber reviewed the Medica documents in camera. After having balanced the interests of medical confidentiality and fairness to the accused the Trial Chamber decided on 24 September 1998 that the Medica documents must be disclosed to both the Prosecution and the Defence in confidence. On 1 October 1998 the Trial Chamber ordered that the re-opening of the proceedings should commence on 9 November 1998.

28. The Defence filed a motion on 1 October 1998 requesting the Trial Chamber to order the Prosecution to disclose the identities of various witnesses, interpreters and interviewers, which were redacted by the Prosecution in five documents. The Prosecution's response to the motion was filed on 8 October 1998 following an Order of the Trial Chamber to that effect. On 14 October 1998, the Trial Chamber, in a confidential Decision, noted that following the Prosecution's agreement in its response, the authenticity and admission into evidence of the said documents were no longer at issue. Having noted the purpose of the re-opening of the proceedings and its previous Orders concerning protective measures for witnesses, the Trial Chamber ordered that the Prosecution must disclose to the Defence the identity of certain witnesses and the author of a certificate of psychological treatment.

29. The Government of Bosnia and Herzegovina, on 5 October 1998, filed a confidential and ex parte response to the request for assistance of 21 September 1998. In a confidential Decision of 9 October 1998, the Trial Chamber decided that the response must be disclosed to both parties. According to the response, the sought after information was not in the possession of the person in question.

30. The Defence filed a confidential submission on 9 October 1998 containing a list of the witnesses it intended to call at the re-opening of the proceedings and a summary of the facts on which each would testify. On 13 October 1998, the Trial Chamber issued a confidential Decision on the proposed calling by the Defence of a certain person as an adverse witness. It noted that according to its Decision of 16 July 1998 the Defence may call new evidence only to address any

medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993. The Trial Chamber decided that the testimony of the intended adverse witness would not be relevant and that he could not be called as a witness.

31. Also on 9 October 1998, the Defence filed a confidential, ex parte and in camera motion for permission, nunc pro tunc, to disclose the trial testimony of Witnesses A and D to two of its intended expert witnesses, Dr. C.A. Morgan and Dr. J. Younggren. The Trial Chamber subsequently issued a confidential and ex parte Order on 13 October 1998. Having considered its Decision on the protective measures for Witnesses A and D at trial issued on 11 June 1998, the Trial Chamber granted the [*327] motion. It allowed the trial testimony to be disclosed to the Defence experts, but only to the extent that it was relevant for the preparation of the expert testimony required by the Defence.

32. On 16 October 1998 the Prosecution filed a confidential submission pursuant to the Trial Chamber orders of 31 August 1998 and 21 September 1998. The Prosecution inter alia requested that the Defence disclose the full statements of the expert witnesses it intended to call at the re-opening of the proceedings instead of the summaries of facts only. The motion also named Dr. D. Brown and Dr. C.C. Rath as the Prosecution's intended expert witnesses. The Trial Chamber issued a Scheduling Order on 20 October 1998, ordering both the Prosecution and Defence to comply with sub-Rule 94 bis (A) and (B)(i) and (ii). The Defence filed their full expert witness statements on 26 October 1998, while the Prosecution likewise submitted the full statements of its two expert witnesses on 30 October 1998. On 30 October 1998 the Defence filed a confidential motion notifying the Trial Chamber that it intended to recall both its expert witnesses in rejoinder. On 2 November 1998 the Prosecution filed a notice pursuant to sub-Rule 94 bis (B) that it wished to cross-examine both the Defence expert witnesses.

33. On 3 November 1998 the Prosecution filed a confidential motion in limine to limit expert evidence. The Defence responded to the Prosecution's motion on 5 November 1998. The Prosecution then, on 6 November 1998, filed a motion requesting leave to file a response to the Defendant's reply to the Prosecution's motion in limine. The Trial Chamber issued two Orders on 6 November 1998. In its confidential Order on the Prosecution motion in limine to limit expert evidence, the Trial Chamber dismissed the Prosecution motion of 3 November 1998. The Trial Chamber, in another confidential Order, also denied the Prosecution leave to file a reply to the Defendant's response of 5 November 1998.

34. The proceedings re-opened on 9 November 1998. Mr. Luka Misetic and Mr. Sheldon Davidson appeared as counsel for the accused. The Prosecution team comprised Ms. Brenda Hollis, Ms. Patricia Viseur-Sellers and Mr. Michael Blaxill. The Defence called four witnesses, including two expert witnesses, while the Prosecution called two expert witnesses.

35. On 9 November 1998 the Trial Chamber received an application to file an amicus curiae brief with the brief attached thereto. The eleven applicants were scholars of the international human rights of women or representatives of non-governmental organizations. The Trial Chamber, on 10 November 1998, issued an Order granting leave to file the amicus curiae brief. On 11 November 1998, another application to file an amicus curiae brief was filed by three applicants on behalf of the Center for Civil and Human Rights of the Notre Dame Law School in Indiana, USA. The Trial Chamber issued an Order granting the applicants leave to file the brief on 11 November 1998. The Trial Chamber orally notified the Prosecution and Defence about these briefs on 11 November 1998 and invited the parties to make written submissions regarding the briefs by 20 November 1998, should they so wish.

36. The re-opened proceedings were closed on 12 November 1998 after the presentation of both parties' closing arguments. On 20 November 1998, the Defence filed a response to the amicus curiae briefs.

37. On 24 November 1998, the Prosecution filed an ex parte and confidential request to redact certain portions from the transcripts of the closing statements delivered on 22 June 1998 to comport with the order for non-disclosure of 10 November 1998. The Trial Chamber granted the request on 25 November 1998. Also on 25 November 1998, the Prosecution filed a motion to expunge certain portions of the 22 June 1998 closing arguments to conform with the decision on protective measures for Witnesses A and D issued by the Trial Chamber on 11 June 1998. On 26 November 1998, the [*328] Prosecution filed a confidential motion to conform the Defendant's response to the amicus curiae briefs to various decisions of the Trial Chamber dealing with protective measures for witnesses. The Defence, on 1 December 1998, filed a confidential response to the Prosecution's motions dated 25 and 26 November 1998. The Trial Chamber, on 3 December 1998, issued an Order granting the Prosecution's motions.

C. The Amended Indictment

38. Paragraphs 1 to 7 of the Amended Indictment set out the background and general context in which the alleged crimes are said to have been committed. The accused is identified in paragraph 9, whilst paragraphs 12 to 17 set forth the general allegations relevant to the specific crimes alleged. The specific charges against the accused are based upon the following factual allegations, which are set out in paragraphs 25 and 26 of the Amended Indictment:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, REDACTED and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, REDACTED rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, REDACTED beat Witness A and Victim B on the feet with a baton. Then REDACTED forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail REDACTED actions.

In relation to these alleged acts, the Amended Indictment charges the accused with two counts of violations of the laws or customs of war, as recognised by Article 3 of the Statute of the International Tribunal: torture (Count 13) and outrages upon personal dignity including rape (Count 14).

II. THE SUBMISSIONS OF THE PARTIES

A. The Prosecution

1. Factual Allegations

39. The Prosecution's factual allegations, substantiating those set out in the Amended Indictment, may briefly be set forth as follows. It is alleged that, on or around 15 May 1993, Witness A, a female Moslem civilian residing in Vitez, was arrested by members of a special unit of the military police of the HVO known as the 'Jokers'. The headquarters of the Jokers was in a well-known local hostelry in the village of Nadioci, known as the 'Bungalow'. The Jokers took Witness A to a house adjacent to the Bungalow, the 'Holiday Cottage', where their living quarters were, and she was detained in a large room, hereafter "large room", in the company of a group of soldiers.

40. The accused, a local commander of the Jokers, arrived at the Holiday Cottage and immediately began to interrogate Witness A about a list of Croatian names and the activities of her sons. During the questioning by the accused, one of the soldiers forced Witness A to undress and then rubbed his knife along her inner thigh and lower stomach and threatened to put his knife inside her vagina should she not tell the truth. The accused continued to interrogate Witness A throughout this threatening conduct.

[*329] 41. Thereafter, Witness A was moved to another room in the Holiday Cottage. A Croatian soldier, known to Witness A and identified in the Amended Indictment as Victim B, but referred to hereafter as Witness D, because he so appeared as a witness in these proceedings, was also brought into the room. He appeared to have been badly beaten. While the accused continued to interrogate Witness A and Witness D, the same soldier who had earlier assaulted Witness A beat both of them with a baton on their feet and then forced Witness A to have oral and vaginal intercourse with him. The accused did nothing to prevent these acts.

2. Legal Arguments

(a) The Individual Criminal Responsibility of the Accused

42. The Prosecution submits that the accused may be held individually responsible for his participation in the alleged crimes pursuant to Article 7(1) of the Statute, which reads: "A person who planned, instigated, ordered, committed or

otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles. 2 to 5 of the present Statute, shall be individually responsible for the crime." The Prosecution contends that such liability can be established by showing that the accused had intent to participate in the crime and that his act contributed to its commission. It is further submitted that such contribution does not necessarily require participation in the physical commission of the crime, but that liability accrues where the accused is shown to have been intentionally present at a location where unlawful acts were being committed. n8 Accordingly, the Prosecution argues that the accused's alleged acts of encouragement, and his omissions, were sufficient to trigger his individual criminal responsibility under Article 7(1) for the crimes alleged. n9

n8 Prosecutor's Pre-Trial Brief, 22 May 1998, p. 5.
n9 Prosecution's Pre-Trial Brief, p. 6.

(b) Violations of Common Article 3 of the Geneva Conventions of 1949 (torture)

43. Specifically in relation to the accused, the Prosecution submits that his alleged acts constitute the crime of torture, as recognised in article 3 common to the four Geneva Conventions of 1949, hereafter "common article 3". The Prosecution contends that by his conduct under the factual circumstances alleged, the accused, acting in an official capacity as a uniformed soldier on duty, intentionally inflicted severe physical or mental pain or suffering on Witness A, a non-combatant, during an interrogation for the purpose of obtaining information and for the purpose of intimidation, thereby committing torture. As it is asserted that these events took place in the context of, and were directly linked to, an armed conflict between the armed forces of the Government of the Republic of Bosnia and Herzegovina, which declared itself independent on 6 March 1992, and the armed forces of the Croatian Community of Herzeg-Bosna, which considered itself an independent political entity inside the Republic of Bosnia and Herzegovina, the Prosecution submits that the elements of the crime of torture under common article 3 are met.

(c) Violations of Additional Protocol II of 1977 (outrages upon personal dignity including rape)

44. The Prosecution further submits that the accused is individually criminally responsible for the alleged acts under article 4(2)(e) of Additional Protocol II to the Geneva Conventions, hereafter "Additional Protocol II", which prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". With reference to the Tadic Jurisdiction Decision that "customary international law imposes criminal liability for serious violations of common article 3 as supplemented by other general principles and rules on the protection of victims of internal armed conflict", n10 it was submitted that the substantive offences prohibited by [*330] article 4 of Additional Protocol II are part of customary law and that they enhance the protection afforded by common article 3.

n10 Case No. IT-94-1-AR72, para. 134.

45. It is argued that by his interrogation of Witness A, a non-combatant in the hands of an adverse party during a conflict, throughout which she was "maintained in a state of forced nudity", n11 "obligated to submit to several sexual assaults", n12 and was "humiliated by attacks on her personal, including sexual, integrity", n13 the accused committed outrages upon personal dignity, within the meaning of article 4(2)(e) of Additional Protocol II.

n11 Prosecution's Pre-Trial Brief, p. 14.
n12 Ibid., p. 14.
n13 Ibid., p. 14.

46. Similarly, the Prosecution argues that, by the accused's conduct during the time that "Witness A, a non- combatant in the hands of an adverse party during an armed conflict, was subjected to vaginal, anal and oral forcible sexual penetration", n14 the accused is criminally responsible for rape, as recognised under article 4(2)(e) of Additional Protocol II.

n14 Ibid., p. 16.

B. The Defence

47. The Defence did not concede the existence of an armed conflict for the purposes of bringing the alleged crimes within the jurisdictional scope of Article 3 of the Statute.

48. As to the specific allegations in the Amended Indictment, the Defence contended that the accused is not guilty of the crimes alleged. It was asserted that the accused was not present for any sexual assault on Witness A, and submitted that Witness A's recollection of the events, which form the basis for the charge against the accused, is unreliable.

49. In support of these submissions, the Defence relied upon alleged inconsistencies in the testimony of Witness A. For example, the Defence stated that in Witness A's original statement to the Prosecution's investigators in 1995, she did not state that the accused was present while she was being beaten and sexually assaulted during the first phase of the interrogation in the Holiday Cottage. n15 Furthermore, the Defence asserted that Witness D, a Prosecution witness, would directly contradict Witness A's recollection of the events alleged. n16

n15 Defence Counsel's Opening Statement, Transcript of trial proceedings, p. 83 (T. 83). All transcript page numbers are hereafter referred to as "T.".
n16 Defence Counsel's Opening Statement, T. 84.

50. The findings of the Trial Chamber are set out in the following sections of the Judgment.

III. THE EXISTENCE OF AN ARMED CONFLICT

A. The Prosecution Case

51. The Prosecution case, as stated in the Amended Indictment, is that from about January 1993 until mid-July 1993 the HVO was engaged in an armed conflict with the Army of Bosnia and Herzegovina, hereafter "ABiH". The Croatian Community of Herzeg-Bosna had declared itself an independent political entity inside the Republic of Bosnia and Herzegovina on 3 July 1992. During this time, the HVO attacked villages inhabited mainly by Bosnian Moslems in the Lasva River Valley region in central Bosnia and Herzegovina, including the municipality of Vitez. The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmici. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians. The Prosecution alleges that this was the context in which the crimes, which the accused is alleged to have committed, took place.

[*331] 52. Evidence of the existence of an armed conflict was given by Prosecution witnesses, including Dr. Muhamed Mujezinovic, a medical doctor in Vitez. According to the witness, the Croatian Democratic Union, hereafter "HDZ", won the first multi-party elections in Vitez in November 1990; the Party of Democratic Action, hereafter "SDA", came second. n17 Throughout 1991, relations between the ethnic groups seemed harmonious. n18 It was only late in 1991 that Dr. Muhamed Mujezinovic first heard about the political entity of Herzeg-Bosna. n19 This witness, a member of the SDA, became vice-president of its executive committee in Vitez in September 1991, and in this capacity he interacted with the HVO on a regular basis. n20 In the meantime, the HVO were arming themselves. n21 In March 1992, a crisis staff was formed in Vitez in response to the problems generated by the conflicts in Croatia and other parts of Bosnia and Herzegovina; it had an equal ethnic composition. n22 In a meeting of the crisis staff held in late April, a member of the HVO said that the Moslems in Vitez had to place themselves under the command of the Croatian Community of Herzeg-Bosna as they had no chance of staying in Vitez; however, this statement was not taken "seriously" and co-operation continued. n23

n17 T. 94.
n18 T. 97.
n19 T. 97-98.
n20 T. 95.
n21 T. 102-103.
n22 T. 98-100.
n23 T. 102-103.

53. The first incident of violence occurred on 20 May 1992 when a young Moslem was killed by an HVO guard. n24 This incident was followed by the take-over by the HVO of the local town hall, the police station and the Territorial Defence building on 18 June 1992, over which the flags of Herzeg-Bosna and Croatia were raised. n25 At a subsequent meeting of the Vitez crisis staff, the HVO members demanded that the Moslems place themselves under their command. n26 The Moslems however considered the actions of the HVO to be an illegal coup and refused to become part of the new government. n27 After this, the HVO took control over the town of Vitez. n28 Harassment of Moslems became frequent n29 and the Moslem community established a co-ordination board for the protection of Moslems. n30 In November of 1992, armed conflict erupted between the HVO and ABiH in Novi Travnik; there were simultaneous incidents of violence in Vitez. n31 Inter-ethnic tension in Vitez continued to rise as the HVO blockaded the town. n32 During this time, killings and other violence became increasingly frequent and Dr. Muhamed Mujezinovic regularly treated the wounded, most of whom were Moslem civilians. n33 On 15 January 1993, the Moslems of Vitez converted their Council for the Defence of Moslems into a war presidency which commanded the ABiH and Dr. Mujezinovic became the President. n34 For a brief period, a joint commission was established to relieve the tension in the area. However, the HVO continued to push for the disarmament of the AbiH. n35 Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmici. n36

n24 T. 103-104.
n25 T. 105.
n26 T. 106.
n27 T. 107.
n28 T. 107.
n29 T. 108.
n30 T. 109.
n31 T. 110.
n32 T. 119.
n33 T. 112.
n34 T. 116.
n35 T. 121-122.
n36 T. 122 and T. 125.

54. Witness A and Witness C testified that the fighting in Vitez started on 16 April 1993 between 5 a.m. and 6 a.m. with a loud detonation. n37 Mr. Sulejman Kavazovic, a member of the Territorial Defence of Bosnia and Herzegovina, testified that after the explosion he saw a lot of HVO soldiers in full combat equipment running toward the part of the city controlled by the Territorial Defence of Bosnia and Herzegovina. n38 Witness A and Witness C gave evidence that Moslem apartments were searched by the HVO n39 and that prominent Moslems were temporarily detained at the Workers University. n40 From that day on, large numbers of the local Moslem population were reduced to living in basements and terrorised by HVO soldiers; Moslems were, on a daily basis, forced from their homes and taken away. n41

n37 T. 275-276 and T. 381.
n38 T. 516.
n39 T. 277 and T. 382.
n40 T. 279 and T. 385.
n41 T. 277-286 and T. 382-390.

55. Witness B testified about the HVO attack on Ahmici. On 16 April 1993, she woke up to the sound of shooting and explosions. n42 A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother. n43 Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent. n44 She was then forced to flee as the soldiers fired at her feet. Her house was set on fire. n45

n42 T. 246.
n43 T. 249 and 251.
n44 T. 249-250.
n45 T. 253-255.

56. Witness D also testified to the outbreak of the armed conflict on 16 April 1993. n46 He was an HVO soldier who was arrested and held by the ABiH for about 10 days. n47 Subsequently, he was arrested and [*332] held by the Jokers for a month. n48 On his release, he continued serving as an active HVO soldier until he was wounded in the leg after six weeks. n49

n46 T. 321.
n47 T. 323-324.
n48 T. 325-326 and T. 353.
n49 T. 353.

57. Mr. Sulejman Kavazovic gave evidence that he was forced to dig trenches on the front-line between the HVO and the Territorial Defence at "the river, at the [pilja locality," and on another occasion at Kratine. n50 He testified that the conflict continued into May 1993 and that he served as an officer in the ABiH until he was wounded on 25 May 1993. Mr. Kavazovic received notification of the cessation of hostilities in January 1995. n51

n50 T. 517-519; Prosecution Exhibit P4.
n51 T. 523.

B. The Defence Case

58. The Defence has not conceded that a state of armed conflict existed at the relevant time, but called no evidence to counter the submissions of the Prosecution. In his closing remarks, Defence counsel submitted that the Prosecution evidence did not demonstrate that there was an armed conflict in terms of front-lines and military objectives, but only that there was an attack by the HVO on civilians. n52

n52 Defence Closing Statement, T. 674.

C. Factual Findings

59. It was not disputed that the test to be applied in determining the existence of an armed conflict is that set out by the Appeals Chamber of the International Tribunal in the Tadic Jurisdiction Decision, which states:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. n53

Applying that test, the Trial Chamber finds, on the clear evidence in this case, that at the material time, being mid- May 1993, a state of armed conflict existed between the HVO and the ABiH.

n53 Case No. IT-94-1-AR72, para. 70.

60. Considering the above finding, the Trial Chamber must now determine whether a nexus exists between the alleged criminal conduct of the accused and the armed conflict.

IV. THE LINK BETWEEN THE ARMED CONFLICT AND THE ALLEGED FACTS

A. The Prosecution Case

61. The Prosecution submitted that the accused participated in the armed conflict as a local commander of the Jokers. n54 It is in this capacity that he is alleged to have interrogated Witness A, a civilian, about her fighting-age sons and relations between Moslems and HVO personnel. n55

n54 Prosecution's Closing Statement, T. 646.
n55 Prosecution's Closing Rebuttal Statement, T. 708.

62. Several Prosecution witnesses identified the accused as a commander of the Jokers: Dr. Muhamed Mujezinovic, n56 Witness D, n57 Witness A, n58 and Mr. Sulejman Kavazovic. n59 Witness B also testified that during the attack on Ahmici, the accused was wearing a Jokers patch on his sleeve. n60

n56 T. 144-145 and T. 234-234.
n57 T. 372.
n58 T. 402.
n59 T. 529.
n60 T. 253.

63. Witness A testified that during her interrogation, she was accused of co-operating with HVO soldiers, in particular Witness D, with whom she was confronted by the accused. He asked her if she knew a man called Petrovic or another man from Busovaca n61 and accused her of having a code-name 'Brasno'. n62 The accused also demanded to know whether her children were in the army and he threatened personally to kill them, n63 Witness D testified that he was beaten and interrogated by [*333] members of the Jokers, including the accused, about his arrest by the ABiH and whether he had told them anything about the Jokers. n64

n61 T. 403.
n62 T. 406.
n63 T. 406-409.
n64 T. 326-328.

B. The Defence Case

64. Although the Defence did not contest that the accused was a member of the Jokers, its case is that he was not present during the sexual assaults on Witness A, and that he did not interrogate her. n65 Moreover, the Defence argues that there was no armed conflict to which the accused could be linked.

n65 T. 689, T. 691 and T. 720.

C. Factual Findings

65. The Trial Chamber accepts the evidence of Witness A about the nature of her interrogation by the accused. She was a civilian in the hands of the Jokers being questioned by the accused, who was a commander of that unit. He was an active combatant and participated in expelling Moslems from their homes. He also participated in arrests such as those of Witnesses D and E. The Trial Chamber holds that these circumstances are sufficient to link the alleged offences committed by the accused to the armed conflict.

V. THE EVENTS AT THE BUNGALOW AND THE HOLIDAY COTTAGE IN NADIOCI

A. Introduction

66. The Prosecution case against the accused turns on the evidence of Witness A, and to a lesser extent, Witness D. Both witnesses have testified as to what happened to them in mid-May 1993, at the Bungalow and the Holiday Cottage, in Nadioci, Central Bosnia. The precise dates involved are a matter of dispute between the parties. The Trial Chamber has been assured that these two vital witnesses have had no contact with each other or knowledge of the whereabouts of the other since then.

67. In response, the case of the Defence is that Witness A is mistaken. Due to the traumatic events that she endured and lapse of time, her memory regarding the events at issue is flawed. Suggestions are alleged to have been made to her during vulnerable stages of her physical and psychological recovery, therefore rendering her memory unreliable. This, it is argued, is demonstrated by inconsistencies in the statements, which she gave in 1993, 1995, 1997 and before the Trial Chamber in oral testimony. The Defence further contends that Witness A's testimony is directly contradicted by that of Witness D, thereby making it unreliable. Witness E was called to challenge certain assertions made by Witness D. The evidence of expert witness Dr. Loftus, who did not examine any of the witnesses, but testified in these proceedings, was submitted to demonstrate the weakness of memory, in particular where shock is involved.

68. The Defence does not deny that the accused was in the Holiday Cottage. There has been no denial that Witness A did in fact suffer the atrocities she claims were committed against her; the defence is simply that Witness A's recollection of the events is inaccurate and that the accused was not present when she was being assaulted.

69. Before examining the evidence pertaining to the events in question, it is necessary for the Trial Chamber to establish the factual background and circumstances which led to Witness A and Witness D being together at the Holiday Cottage in May 1993.

[*334] **B. Background and Circumstances**

1. Witness A

70. The following testimony of Witness A was undisputed. In May 1993, she was a married woman of Bosnian Moslem origin.

71. Fighting between the HVO and the ABiH broke out in Vitez on 16 April 1993 and, through a series of events, Witness A came to be separated from her husband. She spoke of how, in spite of public warnings not to help Moslems, the man she later came to know as Witness D transferred her two sons to a safer building when she and others were taken to the headquarters of the HVO. At a later stage, she and some friends of the family arranged to have her sons sent to Travnik. Witness A, upon cross-examination, denied that her children were in the AbiH, n66 and that her husband had any involvement in the military. n67

n66 T. 432.
n67 T. 432.

72. Witness A testified how she came to live in the family apartment in Vitez with one Vlatko Males, a childhood friend of her children; he was of Croatian origin and had a military affiliation to the HVO. Having promised to protect the mother of his friends in their absence, he moved into the apartment with Witness A. On a day in May, which she said was the 15 May 1993, n68 several soldiers from an elite unit of the HVO came to her apartment. They were dressed in black uniforms, which had the characteristic insignia of the Jokers, known to be a special task unit of the HVO with a "terrifying" reputation. n69 Witness A was not molested at this time, but was ordered to go with them. In her testimony, she recalled that it was approximately 10.30 in the morning. n70 She recounted being taken in a sports car to the Bungalow, which had been turned into the headquarters of the Jokers in 1991.

n68 T. 438 and T. 461.
n69 T. 441.
n70 T. 442.

2. Witness D

73. Witness D was a member of the HVO, and much of his testimony was undisputed. Following the outbreak of hostilities in Vitez, he was assigned guard duties around the area of the HVO Headquarters, which included several residential buildings. One of these buildings housed the apartment of Witness A. As one of the guards of the apartment block, Witness D, on several occasions during the four to five days that he was stationed there, transferred the children of Witness A to a safer building and back again. n71 On or around 8 May 1993, he was captured by the ABiH, and detained for several days, along with two other individuals, n72 one of whom was Witness E. During this time, he was interrogated about the HVO in the Vitez region; his videotaped interrogation was shown to the Trial Chamber as Defence Exhibit D9.

n71 T. 323 and T. 451.
n72 T. 358.

74. Defence Exhibit D10, a document issued by the Joint Committee for the Release of Detainees, dated 16 May 1993, demonstrates that Witness D was released in a prisoner-of-war exchange on 16 May 1993. He was then interrogated by the HVO in Busovaca and eventually released. n73 His evidence that, upon release, he walked back home was

challenged by the testimony of Witness E, who testified that he and Witness D were given a lift back by car. n74 Witness D claims that the accused, a soldier identified hereafter as 'Accused B' and another person picked him up by car as he was walking back home. n75 He was told that they had been looking for him and he was then driven to the Bungalow in Nadioci.

n73 T. 368; Defence Exhibit D8, p. 2.
n74 T. 554.
n75 T. 325; Defence Exhibit D8, p. 3.

75. At the Bungalow, he told the Trial Chamber, he was held in detention and interrogated. The Defence did not challenge this witness's assertion that the accused questioned him about the circumstances of his arrest by the ABiH and what he had revealed to them, and that the accused also [*335] hit the witness. In the course of his detention at the Bungalow, Witness D was subjected to serious physical assaults by Accused B, for what he estimates to be three days, before his encounter with Witness A. The Defence also did not challenge Witness D's allegation that the accused was present for parts of the serious assaults on him. n76 Witness E saw this witness on what appears to have been his first day at the Bungalow, before he showed visible signs of physical assault. n77 Although Witness D does not mention seeing Witness E at the Bungalow at any time, the latter confirmed that he later witnessed some of the severe physical attacks which Accused B inflicted upon Witness D. Both witnesses spoke of a style of beating, which involved hitting the toes and the top of the foot close to the anklebone with a baton. n78 Witness E also testified that he saw Accused B hit Witness D on the head and elsewhere on his body. n79 He also corroborates Witness D's testimony that the accused was present for some of the beatings Witness D suffered. n80

n76 Caveat as above.
n77 T. 558-559.
n78 T. 329-330, T. 561 and T. 585; Defence Exhibit D8, p. 4.
n79 T. 560.
n80 T. 560.

C. Events in the Large Room

76. It is uncontested that on arriving at the Bungalow, Witness A was led away along a path to the Holiday Cottage, which appeared to form part of the Bungalow complex. She recalls having seen a large number of armed soldiers, dressed in the characteristic Jokers uniform, around the Bungalow, which was known to be their headquarters. Witness A was taken to a large room in the Holiday Cottage, which appears to have been the living quarters of the soldiers. She was told to sit and eat a piece of bread with pate, to give her "strength". n81 She was surrounded by soldiers dressed in Jokers uniforms who spoke in expectant tones about the arrival of the 'Boss'. There were about forty of them in the room.

n81 T. 399.

77. Witness A then heard someone say, "Furundzija has arrived", n82 and a young man entered the room holding some papers. n83 Witness A drew the conclusion that this man was the 'Boss' who had been expected by the soldiers, and that his name was Furundzija. n84

n82 T. 399.
n83 T. 401.
n84 T. 401-402 and T. 456; Defence Exhibit D13, p. 6; Prosecution Exhibit P3, p. 23.

78. The man whom Witness A identified as Furundzija, the 'Boss', she described as being a "rather thin young man, rather strong jaw or teeth. Height, well, medium for a man, a metre 75, one metre 80. I cannot tell you exactly"; he had "chestnut to black hair", which was "cut short and combed up". n85 Like the other soldiers, he was wearing a black Jokers uniform, but with the sleeves rolled up. n86 In her 1995 statement, she described him as "tall, maybe the height of . . . who tells me she is about 172 centimetres tall. He was thin, small featured and had short blond hair." n87 In cross-examination, the witness denied having told Prosecution investigators that this man had blond hair. She reiterated that the man definitely had dark brown hair and was around 175 to 180 centimetres tall. n88 When questioned by the

Presiding Judge, the witness was able to identify the accused in court. Since the events in question, she had only seen him momentarily on a BBC television newscast after he had been arrested by SFOR troops. She recalled thinking that he looked as if he had put on weight. n89

n85 T. 403.
n86 T. 403.
n87 Defence Exhibit D13, p. 6.
n88 T. 446.
n89 T. 437.

79. The Trial Chamber notes that the Medical Report of the accused's examination on arrival at the United Nations Detention Unit, admitted as Defence Exhibit D16, specifies his height as 1.83 metres and his weight as 82 kilograms. There are no notes of any distinguishing features. Defence counsel drew attention to these inconsistencies in the description of the accused, which, it submitted, demonstrated that the accused had not been present as alleged.

80. Witness A recalled that in the large room, the accused read the allegations against her and started to question her about her alleged co-operation with the ABiH n90 and about an individual named Petrovic. n91 Defence Counsel pointed out that this was inconsistent with her 1995 witness statement in which she stated that the soldiers asked her about Petrovic. The answers she gave the accused were [*336] apparently unsatisfactory and she was suddenly grabbed by the hair from behind and a knife was held to her throat. A man said, "If you don't know them, do you know me?". n92 This man, Accused B, forced her to undress and to remove her glasses. n93 Witness A, under cross-examination, was adamant that Furundzija was in the room before Accused B entered. n94

n90 T. 403.
n91 T. 401-402; Prosecution Exhibit P3, pp. 24-25.
n92 T. 403; Defence Exhibit D13, p. 6; Prosecution Exhibit P3, p. 23.
n93 T. 403 and T. 405; Defence Exhibit D13, p. 6.
n94 T. 454-456.

81. The witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused. This evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecution. n95 At no stage of the proceedings did the Prosecution seek to modify the Amended Indictment to charge the accused with participation in these assaults. Further to an oral motion by the Defence on 12 June 1998, the Trial Chamber issued a Decision confirming that it would only consider as relevant Witness A's evidence in so far as it relates to paragraphs 25 and 26 as pleaded in the Indictment against the accused. Further clarification was sought by the Prosecution on 15 June 1998 and this was provided by the Trial Chamber orally and in writing on 15 June 1998. Therefore, the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment.

n95 Confidential Prosecution's Reply to Trial Chamber's Order, 1 May 1998.

82. The accused continued to interrogate Witness A, who was forced to remain naked in front of approximately 40 soldiers. Accused B drew a knife over the body and thigh of Witness A, threatening, inter alia, to cut out her private parts if she did not co-operate. n96 As this was happening, it is alleged that the accused continued to interrogate her about her children, her alleged visits to the Moslem part of Vitez and why certain Croats had helped her when she was Moslem. n97 The witness testified that the accused also issued threats against her children. n98 She spoke of a direct relationship between his dissatisfaction with her answers and the assaults inflicted upon her by Accused B. n99 She stated: "it was one at the same time the interrogation and the ill-treatment and the abuse". n100

n96 T. 406; Defence Exhibit D13, p. 6.
n97 T. 406-407; Prosecution Exhibit P3, p. 25; Defence Exhibit D13, p. 6.
n98 T. 408-409.
n99 T. 416.
n100 T. 455.

83. At one stage during the interrogation, Witness A testified that the accused became annoyed with her responses and left the large room, threatening to force her to confess by confronting her with another person who later turned out to be Witness D. n101 The Defence has not disputed that the accused left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B, accompanied by questioning. After being subjected to multiple rapes, sexual assaults and physical abuse by Accused B, she was given a small blanket and taken to another room, the 'pantry', still in a state of nudity.

n101 T. 409-410.

D. Events in the Pantry

84. While Witness A was being taken to the pantry, Witness D was being brought out from the Bungalow for a confrontation with her. Witness D said that Accused B took him out and the accused met them downstairs in the Bungalow. n102 Witness A testified that the accused, another soldier described as Dugi and Accused B, took her out of the large room and that Accused B was with her throughout. n103

n102 T. 343; Defence Exhibit D8, p. 5.
n103 T. 410-411; Defence Exhibit 13, p. 7.

85. The Defence has pointed to inconsistencies in the order in which the two victims entered the room as an indication that Witness A's memory is unreliable. Her testimony to the Trial Chamber on the order of entry is ambiguous n104 but in 1997, she clearly stated that Witness D was already in the room when she entered. n105 On the other hand, her 1995 Witness Statement is also clear: she entered the room first, and then Witness D entered. n106 Witness D says he entered the room and saw a woman he recognised as Witness A, naked but partially covered by a small blanket, leaning against the wall. n107 She was in tears and sobbing. n108 He also recalls that as he entered the room, the accused was there. n109 [*337] Witness A, on her part, recognised Witness D, and described her shock at seeing him: he had a swollen head, bruises on his face, was trembling and appeared to be in a grave condition. n110 The Trial Chamber recalls Witness E's testimony that Witness D was hit on the head and was badly beaten by Accused B in the Bungalow.

n104 T. 411.
n105 Prosecution Exhibit P3, p. 26.
n106 Defence Exhibit D13. P. 7.
n107 T. 345; Defence Exhibit D8, p. 5.
n108 T. 346.
n109 Defence Exhibit D8, p. 6.
n110 T. 413; Defence Exhibit D13, p. 7; Prosecution Exhibit P3, p. 26.

86. Witness A testified that the accused interrogated both of them. n111 They were accused of working for the AbiH. n112 Both witnesses then described how Witness D was beaten by Accused B. Witness A described how Accused B hit Witness D on the toes of the feet. n113 This was consistent with the description given by Witness E and Witness D of the style of beatings inflicted by Accused B on Witness D in the Bungalow. n114 Witness A said that the accused was in the doorway. n115 According to Witness D, the door was kept open and there was an audience of Jokers, both inside the room and outside. n116 He recalls that the accused was with the soldiers outside the room; he believed that they could see what was going on in the pantry. n117

n111 T. 412; Defence Exhibit D13, p. 7.
n112 Defence Exhibit D13, p. 7.
n113 T. 413; Defence Exhibit D13, p. 7.
n114 T. 347, T. 561 and T. 585; Defence Exhibit D8, p. 4.
n115 T. 414.
n116 T. 348; Defence Exhibit D8, pp. 5-6.
n117 T. 348.

87. The attacks then moved on to Witness A: Accused B had warned Dugi, another soldier, not to hit her as he had "other methods" for women, n118 methods which he then put to use. Accused B hit Witness A n119 and forced her to

perform oral sex on him. He raped her vaginally and anally, and made her lick his penis clean. n120 Witness D was forced to watch these assaults and he testified that the accused was one of the soldiers outside the room. n121 It appears to the Trial Chamber that the accused would have had to be in the vicinity of the door in order for Witness D to have seen him amidst the group of soldiers. Witness A categorically stated, in response to cross-examination, that the accused was present in the room: "Yes, he was in the room. He watched me and Witness D and Accused B. He was inside the room . . . and we were all together inside" n122 and said that "Furundzija was the person who interrogated and confronted me". n123 In Prosecution Exhibit P3, she stated that the accused was there all the time, "because he was the one who was confronting me with Witness D". n124 In 1995, she stated that the accused "was in the pantry questioning us as we were being beaten. He was there as Accused B forced me to have oral and vaginal sex with him. He did nothing to stop the beatings or the rapes". n125 Witness D testified that when he was taken out of the pantry, he saw the accused outside the doorway. n126

n118 T. 413; Prosecution Exhibit P3, p. 26; Defence Exhibit D13, p. 7.
n119 Defence Exhibit D13, p. 7; Defence Exhibit 8, p. 6.
n120 T. 415 and T. 350; Defence Exhibit D13, p. 6; Defence Exhibit D8, p. 6.
n121 T. 351; Defence Exhibit D8, p. 6.
n122 T. 415.
n123 T. 480.
n124 Prosecution Exhibit P3, p. 27.
n125 Defence Exhibit D13, p. 7.
n126 T. 352 ("He remained there [in the Holiday Cottage]"); Defence Exhibit D8, p. 6.

88. Witness A continued to be sexually assaulted by Accused B until she collapsed in a state of exhaustion. This is demonstrated by the testimony of Witness A, and also by the evidence of Witness D, who having been returned to the Bungalow, heard a woman screaming from the direction of the Holiday Cottage and the name of Furundzija being called out. Later, a man whom Witness A recognised as Dragan Botic eventually took her upstairs to another room in the cottage.

89. The further abuses visited upon Witness A, who remained in the custody of the Jokers for several weeks, are not the subject matter of the charges against the accused. Witness A continued to be detained until she was released in a prisoner exchange on 15 August 1993. Whilst in captivity, she was repeatedly raped, sexually assaulted and subjected to other cruel, inhuman and degrading treatment. As a result, she experienced severe physical and mental suffering.

E. The Re-opening of the Proceedings

1. Background and Reasons for Re-Opening the Proceedings

90. On 29 June 1998, after the proceedings and closing submissions had been concluded, the Prosecution disclosed for the first time to the Defence a document entitled "Certificate of Psychological Treatment" from Medica, a Womens' Therapy Center in Zenica, dated 11 July 1995. n127 This document [*338] related to Witness A and stated that she had contacted Medica on 24 December 1993 in connection with the psychological trauma she had been suffering since she was abused in the Bungalow. Defence Exhibit D37 stated that she had been receiving treatment in the counselling center and that the symptoms of Post-Traumatic Stress Disorder, hereafter "PTSD", had been relieved. The Prosecution also disclosed a statement dated 16 September 1995 from an unidentified witness who stated that she had first seen Witness A on 24 December 1993 at Medica and last saw the witness on 11 July 1995. n128

n127 Exhibit D37.
n128 Exhibit D38.

91. Thereupon the Defence filed a motion requesting the Trial Chamber to strike out the testimony of Witness A because the late disclosure of the said documents prejudiced the Defence and that such prejudice permeated the strategy of the whole Defence case. Alternatively, it was requested that in the event of a conviction, a new trial be ordered. The Prosecution responded, after which the Trial Chamber heard oral submissions by both parties.

92. In the Decision of 16 July 1998 the Trial Chamber ruled that the interests of justice required a re-opening of the proceedings as the only available means to remedy the prejudice suffered by the Defence. The Prosecution disclosed the

Medica documents to the Defence only after the close of the trial. These documents referred to medical and psychological treatment that Witness A was alleged to have received at Medica. In the circumstances of this case, the late-disclosed material was considered to be relevant to the issue of credibility of Witness A's testimony. The prejudice suffered directly stemmed from the fact that the Defence was unable to fully cross-examine relevant Prosecution witnesses and to call evidence to deal with the issues raised by the Medica documents. This right is encapsulated in Article 21(4)(e) of the Statute, which reads: "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: . . .; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .." In the event, the Trial Chamber ordered the re-opening of the proceedings. It permitted the recalling of Prosecution witnesses for cross-examination, but solely on any "medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993". n129 The Trial Chamber also permitted the Defence to call evidence on these issues and the Prosecution to call evidence in rebuttal.

n129 Decision, 16 July 1998.

93. The Trial Chamber further considered the rights of the accused and Witness A. In the circumstances of the case, the Trial Chamber was of the view that the protection of Witness A could only be allowed to affect the public nature of the trial, not its fairness. This view is supported by Article 20(4) of the Statute. The Statutory provisions of Articles 20(1), 21(2) and in particular the guarantees that an accused is entitled to according to Article 21(4), mandate the Trial Chamber to ensure that the accused receives a fair trial. These Articles read as follows: Article 20(4) provides that "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."; Article 20(1) reads that "the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."; and Article 21(2) reads that "in the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute". In addition, Article 21(3) of the Statute, which reads, "the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute", upholds the presumption of innocence of the accused. The Trial Chamber therefore has to allow the accused to explore every possible defence within the provisions of the Statute. Cognisant of its duty to search for the truth and applying the 'interests of justice' test inherent in its powers, the Trial Chamber decided to re-open the proceedings to allow the Defence to remedy the prejudice suffered.

[*339] 94. On 14 September 1998, in response to a subpoena duces tecum, Medica produced a report, Defence Exhibit D24, on the treatment of Witness A. The report states that on the basis of supportive and therapeutic work with the patient and information on what had occurred, it was possible to conclude that the patient was exhibiting symptoms of PTSD. An attached report compiled by a psychologist dated 24 December 1993 states that Witness A could not sleep without therapy and was afraid to fall asleep, thought of herself as unimportant, had an uncontrolled recollection of events and allowed herself to cry, and suppressed thoughts of the rapes. On 11 July 1995 she is recorded as occasionally coming to talk, taking a tranquilliser called Apaurin, and suffering from insomnia and weeping fits.

95. The case re-opened on 9 November 1998 and the Trial Chamber heard evidence for four days until 12 November 1998. Witness A and Dr. Mujezinovic were recalled for cross-examination, each side called two expert witnesses and both sides made submissions. What follows is a summary of the evidence relating to the central issue, namely whether the reliability of the evidence of Witness A has or may have been affected by any psychological disorder from which she may have suffered as a result of her ordeal. It is thus necessary to consider whether she was suffering from PTSD, and, if so, whether it has or may have affected her memory.

2. Summary of the Relevant Evidence

96. Dr. Mujezinovic said that he saw Witness A in the autumn of 1993. She was frightened and said that she wanted to kill herself; she could not sleep, had nightmares and thought people were accusing her and staring. He referred her to Dr. Racic-Sabic, an associate of Medica who worked in the neuro-psychiatric department in Zenica. The latter subsequently told him that Witness A would need a long period of psychiatric treatment as she was seriously traumatised.

97. Witness A gave a different account. She agreed that she had met Dr. Mujezinovic in 1993 and had a conversation. Although she was physically exhausted and had difficulty sleeping, she did not seek psychiatric help. She was not referred to Dr. Racic-Sabic and had no contact with that doctor. Medica had approached her and she had not asked for psychological assistance. She did not agree with the Medica Report and the diagnosis of PTSD. However, she had taken tranquillisers. She maintained that she accurately remembered the events which form the subject of this case.

98. Explanations for the discrepancies between the evidence of Dr. Mujezinovic and Witness A are to be found in the evidence of two experts. The Defence called Dr. Charles Morgan, Associate Professor of Psychiatry at Yale University School of Medicine and Associate Director of the PTSD Program at the National Centre for PTSD. He said that Witness A's denials that she had PTSD or treatment, were consistent with findings in studies of PTSD, for example, Dr. Carol North found in her study that subjects deny having symptoms of PTSD. n130

n130 T. 996-997.

99. Dr. Craig Rath, an experienced clinical and forensic psychologist from California, called by the Prosecution, said that the discrepancy is to be explained because while Medica believed that Witness A was starting psychotherapy, she herself did not see it in that light. This is because a typical approach in psychiatric treatment is to ask broad questions. The witness was demonstrating symptoms into which she had little insight. Medica approached her in a general manner in order to ventilate her feelings. Witness A then felt a little better and left what Medica saw as the therapy situation but without having built a therapeutic alliance with a therapist, although her "ventilation" had been therapeutic. Dr. Rath said that this would account for the discrepancy in the evidence. Medica viewed her as being treated, but there is no evidence that typical therapeutic techniques were ever applied and there is an issue [*340] whether she engaged in psychotherapy. n131 The difference in the accounts between the witness and Medica can be explained in these terms; the witness felt as if she had an informal talk with them whereas according to Medica this was part of her treatment.

n131 T. 1252-1254.

100. The Trial Chamber accepts the evidence of Dr. Rath on this subject and finds that Witness A is mistaken in saying that she was not referred for treatment.

101. The Trial Chamber accepts the diagnosis that it is likely that Witness A had PTSD. This is based on the certificate from Medica and the evidence of Dr. Morgan, an expert in PTSD, who said that his reading of the documents suggested that Witness A was suffering from chronic PTSD. Dr. Daniel Brown, Assistant Clinical Professor in Psychology, Harvard Medical School, called by the Prosecution, agreed although pointing out that it is not clear whether Witness A had met all the criteria for PTSD. n132

n132 T. 1163.

102. The Defence case was that because Witness A was suffering from PTSD and may have been treated for it, Witness A's memory was likely to have been affected and contaminated. This case was based on the evidence of Dr. Morgan to the effect that high levels of stress hormones can damage the area of the brain called the hippocampus, responsible for memory. Studies showed that the hippocampus in people with PTSD had been damaged and people suffering from PTSD performed more poorly in memory tests than people without PTSD. Studies which the witness had conducted with people suffering from PTSD showed a greater inconsistency in their accounts than people without PTSD. n133 Dr. Morgan used charts to demonstrate what he viewed as the inconsistencies in Witness A's accounts. Dr. Morgan said when giving evidence in rejoinder that he would not consider a single course of information from the reported memory of one individual suffering from PTSD to be scientifically reliable and that he would want independent corroborating evidence. n134

n133 T. 976-980.

n134 T. 1312.

103. The Defence also called Dr. Jeffrey Younggren, an experienced clinical and forensic psychologist from California and a Fellow of the American Psychological Association who has treated many PTSD victims. He said that his reading

indicated that the trauma can have an effect on memory: the more trauma, the worse the memory. He referred to a report entitled "Medica's Psycho Team", n135 which stated that Medica had no knowledge about trauma and how to deal with it and lacked experience and theoretical knowledge. The witness said that this state of affairs could lead to contamination of memory, that group therapy can then fill in the blanks and lead to false beliefs. If Witness A participated in "dream and imagined journeys", n136 it could contribute to false beliefs. n137 The witness also said that he was concerned about the mixed mission of Medica in saying that "their goal is to deal with war criminals". n138 This goal may be incompatible with the recovery and treatment of trauma patients. n139

n135 Exhibit D22, p. 2.

n136 Exhibit D22, p. 3.

n137 T. 886-892.

n138 Report on the Medica Women's Therapy Centre, Exhibit D25, p. 5.

n139 T. 894-895.

104. For the Prosecution, Dr. Brown said that there was a link between PTSD and inconsistency but it did not mean that the trauma caused inconsistency. The evidence about accuracy in recollection of normal, meaningful, personal events shows that the more meaningful the experience, the greater the accuracy of retention. It also shows that inconsistency does not necessarily mean inaccuracy. n140 Dr. Brown said that it was not known if Witness A had hippocampal damage. n141 Dr. Rath pointed out that there was no evidence that Witness A had engaged in group or "dream" psychotherapy or that a therapist had contaminated her memory.

n140 T. 1124, T. 1128 and T. 1136.

n141 T. 1161-1163.

105. The Prosecution argued in its closing remarks that any arguments that Witness A's credibility was diminished due to therapeutic interference with her memory or because of biological damage to her brain were based on pure speculation. PTSD does not render a person's memory of traumatic events unworthy of belief. In fact, the expert evidence indicated that intense experiences such as the events in this case are often remembered accurately despite some inconsistencies. The actions of the accused [*341] as interrogator and "boss" were core to this experience and the evidence of Witness D corroborated this core. The Prosecution concluded by stating it had proved the guilt of the accused beyond reasonable doubt.

106. The Defence argued in its closing remarks that as part of the standard of proof beyond reasonable doubt, doubts in this case should be resolved in favour of the accused. According to the Defence, the diagnosis of PTSD presents an explanation for the inconsistencies in Witness A's various statements and further discrepancies between her evidence and that of other witnesses and documentary evidence. In conclusion the Defence argued that these inconsistencies should not be dismissed but that they indicated a failure on the part of the Prosecution to meet the burden of proof in this case.

3. The Amicus Curiae Briefs

107. The Trial Chamber granted the applications seeking leave to file two amicus curiae briefs. Timely assistance in this manner is generally appreciated. Unfortunately, both the briefs dealt at great length with issues pertaining to the re-opening of the instant proceedings. By the time the two briefs were received, the re-opening of the proceedings had already been decided having commenced on 9 November 1998. Nevertheless, from the discussion on the re-opening proceedings above it should be clear that it was not the fact that Witness A received any medical and psychological counselling that automatically led the Trial Chamber to re-open the proceedings. Rather, the proceedings had to be re-opened in light of the late disclosure of the Medica material and the Trial Chamber's duty to uphold the fairness and presumption of innocence, as discussed above.

4. Findings

108. Having seen and heard all the witnesses and considered the evidence, the Trial Chamber has come to the following conclusions: the Trial Chamber finds that Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had. Indeed the Trial Chamber accepts the evidence of Dr. Rath that such treatment that she may have had was of a purely preliminary nature. The Trial Chamber also considered that the aim in therapy is not fact-finding.

109. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.

F. Inconsistencies in the Testimony of Witness A

110. Following the findings above, the Trial Chamber has to examine the inconsistencies in the testimony of Witness A in order to determine whether they are sufficient to render the material aspects of the evidence of Witness A unreliable. In doing so the Trial Chamber recalls the testimony of Dr. Morgan to the effect that tests carried out to determine the consistency and accuracy of answers given by subjects in memory studies have no bearing on the truthfulness of a witness in court proceedings in that there is no model in the world that can directly measure what anyone knows in their mind. Further, Dr. Morgan added that, "I know of no way of measuring what people actually remember." n142 Much of the Defence challenge to the reliability of Witness A centred around statements allegedly made by her to sources not associated with the International Tribunal.

n142 T. 1042.

[*342] 111. The witness denied that Defence Exhibit D11b, a hand-written statement, was in her handwriting or had been signed by her. Therefore, this exhibit and the typed versions, n143 which appear as statements dated 11 September 1996 from the State Commission for Gathering Facts on War Crimes at the Territory of the Republic of Bosnia and Herzegovina, are unreliable.

n143 Defence Exhibits D11 and D11a (English translation).

112. Witness A also denies having given evidence in legal proceedings brought against Dario Kordic and others. She recalls having a conversation about her experiences, but denies having given a formal statement in the course of legal proceedings. The document filed as Defence Exhibit D12, Witness Interview on 21 December 1993 by the Investigating Judge of the Zenica High Court in the Criminal Case of Dario Kordic et al, has relevant identifications blacked out, including that of the signature of the witness. Witness A did not recognise this document. In the circumstances, this exhibit and its English translation, Defence Exhibit D12a, cannot be relied upon. As a consequence, challenges to the reliability of the testimony of Witness A which have been made on the basis of these documents are not accepted by the Trial Chamber.

113. The Trial Chamber finds that, despite her inconsistencies on the finer details which the Defence has validly pointed out, Witness A is a reliable witness. The evidence of expert witness Dr. Loftus, and cross-examination of Witness A, have not cast doubts on the reliability of her testimony. There is no evidence to substantiate the allegation made in the Defence closing statement that persons such as Enes Surkovic made suggestions on the sequence of events and identities of those involved in abusing Witness A and that these people influenced her recollection of events. The Trial Chamber is of the view that survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses. The Trial Chamber therefore attaches no particular significance to the inconsistencies in the order in which Witnesses A and D say they entered the pantry.

114. The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also significant to note that she has been consistent

throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furundzija, the Boss. The inconsistencies in her identification testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has sufficiently identified Witness A.

115. With respect to inconsistencies as to dates, the Trial Chamber observes that the dates referred to in oral testimony were put to Witness A by Defence Counsel; she herself admitted to being poor with dates and did not volunteer the information on the exact dates of the assaults. The Trial Chamber is more concerned with the events that occurred rather than the exact date on which they happened.

116. Witness A dealt with cross-examination in an honest and confident way and countered challenges to her memory of events by indicating that she was testifying to the best of her recollection, that the evidence she gave was the way she, as the person who endured these events, saw them happen. She told the Trial Chamber that "in those moments, one does not analyse too much", n144 an observation confirmed by the views of expert witness Dr. Loftus. n145 The witness's manner in court was convincing and although her testimony, in accordance with Rule 96 of the Rules n146, requires no corroboration, the [*343] Trial Chamber notes that the evidence of Witness D does confirm the evidence of Witness A in this regard. The Trial Chamber also notes that cross-examination of Witness D did not touch upon his detention at the Bungalow or the Holiday Cottage. Witness E, a witness for the Defence, testified that he found Witness D at the Bungalow and saw him being beaten by Accused B and that the accused was present during some of the assaults. When Witness E left the Bungalow, Witness D stayed behind, being eventually confronted with Witness A.

n144 T. 440.

n145 T. 593-628.

n146 Rule 96 partly reads: "In cases of sexual assault (i) no corroboration of the victim's testimony shall be required [. . .]."

G. The Evidence of Witness D and Witness E

117. Witnesses A and D described in detail the treatment they received at the hands of the accused and Accused B in a convincing manner. The style of beatings described by Witness D in the Bungalow was consistent with that described by Witness E who, although aged sixteen at the material time, appeared confident of his recollection. Witness D, as a member of the HVO who was suspected by the accused and Accused B of having betrayed them to the ABiH, knew the Jokers well. Notwithstanding his detention and punishment at their hands, he returned to active duty with the HVO upon his release. Both Witness D and Witness E clearly described the roles played by the accused and Accused B at the Bungalow. There was nothing material to cast doubt on their testimony.

118. With respect to the dates involved, Witness D consistently said that he could not remember exact dates. n147 He readily accepted the date shown on Defence Exhibit D10 as being the date of his release by the ABiH and identified his signature on the exhibit. He appeared not to have known Witness E beforehand as he was not sure about the name of "this person" n148 although he recalled having been released together with a "younger man" and another "older man".

n147 T. 323.

n148 T. 359.

119. The Trial Chamber attaches no particular significance to the question whether Witness D walked home alone, or whether he was driven back together with Witness E after their release on 16 May 1993. It is sufficient that Witness D was arrested and taken to the Bungalow earlier than Witness E.

H. Factual Findings

120. Having considered the evidence, the Trial Chamber is satisfied beyond reasonable doubt that the following findings may be made.

1. The Arrest

121. On or about 16 May 1993, Witness D was arrested and taken to the Bungalow by the accused and Accused B. He was interrogated and assaulted by both of them. Accused B in particular, beat him with his fists and on the feet and toes with a baton, in the presence of Witness E, and most of the time in the presence of the accused who was coming and going.

122. On or about 18 or 19 May 1993, Witness A was arrested and taken from her apartment in Vitez by several members of an elite unit of soldiers attached to the HVO and known as the Jokers. She was driven by car to the Bungalow, the headquarters of the Jokers. Soldiers and several commanders of different units were based at the Bungalow, among whom were the accused, Accused B, Vlado Santic and others. n149

n149 T. 527-529; Defence Exhibit D14.

123. On arrival at the Bungalow, Witness A was taken to a nearby house, the Holiday Cottage, which formed part of the Bungalow complex. She entered a room described as the large room, which was where the Jokers lodged. She was told to sit down and was offered bread and pate, to eat. Around her, [*344] the soldiers, dressed in Jokers uniforms, awaited the arrival of the man referred to as 'the Boss', who was going to deal with her. Witness A then heard someone announce the arrival of 'Furundzija', and the man she has identified to the satisfaction of the Trial Chamber as being Anto Furundzija, the accused, entered the room holding some papers in his hands.

2. In the Large Room

124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.

125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.

126. Witness A was subjected to severe physical and mental suffering and public humiliation.

3. In the Pantry

127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.

128. Accused B beat Witness D and repeatedly raped Witness A. The accused was present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.

129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.

130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

VI. THE LAW

A. Article 3 of the Statute (Violations of the Laws or Customs of War)

131. Article 3 of the Statute of the International Tribunal provides as follows:

> [*345] The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

132. As interpreted by the Appeals Chamber in the Tadic Jurisdiction Decision, n150 Article 3 has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.

n150 Case No. IT-94-1-AR72, paras. 86-94.

133. It follows that the list of offences contained in Article 3 is merely illustrative; according to the interpretation propounded by the Appeals Chamber, and as is clear from the text of Article 3, this provision also covers serious violations of international rules of humanitarian law not included in that list. In short, more than the other substantive provisions of the Statute, Article 3 constitutes an 'umbrella rule'. While the other provisions envisage classes of offences they indicate in terms, Article 3 makes an open-ended reference to all international rules of humanitarian law: pursuant to Article 3 serious violations of any international rule of humanitarian law may be regarded as crimes falling under this provision of the Statute, if the requisite conditions are met.

B. Torture in International Law

1. International Humanitarian Law

134. Torture in times of armed conflict is specifically prohibited by international treaty law, in particular by the Geneva Conventions of 1949 n151 and the two Additional Protocols of 1977. n152

n151 See common Art. 3; Arts. 12 and 50 of Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949; Arts. 12 and 51 of Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 Aug. 1949; Arts. 13, 14 and 130 of Geneva Convention III Relative to the Treatment of Prisoners of War, 12 Aug. 1949; Arts. 27, 32 and 147 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, hereafter "Geneva Convention IV".

n152 Art. 75 of Geneva Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Victims of International Armed Conflicts (Protocol I), 8 June 1977, hereafter "Additional Protocol I"; and Art. 4 of Geneva Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

135. Under the Statute of the International Tribunal, as interpreted by the Appeals Chamber in the Tadic Jurisdiction Decision, n153 these treaty provisions may be applied as such by the International Tribunal if it is proved that at the relevant time all the parties to the conflict were bound by them. In casu, Bosnia and Herzegovina ratified the Geneva Conventions of 1949 and both Additional Protocols of 1977 on 31 December 1992. Accordingly, at least common article 3 of the Geneva Conventions of 1949 and article 4 of Additional Protocol II, both of which explicitly prohibit torture, were applicable as minimum fundamental guarantees of treaty law in the territory of Bosnia and Herzegovina at the time relevant to the Indictment. In addition, in 1992, the parties to the conflict in Bosnia and Herzegovina undertook to observe the most important provisions of the Geneva Conventions, including those prohibiting torture. n154 Thus undoubtedly the provisions concerning torture applied qua treaty law in the territory of Bosnia and Herzegovina as between the parties to the conflict.

n153 Case No. IT-94-1-AR72, para. 143.

n154 On 22 May 1992, at the invitation of the International Committee of the Red Cross, hereafter "ICRC", the parties to the conflict in Bosnia and Herzegovina signed an Agreement. The parties undertook to apply common Art. 3 of the Geneva Conventions, and "to bring into force" a number of other provisions of the Geneva Conventions including Art. 27, as well as various provisions of Additional Protocol I including Art. 77. This Agreement was signed by the representatives of the President of the Republic, Mr. Izetbegovic, the President of the Serbian Democratic Party, Mr. Karadzic and the President of the Croatian Democratic Community, Mr Brkic. Another Agreement was signed by the same parties on 23 May 1992.

136. The Trial Chamber also notes that torture was prohibited as a war crime under article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia, hereafter "SFRY", and that the same [*346] violation has been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. n155

n155 Tadic Jurisdiction Decision, para 135; and Prosecutor v. Zejnil Delalic et al., Judgment, Case No. IT-96-21-T, 16 Nov. 1998, para. 1212, hereafter "Delalic".

137. The Trial Chamber does not need to determine whether the Geneva Conventions and the Additional Protocols passed into customary law in their entirety, as was recently held by the Constitutional Court of Colombia, n156 or whether, as seems more plausible, only the most important provisions of these treaties have acquired the status of general international law. In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallised from the Lieber Code n157 and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, n158 read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention. n159 Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, hereafter "London Agreement", but it was one of the acts expressly classified as a crime against humanity under article II(1)(c) of Allied Control Council Law No. 10, n160 hereafter "Control Council Law No. 10". As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms.

n156 See [Case name unknown], Judgement, C-574/92, unpublished, Section V, B2c, 28 Oct. 1992, and; Judgement, C-225/95, unpublished, Section VD, 18 May 1995.

n157 "Francis Lieber, Instructions for the Government of Armies of the United States (1863)", reprinted in Schindler and Toman (eds.), The Laws of Armed Conflicts (1988), p. 10.

n158 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 Oct. 1907, hereafter "Hague Convention IV", and the Regulations attached to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.

n159 Preamble to Hague Convention IV. The so-called 'Martens clause' reads: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection

and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience".

n160 Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, Journal Officiel du Commandement en Chef Francais en Allemagne, No. 12 of 11 Jan. 1946.

138. That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the Nicaragua case it held that common article 3 of the 1949 Geneva Conventions, which inter alia prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts. n161

n161 See Judgement, Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. U.S.A.), (Merits), 1986 I.C.J. Reports 14, 27 June 1986, pp. 113-114, para. 218.

139. It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and -- if the requisite conditions are met -- qua treaty law, the content of the prohibition being the same.

140. The treaty and customary rules referred to above impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts. As the International Military Tribunal at Nuremberg put it in general terms: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". n162 Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and [*347] article 6(2) of the Statute of the International Criminal Tribunal for Rwanda, hereafter "ICTR" are indisputably declaratory of customary international law.

n162 See Trials of the Major War Criminals Before the International Military Tribunal, hereafter "IMT", Vol. I, p. 223.

141. It should be stressed that in international humanitarian law, depending upon the specific circumstances of each case, torture may be prosecuted as a category of such broad international crimes as serious violations of humanitarian law, grave breaches of the Geneva Conventions, crimes against humanity or genocide.

142. Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.

2. International Human Rights Law

143. The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace. n163 In addition, treaties as well as resolutions of international organisations set up mechanisms designed to ensure that the prohibition is implemented and to prevent resort to torture as much as possible. n164

n163 These provisions are contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; the United Nations Covenant on Civil and Political Rights of 1966, hereafter "ICCPR"; the Inter-American Convention on Human Rights of 1969; the African Charter on Human and Peoples' Rights of 1981; the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, hereafter "Torture Convention"; and the Inter-American Convention to Prevent and Punish Torture of 1985, hereafter "Inter-American Convention".

n164 Reference can be made to such mechanisms as the United Nations Special Rapporteur on Torture, hereafter "Special Rapporteur"; the European Committee against Torture, set up under the European Convention for the Prevention of Torture of 1987; and the United Nations Committee against Torture, set up under the Torture Convention.

144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or jus cogens. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. n165

n165 See Art. 3 of the Torture Convention; Art. 13(4) of the Inter-American Convention Human Rights Committee, General Comment on Art. 7, para. 9, Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI GEN 1 Rev. 1 at 30 (1994); Soering v. United Kingdom, Judgement of 7 July 1989, Eur. Ct. H.R., Series A, No. 161, para. 91, hereafter "Soering"; Cruz Varas and others v. Sweden, Judgement of 20 March 1991, Eur. Ct. H.R., Series A, No. 201, paras. 69-79; Chahal v. United Kingdom, Judgement of 5 Nov. 1996, Eur. Ct. H.R., Series A, No. 22.

145. These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders. n166 Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.

n166 Torture Convention, Art. 5.

146. The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.

3. Main Features of the Prohibition Against Torture in International Law

147. There exists today universal revulsion against torture: as a USA Court put it in Filartiga v. Pena-Irala, "the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind". n167 This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a [*348] particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

n167 Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980).

(a) The Prohibition Even Covers Potential Breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in Soering, n168 International law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

n168 The Court stated: "It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him, if implemented, be contrary to Article 3 [prohibiting torture and inhuman or degrading treatment] by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article." (para. 90).

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied. n169 By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

n169 See Mariposa Development Company and Others, Decision, U.S.-Panama General Claims Commission, 27 June 1933, U.N. Reports of International Arbitral Awards, Vol. VI, pp. 340-341; German Settlers in Upper Silesia, Advisory Opinion of 10 Sept. 1923, PCIJ, Series B, No. 6, pp. 19-20, 35-38; the arbitral award of 1922 in the Affaire de l'impot sur les benefices de guerre, in U.N. Reports of International Arbitral Awards, Vol. I, pp. 302-305.

(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.

[*349] 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. n170 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.

n170 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).

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, n171 and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. n172 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 obedience imposed by the individual State". n173

n171 Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969.

n172 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)).

n173 IMT, Vol. 1, p. 223.

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 [*350] 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". n174

n174 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.

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.

4. Torture Under Article 3 of the Statute

158. Torture is not specifically prohibited under Article 3 of the Statute. As noted in paragraph 133 of this Judgement, Article 3 constitutes an 'umbrella rule', which makes an open-ended reference to all international rules of humanitarian law. In its "Decision On The Defendant's Motion To Dismiss Counts 13 and 14 of The Indictment (Lack Of Subject Matter Jurisdiction)" issued on 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers torture and outrages upon personal dignity including rape, and that the Trial Chamber has jurisdiction over alleged violations of Article 3 of the Statute.

5. The Definition of Torture

159. International humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in article 1(1) of the 1984 Torture Convention whereby:

> 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 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.

160. This definition was regarded by Trial Chamber I of ICTR, in Prosecutor v. Jean-Paul Akayesu, hereafter "Akayesu", as sic et simpliciter applying to any rule of international law on torture, including the relevant provisions of the ICTR Statute. n175 However, attention should be drawn to the fact that article 1 of the Convention explicitly provides that the definition contained therein is "for the purposes of this Convention". It thus seems to limit the purport and contents of that definition to the Convention solely. An extra-conventional effect may however be produced to the extent that the definition at issue codifies, or contributes to developing or crystallising customary international law. Trial Chamber II of the International Tribunal has rightly noted in Delalic that indeed the definition of torture contained in the 1984 Torture Convention is broader than, and includes, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter-American Convention, and has hence concluded that that definition "thus reflects a consensus which the Trial Chamber considers to be representative of customary international law". n176 This Trial Chamber shares such conclusion, although on legal grounds that it shall briefly set out. First of all, there is no gainsaying that the definition laid [*351] down in the Torture Convention, although deliberately limited to the Convention, must be regarded as authoritative, inter alia, because it spells out all the necessary elements implicit in international rules on the matter. Secondly, this definition to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975, hereafter "Torture Declaration". n177 It should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition. Thirdly, a substantially similar definition can be found in the Inter-American Convention. n178 Fourthly, the same definition has been applied by the United Nations Special Rapporteur and is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights n179 and the Human Rights Committee. n180

n175 Judgment, Case No. ICTR-96-4-T, 2 Sept. 1998, para. 593.

n176 Case No. IT-96-21-T, para. 459.

n177 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly resolution 3452 (XXX) of 9 Dec. 1975. Art. 1(2) describes torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

n178 Arts. 2 and 3.

n179 The European Court of Human Rights found that torture is deliberate inhuman treatment causing very serious and cruel suffering (Ireland v. United Kingdom, Eur. Ct. H.R., Series A, No. 25, para. 167). The level of pain and suffering was said to be the distinguishing factor between torture and cruel, inhuman or degrading treatment: "The Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering". In the Greek Case, the Commission held that torture has a purpose, such as the obtaining of information or confessions or the infliction of punishment and it is generally an aggravated form of inhuman treatment (Greek Case, 1969 Y.B. Eur. Conv. on H.R. 12, p. 186).

n180 The Human Rights Committee, in its General Comment on Art. 7 of the ICCPR, indicated that the distinction between prohibited forms of mistreatment depends on the kind, purpose and severity of the particular treatment. (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI GEN 1 Rev. 1 at 30 (1994)).

161. The broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.

162. The Trial Chamber considers however that while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that torture:

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
(ii) this act or omission must be intentional;
(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
(iv) it must be linked to an armed conflict;
(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from "outrages upon personal dignity". n181 The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture.

n181 See e.g. Art. 3 (1)(c) common to the Geneva Conventions, Art. 75 (2)(b) of Additional Protocol I and Art. 4 (2)(e) of Additional Protocol II.

163. As evidenced by international case law, the reports of the United Nations Human Rights Committee n182 and the United Nations Committee Against Torture, those of the Special Rapporteur, n183 and the public statements of the European Committee for the Prevention of Torture, n184 this vicious and ignominious practice can take on various forms. International case law, n185 and the reports of the United Nations Special Rapporteur n186 evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons [*352] associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture, as demonstrated by the finding of the European Court of Human Rights in Aydin n187 and the Inter-American Court of Human Rights in Meijia. n188

n182 Human Rights Committee, General Comment No. 20 on Art. 7 of the ICCPR, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI GEN 1 Rev. 3, at 31-33 (1997).

n183 The Special Rapporteur to examine questions relevant to torture was appointed by the Commission on Human Rights in its resolution 1985/33. In pursuance of this resolution, the Special Rapporteur submitted annual reports to the Commission, which are contained in documents E/CN. 4/Sub. 2/1985/6, E/CN. 4/1986/15, E/CN. 4/1987/13, E/CN. 4/1988/17 and Add. 1, E/CN. 4/1989/15, E/CN. 4/1990/17 and Add. 1, E/CN. 4/1991/17, E/CN. 4/1992/17 and Add. 1 and E/CN. 4/1993/26.

n184 See the Public Statement on Turkey adopted on 15 Dec. 1992 (CPT/inf (93)1) as well as the Public Statement adopted on 6 Dec. 1996 (CPT/Inf (96) 34).

n185 See e.g. Aksoy v. Turkey, Judgment of 18 Dec. 1996, Eur. Ct. H.R., Reports of Judgments and Decisions 1996-VI; Aydin v. Turkey, Judgment of 25 Sept. 1997, Eur. Ct. of H.R., Reports of Judgments and Decisions, 1997-VI, paras. 62-88, hereafter "Aydin"; Fernando and Raquel Mejia v. Peru (Decision of 1 March 1996), Report No. 5/96, case no 10.970, in Annual Report of the Inter-American Commission on Human Rights 1995 OEA/Ser.L/V/II.91, pp. 182-188, hereafter "Meijia".

n186 See e.g. Report of 1986 (Special Rapporteur P. Kooijmans, E/CN.4/1986/15, pp. 29-30) and the Report of 1995 (Special Rapporteur N. Rodley, E/CN.4/1995/34, pp. 8-10).

n187 Paras. 83-84.

n188 At pp. 182-188.

164. Depending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture; this will be covered in the following section of the Judgement.

C. Rape and Other Serious Sexual Assaults in International Law

1. International Humanitarian Law

165. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949, n189 Additional Protocol I of 1977 n190 and Additional Protocol II of 1977. n191 Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties. n192

n189 Art. 27 of Geneva Convention IV.

n190 Art. 76(1).

n191 Art. 4(2)(e).

n192 See common Art. 3, which prohibits "outrages upon personal dignity, and in particular, humiliating and degrading treatment"; Art. 147 of Geneva Convention IV; Art. 85(4)(c) of Additional Protocol I; and Arts. 4(1) and 4(2)(a) of Additional Protocol II. In an aide-memoire of 3 Dec. 1992 and in its recommendations to the Conference on the Establishment of an International Criminal Court in Rome, July 1998, the ICRC has confirmed that the act of "wilfully causing great suffering or serious injury to body or health", categorised as a grave breach in each of the four Geneva Conventions, does include the crime of rape.

166. At least common article 3 to the Geneva Conventions of 1949, which implicitly refers to rape, and article 4 of Additional Protocol II, which explicitly mentions rape, apply qua treaty law in the case in hand because Bosnia and Herzegovina ratified the Geneva Conventions and both Additional Protocols on 31 December 1992. Furthermore, as stated in paragraph 135 above, on 22 May 1992, the parties to the conflict undertook to observe the most important provisions of the Geneva Conventions and to grant the protections afforded therein.

167. In addition, the Trial Chamber notes that rape and inhuman treatment were prohibited as war crimes by article 142 of the Penal Code of the SFRY and that Bosnia and Herzegovina, as a former Republic of that federal State, continues to apply an analogous provision.

168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code n193 and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the 'Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. n194 The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, n195 along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

n193 "Francis Lieber, Instructions for the Government of Armies of the United States (1863)", reprinted in Schindler and Toman (eds.), The Laws of Armed Conflicts (1988), p. 10.

n194 See Roeling and Ruter (eds.), The Tokyo Judgement: The International Military Tribunal for the Far East (1977), vol. I, p. 385.

n195 In this case, there was found to be command responsibility for rape, and this was punished as a war crime. In its decision of 7 Dec. 1945 the Commission held: "It is absurd [. . .] to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them". (Text reprinted in Friedman (ed.), The Law of War (1972), vol. II, p. 1597).

169. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

[*353] 2. International Human Rights Law

170. No international human rights instrument specifically prohibits rape or other serious sexual assaults. Nevertheless, these offences are implicitly prohibited by the provisions safeguarding physical integrity, which are contained in all of the relevant international treaties. n196 The right to physical integrity is a fundamental one, and is undeniably part of customary international law.

n196 Art. 7 of the ICCPR prohibits cruel, inhuman or degrading treatment, and complaints alleging State failure to prevent or punish rape and serious sexual assaults have been brought to the Human Rights Committee under this provision. In the case of Cyprus v. Turkey, 4 EHRR 482 (1982), the European Commission of Human Rights found that Turkey had violated its obligation to prevent and punish inhuman or degrading treatment under Art. 3 as a result of the rapes committed by Turkish troops against Cypriot women. In the Aydin case, the European Court found that rape of a detainee by an official of the State "must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence" (para. 83). Under the African Charter on Human and Peoples' Rights, rape and other serious sexual assaults are caught by Art. 4 as violations of the right to respect for the integrity of the person, and also under Art. 5 which prohibits all forms of cruel, inhuman and degrading treatment. The Inter-American Convention on Human Rights enshrines the right to humane treatment in Art. 5, under which "every person has the right to have his physical, mental and moral integrity respected" and "no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

171. In certain circumstances, however, rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture, as stated above in paragraph 163.

3. Rape Under the Statute

172. The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war n197 or an act of genocide, n198 if the requisite elements are met, and may be prosecuted accordingly.

n197 Art. 3 of the Statute.

n198 Art. 4 of the Statute.

173. The all-embracing nature of Article 3 of the Statute has already been discussed in paragraph 133 of this Judgment. In its "Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject-Matter Jurisdiction)" of 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers outrages upon personal dignity including rape.

4. The Definition of Rape

174. The Trial Chamber notes the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression". n199 This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis. n200

n199 Prosecution's Pre-trial Brief, p. 15.

n200 Ibid., p. 15.

175. No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both rape and "any form of indecent assault" on women in article 27 of Geneva Convention IV, article 76(1) of Additional Protocol I and article 4(2)(e) of Additional Protocol II. The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is, inter alia, confirmed by Article 5 of the International Tribunal's Statute, which explicitly provides for the prosecution of rape while it implicitly covers other less grave forms of serious sexual assault through Article 5(i) as "other inhuman acts". n201

n201 The parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. The expression at issue undoubtedly embraces such acts as serious sexual assaults short of rape proper (rape is specifically covered by Art. 27 of Geneva Convention IV and Art. 75 of Additional Protocol I, and mentioned in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993) S/25704, para. 48, hereafter "Report of the Secretary-General"), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights and covered by the provisions of humanitarian law just mentioned as well as the Report of the Secretary-General), or the enforced disappearance of persons (prohibited by the General Assembly resolution 47/133 of 18 Dec. 1992 and the Inter-American Convention on Human Rights of 1969).

176. Trial Chamber I of the ICTR has held in Akayesu that to formulate a definition of rape in international law one should start from the assumption that "the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts". n202 According to that Trial Chamber, in international law it is more useful to focus "on the conceptual framework of State sanctioned violence". n203 It then went on to state the following:

n202 Case No. ICTR-96-4-T, para. 597.

n203 Ibid.

[*354] Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. n204

This definition has been upheld by Trial Chamber II quater of the International Tribunal in Delalic. n205

n204 Ibid., paras. 597-598.

n205 Case No. IT-96-21-T, para. 479.

177. This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitgrundsatz, also referred to by the maxim "nullum crimen sine lege stricta"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

178. Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings", n206 account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

n206 Para. 5, Separate and Dissenting Opinion of Judge Cassese, Prosecutor v. Drazen Erdemovic, Judgment, Case No. IT-96-22-A, 7 Oct. 1997.

179. The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.

180. In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a woman, n207 others provide that rape can be committed against a victim of either sex. n208 The laws of several jurisdictions state that the actus reus of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ. n209 There are also jurisdictions which interpret the actus reus of rape broadly. n210 The provisions of civil law jurisdictions often use wording open for interpretation by the courts. n211 Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: n212 force is given a broad interpretation and includes rendering the victim helpless. n213 Some jurisdictions indicate that the force or intimidation can be directed at a third person. n214 Aggravating factors commonly include causing the death of the victim, the fact that there were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely.

n207 See Section 361 (2) of the Chilean Code; Art. 236 of the Chinese Penal Code (Revised) 1997; Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code; Art. 179 of the SFRY Penal Code; Section 132 of the Zambian Penal Code.

n208 See Art. 201 of the Austrian Penal Code (StGB); French Code Penal Arts. 222-23; Art. 519 of the Italian Penal Code (as of 1978); Art. 119 of the Argentinian Penal Code.

n209 See Section 375 of the Pakistani Penal Code 1995; Art. 375 of the Indian Penal Code; The Law of South Africa, W.A. Joubert 1996 at p. 257-8: "The actus reus of the crime consists in the penetration of the female by the male's sexual organ (R. v. M. 1961 2 SA 60 (O) 63). The slightest penetration is sufficient." (R. v. Curtis 1926 CPD 385 389); Section 117 of the Ugandan Penal Code: "there must be "carnal knowledge." This means sexual intercourse. Sexual intercourse in turn means penetration of the man's penis into the woman's vagina".

n210 For a broad definition of sexual intercourse, see the Criminal Code of New South Wales s. 61 H (1). See also the U.S. Proposal to the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (19 June 1998 A/CONF. 183/C. 1/L/10).

n211 See e.g. the Dutch Penal Code stating in Art. 242: "A person who by an act of violence or another act or by threat of violence or threat of another act compels a person to submit to acts comprising or including sexual penetration of the body is guilty of rape and liable to a term of imprisonment of not more than twelve years or a fine of the fifth category." See also Art. 201 of the Austrian Penal Code (StGB); French Code Penal Arts. 222-23.

n212 See e.g. in England and Wales the Sexual Offences Act 1956 to 1992.

n213 See Art. 180 of the Dutch Penal Code; Art. 180 of the SFRY Penal Code.

n214 The Penal Code of Bosnia and Herzegovina (1988) Ch. XI states that "whoever coerces a female person with whom he is not married to, into sexual intercourse by force or threat to endanger her life or body or that of someone close to her will be sentenced to between one to ten years in prison".

[*355] 181. It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.

182. A major discrepancy may, however, be discerned in the criminalisation of forced oral penetration: some States treat it as sexual assault, while it is categorised as rape in other States. Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.

183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'etre of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

184. Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of nullum crimen sine lege to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime. Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex -- and sentenced in accordance with the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules -- then he is not adversely affected by the categorisation of forced oral sex as rape rather than as sexual assault. His only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant. However, one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape.

185. Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
[*356] (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.

186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.

5. Individual Criminal Responsibility

187. It follows from Article 7(1) of the Statute that not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited.

188. There has been some variation in the Prosecution's allegations concerning responsibility for direct perpetration. In the "Prosecutor's Reply Re: Article 7(1) of the Statute of the International Tribunal" filed on 31 March 1998, the Prosecution claimed that it would not be trying the accused for committing rape as the direct perpetrator. n215 However, in the opening statement the following assertion was made: "We say that by conducting an interrogation under the circumstances described by Witness A, by transferring the victim to another room, by bringing in the other person for the confrontation, and remaining while further beating and sexual abuse occurred, marks (sic) the accused as a direct perpetrator committing the crimes of torture and outrages upon personal dignity, including rape". n216

n215 Prosecutor's Reply Re: Art. 7(1) of the Statute of the International Tribunal, 31 March 1998, p. 2: "The charges against the accused do not portray him as the actual perpetrator of the rape. The Prosecution will not be attempting to show, under Art. 7(1) that the accused "committed" the rape".

n216 Prosecution Opening Statement, T. 70.

189. The Trial Chamber finds that as the Prosecution has relied on Article 7(1) without specification and left the Trial Chamber the discretion to allocate criminal responsibility, it is empowered and obliged, if satisfied beyond reasonable doubt that the accused has committed the crimes alleged against him, to convict the accused under the appropriate head of criminal responsibility within the limits of the Amended Indictment.

D. Aiding and Abetting

1. Introduction

190. The accused is charged with torture and outrages upon personal dignity, including rape. For the purposes of the present case however, it is necessary to define "aiding and abetting" as used in Article 7(1) of the Statute.

191. Since no treaty law on the subject exists, the Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility. In particular, it must establish both whether the accused's alleged presence in the locations where Witness A was assaulted would be sufficient to constitute the actus reus of aiding and abetting, and also the relevant mens rea required to accompany this action for responsibility to ensue.

2. Actus Reus

192. With regard to the actus reus, the Trial Chamber must examine whether the assistance given by the aider and abettor need be tangible in nature or may consist only of encouragement or moral [*357] support. The Trial Chamber must also examine the proximity required between the assistance provided and the commission of the criminal act. In particular, it will have to consider whether the actions of the aider and abettor need to have a causal effect, so that

without his contribution the offence would not be committed, or whether the acts of the aider and abettor need simply facilitate the commission of the offence in some way.

(a) International Case Law

(i) Introduction

193. Little light is shed on the definition of aiding and abetting by the international instruments providing for major war trials: the London Agreement, n217 the Charter of the International Military Tribunal for the Far East, establishing the Tokyo Tribunal, n218 and Control Council Law No. 10. It therefore becomes necessary to examine the case law.

> n217 Secondary liability was provided for in proceedings at the IMT at Nuremberg in Art. 6 of the Charter annexed to the London Agreement: "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan". The IMT limited its consideration of liability in respect of the common plan or conspiracy to the charge of waging aggressive war and did not apply it with respect to the charges of war crimes and crimes against humanity. As such, the IMT Judgement provides little assistance on the issue of complicity.
>
> n218 Art. 5 of the Charter of the IMT for the Far East contained a provision identical to that of the Nuremberg Tribunal.

194. For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.

195. First of all, there are the cases stemming from US military commissions or, in territory occupied by US forces, by courts and tribunals set up by the military government. While the military commissions operated under different directives within each theatre of US military operations, each applied a provision identical to that of the London Agreement with relation to complicity. In occupied territories, the courts and tribunals operated under the terms of Control Council Law No. 10.

196. The Trial Chamber will also rely on case law from the British military courts for the trials of war criminals, whose jurisdiction was based on the Royal Warrant of 14 June 1945, n219 which provided that the rules of procedure to be applied were those of domestic military courts, unless otherwise specified. In fact, unless otherwise provided, n220 the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue. However, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration. The British cases deal with forms of complicity analogous to that alleged in the present case. The term used to describe those liable as accomplices (in killing) is that they were "concerned in the killing".

> n219 The text of the Royal Warrant of 14 June 1945 and the Regulations for the Trial of War Criminals appended thereto is reproduced in Telford Taylor, Final Report of the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council No. 10 (1949), p. 254 ff.
>
> n220 See in particular the Judge Advocate's summary of the law, Trial of Franz Schonfeld and Nine Others, Essen, 11-26 June 1946, Vol. XI, Law Reports, p. 69f, hereafter "Schonfeld".

197. Cases heard under Control Council Law No. 10, either by the German Supreme Court in the British Occupied Zone, or by German courts in the French Occupied Zone are also material to the Trial Chamber's analysis.

198. Finally, the International Tribunal has on a previous occasion examined the question of complicity under its Statute, namely in the Opinion and Judgement of 7 May 1997 in the case of Prosecutor v. Dusko Tadic, n221 hereafter "Tadic Judgement".

n221 Case No. IT-94-1-T, paras. 688-692.

[*358] (ii) Nature of Assistance

199. The Trial Chamber will first examine the nature of the assistance required to establish actus reus. The cases which follow indicate that in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime.

200. In the British case of Schonfeld, n222 four of the ten accused were found guilty of being "concerned in the killing of" three Allied airmen, who had been found hiding in the home of a member of the Dutch resistance. All four claimed that their purpose in visiting the scene had been the investigation and arrest of the Allied airmen. One admitted to shooting the three airmen but claimed it was in self-defence; he was found guilty and sentenced to death. The roles of the three others were less direct. One drove a car to the scene and was the first to enter the house. Another had obtained the original information, searched a different house for the airmen earlier and claimed to have stood guard at the back entrance to the house along with the fourth convicted person. All except one denied having fired any shots themselves.

n222 At p. 64.

201. The court did not make clear the grounds on which it found these three to have been "concerned in the killing". n223 However, the Advocate General, citing the position in English law, outlined the role of an accessory who is not present at the scene but procures, counsels, commands or abets another to commit the offence, and that of an aider and abettor, either of which could have formed the basis of the court's decision. In doing so he gave an example of how an individual may participate without giving tangible assistance:

> if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting. n224

n223 The prosecutor referred to Regulation 8 (ii) of the Royal Warrant concerning units or groups of men discussed above, and this may have been taken into consideration by the court. In his reference to English substantive law on complicity, the Advocate General included the doctrine of "common design", whereby if a group sets out to commit a crime, all are equally guilty of the act committed by one of them in the pursuance of that criminal goal whether or not they materially contribute to the execution of the crime.

n224 Schonfeld, p. 70. A similar passage is to be found in another British case, the Trial of Werner Rohde and Eight Others, British Military Court, Wuppertal, 29th May-1st June 1946, Vol. V, Law Reports, p. 56.

202. Again, in giving "additional confidence to his companions" the defendant facilitates the commission of the crime, and it is this which constitutes the actus reus of the offence.

203. In the British case of Rohde n225 six persons were found guilty of being "concerned in the killing" of four British women prisoners in German hands. The women were executed by lethal injection and their bodies disposed of in the prison camp crematorium. In defining the term "concerned in the killing", the Judge Advocate explained that actual presence at the crime scene was not necessary to be "concerned in the killing". He gave the example of a lookout, who would be "concerned in the killing" by providing a service to the commission of the crime in the knowledge that the crime was going to be committed. n226

n225 Ibid., p. 54.

n226 However, two defendants appear to have been convicted without proof of knowledge. See also the Almelo Trial, Trial of Otto Sandrock and Three Others, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24-26 Nov. 1945, Vol. I, Law Reports, p. 35, in which four German soldiers

> were charged with committing a war crime in that they participated in the execution of a British prisoner of war and a Dutch civilian. One ordered the execution and one fired the shots. The other two acted as lookouts, waiting near the car and preventing people from coming near while the shooting took place. All four were found guilty. See also the Stalag Luft III case (Trial of Max Wielen and 17 Others, British Military Court, Hamburg, 1 July-3 Sept. 1947, Vol. XI, Law Reports, p. 31). Two defendants, Denkmann and Struve, were convicted for having acted as drivers in the execution of British prisoners of war. The Judge Advocate, stating English law on the matter, said: "If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary" (pp. 43-44, p. 17 of the Official Transcript, Public Record Office, London).

204. In the case of one of the accused, assistance ex post facto was found to be sufficient for criminal responsibility. As this was not the position under English law, the inference is warranted that the court applied a different law to these international crimes. n227 The service provided by the cremator may be analogous to that of the lookout, in that the knowledge that the bodies will be disposed of, in the same way that the knowledge that they will be warned of impending discovery in the lookout scenario, reassures the killers and facilitates their commission of the crime in some significant way.

> n227 In English law, the law relating to accessories after the fact has generally been a separate statutory offence of "assisting an offender" rather than a form of aiding and abetting (see section 4(1) of the Criminal Law Act 1967).

205. Guidance can also be derived from the following cases, which were heard under the terms of Control Council Law No. 10. n228 In the Synagogue case, decided by the German Supreme Court in the [*359] British Occupied Zone, one of the accused was found guilty of a crime against humanity (the devastation of a synagogue) n229 although he had not physically taken part in it, nor planned or ordered it. His intermittent presence on the crime-scene, combined with his status as an "alter Kampfer" (long-time militant of the Nazi party) and his knowledge of the criminal enterprise, were deemed sufficient to convict him.

> n228 The judgements referred to in the following are to be found in Entscheidungen des Obersten Gerichtshofs fur die Britische Zone. Entscheidungen in Strafsachen, Vol. I (1949). Several contain the proposition that in judging crimes against humanity under Control Council Law No. 10, no recourse may be had to German law on aiding and abetting, although others do apply German principles.

> n229 Strafsenat. Urteil vom 10. August 1948 gegen K. und A. StS 18/48 (Entscheidungen, Vol. I, pp. 53 and 56).

206. The accused was convicted at first instance of a crime against humanity under the provision on co-perpetration of a crime ("Mittaterschaft") of the then German penal code (Art. 47 Strafgesetzbuch). The conviction was confirmed on appeal. The appellate decision noted that the accused was a militant Nazi. The court went on to find that he knew of the plan at least two hours before the commission of the crime.

207. It may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.

208. The Synagogue case may be contrasted with the Pig-cart parade case, also from the German Supreme Court in the British Occupied Zone. The accused, P had attended, as a spectator in civilian dress, a SA (Sturmabteilung) "parade" in which two political opponents of the NSDAP (Nationalsozialistische Deutsche Arbeiterpartei) were exposed to public humiliation. P had followed the "parade" without taking any active part. The court found that P,

> followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown . . . His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability. n230

P was found not guilty. He may have lacked the necessary mens rea. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the actus reus.

n230 Strafsenat. Urteil vom 10. August 1948 gegen L. u. a. StS 37/48 (Entscheidungen, Vol. I, pp. 229 and 234).

209. It appears from the Synagogue and Pig-cart parade cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in Akayesu. Jean-Paul Akayesu was the bourgmestre, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place: . . .". n231 Furthermore, it can be inferred from this finding that assistance need not be tangible. In addition, assistance need not constitute an indispensable element, that is, a conditio sine qua non for the acts of the principal.

n231 Case No. ICTR-96-4-T, para. 692, emphasis added.

210. Mention should also be made of several cases which enable us to distinguish aiding and abetting from the case of co-perpetration involving a group of persons pursuing a common design to commit crimes.

[*360] 211. The Dachau Concentration Camp case was held before a US Tribunal under Control Council Law No. 10. n232 All the accused held some position in the hierarchy running the Dachau concentration camp. While allegations of direct participation in instances of ill-treatment were made against certain accused, and allegations of command responsibility against others, the real basis of the charges was that all the accused had "acted in pursuance of a common design" to kill and mistreat prisoners, and hence to commit war crimes.

n232 The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others, General Military Government Court of the United States Zone, Germany, 15 Nov.-13 Dec. 1945, Vol. XVI, Law Reports, p. 5. The Prosecution did refer to principles of American criminal law on the subject of complicity (pp. 12-13).

212. The organised and official nature of the system by which war crimes were perpetrated in this case adds a specific element to the "complicity" of the accused. The report of the case by the United Nations War Crimes Commission isolates three elements necessary to establish guilt in each case. The first was the existence of a system to ill-treat the prisoners and commit the various crimes alleged; the second was the accused's knowledge of the nature of this system; and the third was that the accused "encouraged, aided and abetted or participated" in enforcing the system. Once the existence of the system had been established, a given accused was potentially liable for his participation in this system. The roles of the accused ranged from camp commanders to guards and prisoner functionaries and all were found guilty, with the difference in the levels of participation reflected in the sentences. It would seem that the holding of any role in the administration of the camps was sufficient to constitute encouraging, aiding and abetting or participating in the enforcement of the system.

213. The prosecution in the Dachau Concentration Camp case, did not base its case on the direct participation of the accused in the crime. Regardless of whether the accused themselves had beaten or murdered the concentration camp inmates, the assistance they afforded to those who did, or the system, formed the basis of their guilt. The level of assistance required was low: any participation in the enterprise was sufficient, although as the accused were all members of staff of the camps, their contribution to the commission of the crimes was tangible - the carrying out of their respective duties - so that none were convicted on the basis of having lent moral support or encouragement alone.

214. The same approach underlies the judgment of the German courts in the Auschwitz Concentration Camp n233 trial. In summarising with approval the findings of the court of first instance in the case of the accused Hocker, the German Supreme Court stated:

> The assize court found that the accused's deeds had been proved on the basis of the fact that the accused was adjutant to the camp commander, and that participation at the arrival of the detainees were part of the adjutant's duties, as well as on the basis of the testimony of the witnesses Wal. and Pa., who witnessed such participation. n234

n233 Massenvernichtungsverbrechen und NS-Gewaltverbrechen in Lagern; Kriegsverbrechen. KZ Auschwitz, 1941-1945, reported in Justiz und NS-Verbrechen, 1979, vol. XXI, pp. 361-887.

n234 Ibid., p. 858 (unofficial translation).

215. In the same case the court remarked how the accused Mulka, by means of his presence on the ramp at the moment of arrival of the detainees "psychologically strengthened the SS-men" n235 in charge of separating the Jews destined for labour from those destined for the gas chambers. However, account was taken of the accused's role as adjutant to the camp commander, of his administrative duties related to the preparation of the mass killings, and of the specific characteristics of concentration camp trials outlined above.

n235 Schutzstaffel der Nationalsozialistische Deutsche Arbeiterpartei, hereafter "SS"', p. 446 (unofficial translation).

216. This distinction between participation in a common criminal plan or enterprise, on the one hand, and aiding and abetting a crime, on the other, is also supported by the Rome Statute for an International Criminal Court, n236 hereafter "Rome Statute", adopted on 17 July 1998 by the Rome Diplomatic Conferences. Article 25 of the Rome Statute distinguishes between, on the one hand, a person who "contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose" where the contribution is intentional and done with the purpose of [*361] furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime", n237 from, on the other hand, a person who, "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission". n238 Thus, two separate categories of liability for criminal participation appear to have crystallised in international law -- co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.

n236 On the legal status of this Statute, see para. 227 below.

n237 Art. 25(3)(d).

n238 Art. 25(3)(c).

(iii) Effect of Assistance on the Act of the Principal

217. Back to aiding and abetting, in the Einsatzgruppen case, n239 heard by a US Military Tribunal sitting at Nuremberg, all of the accused except for one (Graf) were officers charged with war crimes and crimes against humanity pursuant to Control Council Law No. 10. The Tribunal held that the acts of the accomplices had to have a substantial effect on those of the principals to constitute the actus reus of the war crimes and crimes against humanity charged. This conclusion is illustrated by the cases of four of the accused: Klingelhoefer, Fendler, Ruehl and Graf. Klingelhoefer held a variety of positions, the least important of which was that of interpreter. The court said that even if this were his only function,

> it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive of his organisation he was aware that the people listed would be executed when found. n240

n239 Trial of Otto Ohlendorf and Others (Einsatzgruppen), in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. IV.

n240 Ibid. p. 569.

218. Fendler served in one of the Kommandos of the Einsatzgruppen for a period of seven months. The prosecution case against him was not that he himself conducted an execution but rather "that he was part of an organisation committed to an extermination programme". n241 The Court noted that:

> The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was "too summary". But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected. n242

Both of these defendants were found guilty.

n241 Ibid. p. 571.

n242 Ibid. p. 572.

219. The cases of Ruehl and Graf provide a contrast which helps delineate the actus reus of the offence. The Tribunal held that both had the requisite knowledge of the criminal activities of the organisations of which they were a part. Ruehl's position, however, was not such as to "control, prevent, or modify" those activities. His low rank failed to "place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation". n243 He was found not guilty.

n243 Ibid. p. 581.

220. Graf was a non-commissioned officer. The court held that:

> Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of the others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment. n244

n244 Ibid. p. 585.

221. It is clear, then, that knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient for complicity in this case and that the defendants' acts in carrying out their duties had to have a substantial effect on the commission of the offence for responsibility to [*362] ensue. This might be because their failure to protest made some difference to the course of events, or, in the case of Klingelhoefer, that his transmission of the lists of names led directly to the execution of the members of those lists.

222. In the British case of Zyklon B, n245 the three accused were charged with supplying poison gas used for the extermination of allied nationals interned in concentration camps, in the knowledge that the gas was to be so used. The owner and second-in-command of the firm were found guilty; Drosihn, the firm's first gassing technician, was acquitted. The Judge Advocate set out the issue of Drosihn's complicity as turning on,

> whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty. n246

n245 Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93.

n246 Ibid. p. 102.

223. This clearly requires that the act of the accomplice has at least a substantial effect on the principal act -- the use of the gas to murder internees at Auschwitz - in order to constitute the actus reus. The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, mens rea alone is insufficient to ground a criminal conviction.

224. In S. et al., n247 hereafter "Hechingen Deportation", heard by a German court in the French occupied zone, five accused were charged with complicity in the mass deportation of Jews in 1941 and 1942 as a crime against humanity under Control Council Law No. 10. n248 The accused, S, was the local administrative authority responsible for organising the execution of Gestapo orders. He had complied with a Gestapo decree concerning the deportations. The court of first instance found S guilty of aiding and abetting the Gestapo in its criminal activity. His objection that his conduct in no way contributed to the crimes, because others would have taken his place if he had refused to comply with the Gestapo decree, was dismissed. The court pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another. n249

n247 LG Hechingen, 28.6. 1947, Kls 23/47 and OLG Tubingen, 20.1.1948, Ss 54/47 (decision on appeal), reported in Justiz und NS-Verbrechen, case 022, vol. I, pp. 469 ff.

n248 Regarding the law applicable to complicity, the court of first instance held that Control Council Law No. 10 is not only authoritative, it is the exclusive legal basis for the punishment of the conduct defined as a crime by that law. The provisions of the first (general) part of the German Criminal Code are not immediately applicable to crimes falling under Control Council Law No. 10: whenever Control Council Law No. 10 is applied, the rules of the general part have either to be found in Control Council Law No. 10 (e.g. rules concerning aiding and abetting (Art. II 2(c)) and the rules concerning mitigating circumstances (Art II 3)), or, in the event there should not be any express rules in Control Council Law No. 10, they have to be supplemented from the object and purpose of the statute and taking into consideration generally recognised principles of criminal law (e.g. in relation to the so-called duress).

n249 Ibid., p. 484.

225. The Court of First Instance convicted also three other accused, Ho., K and B, female low-level government employees, who had been ordered to search Jewish women for valuables and jewellery before deportation n250 (their conviction was later quashed by the appeals court on the basis of different legal findings concerning the mens rea for aiding and abetting). n251

n250 "It is irrelevant that if a single accused or all of them had refused to co-operate, the search would have been carried out by the other accused or by somebody else." (Ibid., p. 490, unofficial translation).

n251 Ibid., p. 498.

226. Finally, in the Tadic Judgement, Trial Chamber II of the International Tribunal held that there was a basis in customary international law for holding an individual criminally responsible in respect of the various types of participation falling short of primary involvement, listed in Article 7(1) of the Statute. n252 The Trial Chamber examined a number of the post-Second World War trials and found that there was a requirement both that the conduct of the accused contribute to the commission of the illegal act, and that his participation directly and substantially effect the commission of the offence. When applying these criteria in the section on legal findings, the Trial Chamber held that the accused "intentionally assisted directly and substantially in the common purpose of the group" to commit the offence. n253

n252 Case No. IT-94-1-T, para. 669.

n253 Ibid., paras. 730 and 738.

[*363] (b) International Instruments

227. The two international instruments useful for these purposes are the 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission, and the Rome Statute. Neither instrument is legally binding internationally. The Draft Code was adopted in 1996 by the United Nations International Law Commission, a body consisting of outstanding experts in international law, including governmental legal advisers, elected by the United Nations General Assembly. The Draft Code was taken into account by the General Assembly: in its resolution 51 (160) of 30 January 1997 it expressed its "appreciation" for the completion of the Draft Code and among other things drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the Draft Code to their work. n254 In the light of the above the Trial Chamber considers that the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world. As for the Rome Statute, at present it is still a non-binding international treaty (it has not yet entered into force). It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. n255 In many areas the Statute may be regarded as indicative of the legal views, i.e. opinio juris of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.

n254 See operative para. 2 of the resolution.

n255 The significance of the Rome Statute has also been acknowledged by the Sixth Committee of the United Nations in a resolution entitled "Establishment of an international criminal court", dated 18 Nov. 1998 (A/C. 6/53/L. 9/Rev. 1), in which it "notes that a significant number of States have signed the Rome Statute"; "acknowledges the historic significance of the adoption of the Rome Statute", and; "calls upon all States to consider signing and ratifying the Rome Statute, and encourages efforts aimed at promoting awareness of the results of the Conference and of the provisions of the Rome Statute".

228. The Code of Crimes against the Peace and Security of Mankind deals with aiding and abetting in article 2(3)(d), which would impose criminal responsibility upon an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission". n256

n256 Report of the I.L.C., on the work of its forty-eighth session, G.A. Supp. No. 10 (A/51/10) 1996, p. 18.

229. In the absence of specification, it appears that assistance can be either physical or in the form of moral support. Encouragement given to the perpetrators may be punishable, even if the abettor did not take any tangible action, provided it "directly and substantially" assists in the commission of a crime. This proposition is also supported by a passage from the International Law Commission's Commentary concerning ex post facto assistance:

> The Commission concluded that complicity could include aiding, abetting or assisting ex post facto, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime. n257

n257 Ibid., p. 24.

230. This conclusion implies that action which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime. From this perspective, willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer of help in fact encouraged or facilitated the commission of the crime by the main perpetrator. n258

n258 See the Rohde case.

[*364] 231. The International Law Commission's Commentary also states that "participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way". n259 The word "facilitates" suggests that it is not necessary for the conduct of the aider and abettor to cause the commission of the crime; it need not be a conditio sine qua non of the crime. The "directly and substantially" requirement in article 2, and the word "significant" used in the International Law Commission Commentary, however, clearly exclude any marginal participation. Article 25(3), in particular paragraphs (c) and (d), of the Rome Statute deals with aiding and abetting:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> [. . .]
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> [. . .].

This wording is less restrictive than the Draft Code, which limits aiding and abetting to assistance which "facilitates in some significant way", or "directly and substantially" assists, the perpetrator. Article 25 of the Rome Statute, like the Draft Code, also clearly contemplates assistance in either physical form or in the form of moral support. Indeed, the word "abet" includes mere exhortation or encouragement.

n259 Report of the I.L.C., p. 24 (emphasis added).

(c) Conclusion

232. On the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle an audience being a necessary element of a spectacle -- the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals. This is supported by the provisions of the International Law Commission Draft Code. In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting.

233. On the effect of the assistance given to the principal, none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a conditio sine qua non for, those of the principal. The suggestion

made in the Einsatzgruppen and Zyklon B cases is that the relationship [*365] between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility, as demonstrated by the case of the defendant Ruehl in the Einsatzgruppen case. This interpretation is supported by the German cases cited.

234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.

3. Mens Rea

(a) International Case Law

236. With regard to mens rea, the Trial Chamber must determine whether it is necessary for the accomplice to share the mens rea of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute mens rea in aiding and abetting the crime. The case law indicates that the latter will suffice.

237. For example in the Einsatzgruppen case n260 knowledge, rather than intent, was held to be the requisite mental element.

> n260 This is reflected in passages quoted from the Einsatzgruppen case in relation to Klingelhoefer and Fendler, pp. 568-573.

238. The same position was taken in Zyklon B where the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.

239. Two of the not guilty verdicts in Schonfeld also provide an indication of the mens rea necessary to amount to being "concerned in the killing". Both concerned drivers who claimed to have followed instructions without knowing the purpose of the mission, and were therefore found not guilty. Despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.

240. In the Hechingen Deportation case, the court of first instance considered the mens rea required for aiding and abetting and concluded that this mental element encompassed both the knowledge of the crime being committed by the principals and the awareness of supporting, by aiding and abetting, the criminal conduct of the principals. n261 As mentioned above, the subsequent acquittal of the accused Ho., K., and B. on appeal was based on a different legal standard concerning the mens rea of those accused, requiring the aider and abettor to have acted out of the same cast of mind as the principal. n262

> n261 "As far as the mens rea is concerned, whether the accused's conduct is punishable or not depends on whether he intentionally acted as an aider and abettor. The aider and abettor's intent (Gehilfenvorsatz) requires in the first place, that he knew the conduct he was supporting by his participation; he must have been aware that the action requested of him by the Gestapo served a persecution on racial grounds. As a result of the trial proceedings and of the evidence, the court finds that the accused had this awareness (Bewu [beta]tsein), on the basis of the wording and of the contents of the Gestapo decrees he received, although he has credibly asserted that he did not reckon with the possibility that the deported Jews would be killed [. . .]. The abettor's intent secondly requires that he knew that by means of his participation he supported the principal criminal conduct. On the basis of the evidence produced in trial this court finds that the accused had this awareness. The accused's reasoning that, if he had refused to execute the measures requested by the Gestapo himself, somebody else

would have implemented those measures, does not exclude this awareness; on the contrary, it proves its existence [. . .]. The abettor's intent, however, does not require that the accused himself acted for racist motives or, generally, out of an inhuman cast of mind. Nor is it necessary that the accused was aware of the illegality (Rechtswidrigkeit) of his conduct, as CCL No. 10 [Control Council Law. No. 10] provides for the punishment of persecution on racial grounds whether they violate the domestic law of the country on whose territory it is committed or not [. . .]". (pp. 484-485, unofficial translation).

n262 The relevant part of the judgment reads as follows: "Under Article II, 2(a) to (c), Control Council Law No. 10 treats all thinkable forms of perpetration and of complicity as equal. It does not distinguish between being a perpetrator and being an accomplice [as opposed to German law]. The aider and abettor of a crime against humanity 'is deemed to have committed a crime against humanity without regard to the capacity in which he acted'. As a consequence of this complete equality between perpetrator and aider and abettor, the aider and abettor has to have acted out of the same cast of mind as the principal, i.e. out of an inhuman cast of mind, or, in the case of persecutions, motivated by a political, racist or religious ideology. The court of first instance correctly assumed that the statute [Control Council Law No. 10] had to be construed without recourse to exterior sources." (Ibid., p. 498, unofficial translation, emphasis added).

241. Finally, in the Tadic Judgment it was found that the test of mens rea which emerged from the post-Second World War trials is "awareness of the act of participation coupled with a conscious decision to participate". n263 The requirement adopted by the Trial Chamber was that the mental element for aiding and abetting consists of a knowing participation in the commission of an offence. n264

n263 Case No. IT-94-1-T, para. 674.

n264 Ibid., para. 692.

[*366] (b) International Instruments

242. Article 2(3)(d) of the International Law Commission's Draft Code on Crimes and Offences Against Mankind, provides that the mens rea required is that the assistance be given "knowingly". The Commentary adds:

Thus, an individual who provides some assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under the present sub-paragraph. n265

n265 Report of the I.L.C., p. 24.

243. Therefore, it is not necessary for an aider and abettor to meet all the requirements of mens rea for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.

244. Reference should also be made to article 30 of the Rome Statute, which provides that, "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". n266

n266 Emphasis added. Art. 30, reads:
"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

(c) Conclusions

245. The above analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.

246. Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

247. Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of mens rea in customary international law. This is the standard adopted by this Tribunal in the Tadic Judgement, although sometimes somewhat misleadingly expressed as "intent". n267

n267 Case No. IT-94-1-T, paras. 675-677.

248. One exception to this requirement of knowledge is the Rohde case, which appears to require no mens rea at all. However, this case is based on English law and procedure under the Royal Warrant. Furthermore, it is out of line with the other British cases, which do require knowledge. At the other end of the scale is the appeal court decision in the Hechingen Deportation case, which required that the accomplice share the mens rea of the perpetrator. However, the high standard proposed by this case is not reflected in the other cases.

[*367] 249. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.

E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also partakes of the purpose behind torture (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and

support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than [*368] others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable. n268

> n268 See also the Eichmann case: "[. . .] even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer", p. 323, and Akayesu, Case No. ICTR-96-4-T, para. 541. See also the Pinochet Judgment of the House of Lords, 25 Nov. 1998, per Lord Steyn: "It is apparently conceded that if [General Pinochet] personally tortured victims the position would be different. This distinction flies in the face of an elementary principle of law, shared by all civilised legal systems, that there is no distinction between the man who strikes, and a man who orders another to strike".

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, inter alia, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim quis per alium facit per se ipsum facere videtur (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described supra, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.

VII. LEGAL FINDINGS

A. Relevant Criteria

1. Applicability of Article 3 of the Statute

258. It is well established that for international humanitarian law to apply there must first be an armed conflict. The Trial Chamber has found that there was an armed conflict between the HVO and the ABiH [*369] at the material time. For the purposes of Article 3 of the Statute, the nature of this armed conflict is irrelevant. The Appeals Chamber in the Tadic Jurisdiction Decision held that it does not matter whether the serious violation occurred in the context of an international or internal armed conflict, provided the following requirements are met:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. n269

n269 Case No. IT-94-1-AR72, para. 94.

259. The Trial Chamber has found that the International Tribunal has jurisdiction over torture and outrages upon personal dignity including rape under Article 3 of its Statute. There is therefore temporal, territorial and subject matter jurisdiction and the Trial Chamber is properly seised of this matter.

2. The Elements of Torture

260. These have been identified by the Trial Chamber in paragraph 162 of this Judgment.

3. The Elements of Rape

261. These have been identified by the Trial Chamber in paragraph 185 of this Judgment.

B. Status of Those Involved

262. The accused was a commander of the Jokers, a special unit of the HVO. He was an active combatant and had engaged in hostilities against the Moslem community in the Lasva Valley area, including the attack on the village of Ahmici, where he personally participated in expelling Moslems from their homes in furtherance of the armed conflict already described. Accused B was a commander in one of the units of the HVO. Witness A was a Moslem civilian and non-combatant who was arrested and detained by the Jokers. Witness D, a Croatian, was a combatant with the HVO but was arrested by the Jokers and detained on suspicion of having betrayed them to the ABiH who had captured him for a period of time. Witness E, a Croatian, was a non-combatant who had been arrested by the ABiH after straying into their territory and was detained by the Jokers for questioning upon his release.

C. The Amended Indictment

263. The Amended Indictment against the accused charges him with two counts, Count 13 and Count 14. The citation of events in the paragraphs in the Amended Indictment culminate in paragraphs 25 and 26 respectively supporting the charges in the counts. They read as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, [REDACTED] [*370] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, n270 a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.
>
> n270 Referred to in this Judgment as Witness D.
>
> 1. Count 13: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR
>
> (torture) recognised by Article 3 of the Statute

264. Count 13 is based on what happened in the large room and in the pantry of the Holiday Cottage. The Trial Chamber is satisfied that the accused was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.

265. The intention of the accused, as well as Accused B, was to obtain information which they believed would benefit the HVO. They therefore questioned Witness A about the activities of members of Witness A's family and certain other named individuals, her relationship with certain HVO soldiers and details of her alleged involvement with the ABiH.

266. The Trial Chamber has found that the accused was also present in the pantry where the second phase of the interrogation of Witness A occurred. Witness D was taken there for a confrontation with Witness A to make her confess as 'promised' by the accused in the large room. Both Witness A and Witness D were interrogated by the accused and hit on the feet with a baton by Accused B in the course of this questioning. Accused B again assaulted Witness A who was still naked, before an audience of soldiers. He raped her by the mouth, vagina and anus and forced her to lick his penis clean. The accused continued to interrogate Witness A in the same manner as he had done earlier in the large room. As the interrogation intensified, so did the sexual assaults and the rape.

267. The intention of the accused, as detailed above, was to obtain information from Witness A by causing her severe physical and mental suffering. In relation to Witness D, the accused intended to extract information about his alleged betrayal of the HVO to the ABiH and his assistance to Witness A and her children.

(i) The Trial Chamber finds that in relation to Witness A, the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co-perpetrator by virtue of his interrogation of her as an integral part of the torture. The Trial Chamber finds that the accused tortured Witness A.

(ii) In relation to Witness D, paragraph 26 of the Amended Indictment alleges that having been badly beaten in the Bungalow, he was then taken with Witness A to another room. While the accused [*371] continued to interrogate Witness A and Witness D, Accused B beat them both on the feet with a baton. Witness D was then forced to watch Accused B's sexual attacks on Witness A, which have already been described. The physical attacks upon Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering.

268. On the evidence on record, the Trial Chamber finds that the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co-perpetrator of torture, he is individually responsible for torture. The Trial Chamber is satisfied that the Prosecution has proved the case against the accused beyond reasonable doubt.

269. The Trial Chamber therefore finds the accused, as a co-perpetrator, guilty of a Violation of the Laws or Customs of War (torture) on Count 13.

2. Count 14: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR

(outrages upon personal dignity including rape)

recognised by Article 3 of the Statute

270. The rapes committed by Accused B on Witness A were not disputed in any of the details described by the victim and Witness D. What was contested was the presence of the accused, and, to some extent, whether he played any part in their commission. The Trial Chamber has found that Witness A was subjected to rape and serious sexual assaults by Accused B in the course of the interrogation by the accused.

271. The elements of rape, as discussed in paragraph 185 of this Judgment, were met when Accused B penetrated Witness A's mouth, vagina and anus with his penis. Consent was not raised by the Defence, and in any case, Witness A was in captivity. Further, it is the position of the Trial Chamber that any form of captivity vitiates consent. Under Rule 96 of the Rules, it is clear that no corroboration of the evidence of Witness A is required. The Trial Chamber notes that in any case, the evidence of Witness D does confirm the evidence of Witness A in this regard.

272. The Trial Chamber is satisfied that all the elements of rape were met. Again, the rapes and sexual assaults were committed publicly; members of the Jokers were watching and milling around the open door of the pantry. They laughed at what was going on. The Trial Chamber finds that Witness A suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B in what amounted to outrages upon her personal dignity and sexual integrity.

273. The position of the accused has already been discussed. He did not personally rape Witness A, nor can he be considered, under the circumstances of this case, to be a co-perpetrator. The accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.

274. On the evidence on record, the Trial Chamber is satisfied that the Prosecution has proved its case against the accused beyond reasonable doubt. In accordance with Article 7(1) and the findings of the Trial Chamber that the actus reus of aiding and abetting consists of assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime and that the mens rea required is the knowledge that these acts assist the commission of the offence, the Trial Chamber holds that the presence of the accused and his continued interrogation aided and abetted the crimes [*372] committed by Accused B. He is individually responsible for outrages upon personal dignity including rape, a violation of the laws or customs of war under Article 3 of the Statute.

275. The Trial Chamber therefore finds the accused, for aiding and abetting, guilty of a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) on Count 14.

VIII. SENTENCING

A. Introduction

276. The accused, Anto Furundzija, has been found guilty on Count 13, a Violation of the Laws or Customs of War (torture), and Count 14, a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) both under Article 3 of the Statute. It is pursuant to these findings of guilt that the Trial Chamber will proceed to sentence him.

B. Sentencing Guidelines

277. In determining the appropriate sentence for the accused in this case, the Tribunal is guided by its Statute and Rules. The Statute provides as follows:

> Article 23
>
> Judgment
>
> 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
>
> [. . .]
>
> Article 24
>
> Penalties
>
> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> [. . .]

278. The Trial Chamber has also duly considered Rules 100 n271 and 101 of the Rules. n272

> n271 Rule 100 reads:
> "(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
> (B) The sentence shall be pronounced in a judgment in public and in the presence of the convicted person, subject to sub-Rule 102(B)."
>
> n272 Rule 101 reads:
> "(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2 of the Statute, as well as such factors as:
> (i) any aggravating circumstances;
> (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
> (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
> (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
> (C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
> (E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

C. Submissions of the Parties

279. Both parties made submissions regarding sentence in open session on 22 June 1998. The Prosecution submitted, in relation to the tortures, that "this goes to the heavier end of gravity for an offence of torture." n273 With regard to the outrages upon personal dignity, the Prosecution called the instances of rape in this case "probably the most severe form of outrage upon personal dignity, and the physical, personal, and sexual integrity of the victim." n274 Other aggravating circumstances mentioned by the Prosecution include the presence of other soldiers during the perpetration of the alleged crimes. According to the Prosecution, there are no mitigating circumstances in this case and it recommends [*373] that the accused be sentenced according to the sentencing practice of the former Yugoslavia, without giving any specific recommendation for the length of sentence.

n273 Closing Statement, T. 641.

n274 Closing Statement, T. 641.

280. The Defence called Dragan Strbac, an employee of the Sector for Civilian Defence in the Federal Ministry of Defence in Sarajevo, who had known the accused as a neighbour in Dubravica since birth. n275 He testified that the accused is married and has a daughter of approximately three years old. n276 He was living with his mother and family in Vitez before his arrest. n277 To his knowledge, the accused was never previously arrested for a crime. Although he was a member of the Territorial Defence and later the HVO, n278 he was never a nationalist. n279 Instead, the witness described him as "well-liked by his peers, communicative, vivacious", and "honest and fair." n280 Apart from this evidence, the Defence made no further submissions on sentencing.

n275 T. 630.

n276 T. 632.

n277 T. 634.

n278 T. 636.

n279 T. 634.

n280 T. 635.

D. Aggravating Circumstances

281. As for the first count, the accused's role in the tortures was that of fellow perpetrator. His function was to interrogate Witness A in the large room and later in the pantry where he also interrogated Witness D, while both were being tortured by Accused B. In such situations, the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering. Torture is one of the most serious offences known to international criminal law and any sentence imposed must take this into account.

282. In relation to the second count, the Trial Chamber bears in mind that the accused did not himself perpetrate acts of rape, but aided and abetted in the rapes and serious sexual assaults inflicted on Witness A. The circumstances of these attacks were particularly horrifying. A woman was brought into detention, kept naked and helpless before her interrogators and treated with the utmost cruelty and barbarity. The accused, far from preventing these crimes, played a prominent part in their commission.

283. In conclusion, the Trial Chamber holds that this case presents particularly vicious instances of torture and rape. The Trial Chamber further considers the accused's active role as a commander of the Jokers to be an aggravating factor. Finally, the Trial Chamber considers the fact that Witness A was a civilian detainee and at the complete mercy of her captors to be a further aggravating circumstance.

E. Mitigating Circumstances

284. The Trial Chamber bears in mind the age of the accused. He was born on 8 July 1969 and is currently 29 years of age. At the time of the commission of the offences in May of 1993, he was 23 years of age. The Trial Chamber has also taken into consideration the evidence given by the witness Dragan Strbac, including the fact that the accused has no previous convictions and is the father of a young child. However, this may be said of many accused persons and cannot be given any significant weight in a case of this gravity.

F. The General Practice in the Courts of the Former Yugoslavia

285. Sub-Rule 101(B)(iii) requires the Trial Chamber to consider the general practice regarding prison sentences in the courts of the former Yugoslavia. Article 41(1) of the SFRY Penal Code set out the various factors to be taken into account in determining sentence:

> The court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, keeping in mind the [*374] purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment, and particularly: the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object; circumstances of the commission of the offence; the perpetrator's past life; the perpetrator's personal circumstances and his behaviour after the commission of the offence; as well as other circumstances relating to the perpetrator.

For this purpose, the Trial Chamber also takes note of Chapter XVI of the 1990 SFRY Penal Code, entitled "Criminal Offences Against Humanity and International Law". Article 142 of that Code lists a number of criminal acts:

> Whoever, in violation of international law in time of war, armed conflict or occupation, orders an attack against the civilian population . . . or killings, tortures, or inhuman treatment of the civilian population . . . compulsion to prostitution or rape . . . shall be punished by no less than five years in prison or by death penalty. n281

As was held in the case of Prosecutor v. Dusko Tadic, hereafter" Tadic Sentencing Judgment":

> [. . .]the offences of which he has been convicted under Article 3 of the Statute, under Common Article 3 -- itself an extension in those Conventions to armed conflicts not of an international character of the fundamental provisions of the grave breaches regime -- are generally very similar to those covered by Article 142 of the SFRY Penal Code [. . .]. n282

> n281 Note that an amendment to the law (published in the Official Gazette of the FRY no. 37 of 16 July 1993 p. 817) stipulated that the most serious criminal offences could be punishable by up to 20 years imprisonment (and no longer the death penalty).

> n282 Case No. IT-94-1-T, 14 July 1997, para. 8.

286. The Trial Chamber must itself interpret the SFRY Penal Code as the parties have not presented it with decisions of the courts of the former Yugoslavia dealing with similar situations. It is clear that article 142 allows for the imposition of severe penalties for war crimes, namely "at least five years in prison" or the death penalty. The Trial Chamber notes that by virtue of Article 24 of its Statute, the maximum penalty the International Tribunal may impose is that of life imprisonment, and never the death penalty. n283

> n283 The SFRY Penal Code provided that a prison term of 20 years (not life) may be imposed instead of a death sentence.

G. Sentencing Policy of the Chamber

287. Apart from the factors mentioned above, the Trial Chamber bears in mind the severe physical pain and great emotional trauma that Witness A has had to suffer as a consequence of these depraved acts committed against her. It also notes the severe pain and suffering caused to Witness D.

288. It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that punitur quia peccatur (the individual must be punished because he broke the law) but also punitur ne peccatur (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.

289. In another case before the International Tribunal, it was remarked that

> the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity. n284

[*375] Although this case does not deal with crimes against humanity, the Trial Chamber finds that this reasoning can also apply to war crimes and other serious violations of international humanitarian law.

> n284 Sentencing Judgment, Prosecutor v. Drazen Erdemovic, Case No, IT-96-22-T, 29 Nov. 1996, para. 65.

290. The Trial Chamber is further guided in its determination of sentence by the principle proclaimed as early as in 1764 by Cesare Beccaria: "punishment should not be harsh, but must be inevitable." n285 It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.

> n285 As he put it, "one of the greatest brakes on crime is not the cruelty of the punishment but its infallibility, and, consequently, the vigilance of judges.". Beccaria, "Dei delitti e delle pene (Crimes and Punishment)", 1766 ed., para. XXVII, Venturi (ed.), 1965 p. 59.

291. Finally, none of the above should be taken to detract from the Trial Chamber's support for rehabilitative programmes in which the accused may participate while serving his sentence; the Trial Chamber is especially mindful of the age of the accused in this case.

H. The Sentence to be Imposed for a Multiple Conviction

292. The question remains, as to how a double conviction reflects on sentencing. The Trial Chamber has found the accused guilty of the two counts with which he has been charged. Pursuant to sub-Rule 101(C) of the Tribunal's Rules, the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

293. In pronouncing on this matter, the Trial Chamber is under a duty to apply the provisions of the Statute, in particular Article 24(1). Pursuant to article 48 of the former SFRY Penal Code, which is still applied in Bosnia and Herzegovina, n286 if the accused has committed several criminal offences by one act or several offences by several acts, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments. n287

> n286 The Republic of Croatia enacted its own Penal Code in 1997.

> n287 The text of Art. 48 partly reads: "(1) If the perpetrator by one deed has committed several criminal offences or by several deeds has committed several criminal offences none of which has yet been adjudicated, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment in the following way; 1) If capital punishment has been inflicted by the court for one of

> the concurring criminal offences, it shall pronounce that punishment only; [. . .] 3) If the punishments of imprisonment were assessed by the court for the concurring criminal offences, it shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, or exceed 15 years of imprisonment".

294. As was held by the Trial Chamber in the Tadic Sentencing Judgment, "(t)he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person". n288 This Trial Chamber notes that in numerous legal systems the penalty inflicted in case of multiple conviction for offences committed by one act, or by several acts which may be considered to form the same transaction, is limited to the punishment provided for the most serious offence. n289

> n288 Case No. IT-94-1-T, para. 9.

> n289 An example of this approach is found in Arts. 55 and 56 of the Dutch Penal Code.

295. In the present case, Witness A was tortured by means of serious sexual assault and beatings, and the Trial Chamber has considered this to be a particularly vicious form of torture for the purpose of aggravating the sentence imposed under Count 13. On the other hand, in assessing the sentence imposed under Count 14, the Trial Chamber has considered the fact that the sexual assault and rape amounted to a very serious offence. Therefore, the sentence imposed for outrages upon personal dignity including rape shall be served concurrently with the sentence imposed for torture.

296. In the light of the above observations, the Trial Chamber is inclined to follow the practice of the Tribunal in the Tadic and Delalic cases. n290

> n290 See Delalic, Case No. IT-96-21-T, para. 1286.

[*376] **IX. DISPOSITION**

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the TRIAL CHAMBER finds, and imposes sentence, as follows:

With respect to the accused, ANTO FURUNDZIJA:

Count 13: GUILTY of a Violation of the Laws or Customs of War (torture).

> For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Anto Furundzija to 10 years' imprisonment.

Count 14: GUILTY of a Violation of the Laws or Customs of War (outrages upon personal dignity, including rape).

> For outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War, the Trial Chamber sentences Anto Furundzija to 8 years' imprisonment.

The foregoing sentences are to be served concurrently, inter se.

A. Credit for Time Served

Pursuant to sub-Rule 101(D) of the Rules, a convicted person is entitled to credit "for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal." Anto Furundzija was detained by the authorities in Bosnia and Herzegovina on 18 December 1997, pursuant to a Warrant of Arrest and Order for Surrender issued by Judge Lal Chand Vohrah on 8 December 1995. n291 On 18 December 1997, Anto Furundzija was transferred to the United Nations Detention Center in The Hague, where he has remained in detention throughout the trial. Accordingly, 11 months and 22 days shall be deducted from the sentence today imposed on Anto Furundzija, together with such additional time as he may serve pending the determination of any final appeal.

In accordance with Rule 102 of the Rules, Anto Furundzija's sentence, subject to the above mentioned deduction, shall begin to run from today.

n291 Case No. IT-95-17-I, 8 Dec. 1995.

B. Enforcement of Sentences

Pursuant to Article 27 of the Statute and Rule 103 of the Rules, Anto Furundzija shall serve his sentence in a State designated by the President of the International Tribunal. The transfer of Anto Furundzija to the designated State shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the accused, Anto Furundzija, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the [*377] determination of the final appeal by the Appeals Chamber. Until such time as his transfer is effected, Anto Furundzija shall remain in the custody of the International Tribunal, in accordance with Rule 102.

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

Florence Ndepele Mwachande Mumba

Presiding

Richard May

Antonio Cassese

Dated this tenth day of December 1998
At The Hague,
The Netherlands.

[*391] **ANNEX A- Amended Indictment**

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case: IT-95-17/1-PT

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

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Date Filed: 2 June 1998

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

ANTO FURUNDZIJA

AMENDED INDICTMENT

Louise Arbour, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Tribunal Statute) alleges that:

1. On 6 March 1992, the Republic of Bosnia-Herzegovina ("BiH") declared its independence.

2. From at least 3 July 1992, the Croatian Community of Herzeg-Bosna ("HZ-HB") considered itself an independent political entity inside the Republic of Bosnia-Herzegovina.

3. From at least January 1993 through at least mid-July 1993, the HZ-BZ armed forces, known as the Croatian Defence Council ("HVO"), were engaged in an armed conflict with the armed forces of the government of the Republic of Bosnia-Herzegovina.

4. From the outset of hostilities in January 1993, the HVO attacked villages chiefly inhabited by Bosnian Muslims in the Lasva River Valley region in Central Bosnia-Herzegovina. These attacks resulted in the death and wounding of numerous civilians.

5. In addition, other civilians were detained, transported from their places of residence, forced to perform manual labour, were tortured, subjected to sexual assaults, and other physical and mental abuse. Hundreds of Bosnian Muslim civilians were arrested by the HVO and taken to the locations such as the Vitez Cinema Complex and the Vitez Veterinary Station which were being used as detention facilities.

6. While imprisoned, numerous Bosnian Muslim prisoners were brought to the front lines where HVO soldiers forced them to dig protective trenches to protect HVO soldiers from being shot by BiH snipers. On several occasions Bosnian Muslim prisoners were killed and wounded while digging these protective trenches.

7. One of the locations relevant to this indictment where Bosnian Muslim prisoners were forced to dig trenches was at Kratine, a small hamlet in the Vitez municipality.

THE ACCUSED

8. [REDACTED]

9. ANTO FURUNDZIJA was born in Travnik on 8 July 1969, and currently resides in Dubravica, Vitez. During the war, he was a commander of the JOKERS working out of their headquarters (the "Bungalow") in Nadioci near Vitez.

[*392] 10. [REDACTED]

11. [REDACTED]

GENERAL ALLEGATIONS

12. At all times relevant to this indictment, a state of international armed conflict and partial occupation existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia.

13. All acts or omissions set forth herein as grave breaches of the Geneva Conventions of 1949 (grave breaches) and recognised by Article 2 of the Statute of the Tribunal occurred during that armed conflict and partial occupation.

14. At all times relevant to this indictment, the victims referred to in the charges contained herein were persons protected by the Geneva Conventions of 1949.

15. At all times relevant to this indictment, the accused were required to abide by all laws or customs governing the conduct of war.

16. Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.

17. The general allegations contained herein are incorporated into each of the charges set forth below.

THE CHARGES

COUNTS 1 - 2 (UNLAWFUL CONFINEMENT OF CIVILIANS)

18. [REDACTED]

COUNTS 3 - 4 (INHUMANE AND CRUEL TREATMENT)

19. [REDACTED]

COUNTS 5 - 8 (TORTURE AND MURDER)

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

COUNTS 9 - 11 (TORTURE/RAPE)

23. [REDACTED]

24. [REDACTED]

COUNTS 12 - 14 (TORTURE/RAPE)

25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.

26. The Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, REDACTED beat Witness A and Victim B on the feet with a baton. Then REDACTED forced Witnesses A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail REDACTED actions.

[*393] By the foregoing acts and omissions, [REDACTED] Anto FURUNDZIJA committed the following crimes:

COUNT 12: (WITHDRAWN WITH THE CONSENT OF THE TRIAL CHAMBER).

COUNT 13: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (torture) recognised by Article 3 of the Tribunal Statute.

COUNT 14: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (outrages upon personal dignity including rape) recognized by Article 3 of the Tribunal Statute.

COUNTS 15 - 17 (TORTURE/RAPE)

27. [REDACTED]

COUNTS 18 - 21 (TORTURE/RAPE, UNLAWFUL CONFINEMENT)

28. [REDACTED]

29. [REDACTED]

COUNT 22 - 25 (TORTURE/RAPE, UNLAWFUL CONFINEMENT)

30. [REDACTED]

2 June 1998

The Hague

The Netherlands

Graham T. Blewitt

Deputy Prosecutor

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Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime

Diane F. Orentlicher†

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When we neither pun. nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.

A. Solzhenitsyn[1]

INTRODUCTION

From Latin America to Asia, from Eastern Europe to Africa, long-entrenched dictatorships have given way to elected civilian governments.[2] The trend has been sweeping and, at times, astonishing. The outcome of recent transitions cannot yet be known, but it is now clear that nations emerging from dictatorship face formidable challenges as they seek to establish or restore the rule of law.

Many of the new governments replaced regimes responsible for brutal crimes—forced "disappearances," political killings and torture—inflicted on a staggering scale and with wholesale impunity. Whether these crimes should be prosecuted has loomed as one of the most urgent, and agonizing, issues confronting the nascent democracies. In some instances, security forces responsible for the worst abuses retain substantial power, and make clear that they will not brook any legal accounting.[3] In several countries, governments have responded by granting de facto impunity; in others, the military has insisted upon amnesties which are designed, as one writer has observed, "to enforce a total amnesia regarding [its] crimes."[4] With a tenuous grip on power, some of the fledgling democracies have been presented with a Hobson's choice between their very survival and the principles upon which their existence was founded. How to balance the demands of justice against the continued dangers of military or other force presents issues to which no one has yet proposed generally satisfactory resolutions.

While sharply divided over what policy would best promote a democratic transition, commentators agree on the importance of identifying relevant

1. THE GULAG ARCHIPELAGO 178 (T. Whitney trans. 1974).

2. Examples include Uruguay, Chile, Argentina, Brazil, Peru, Bolivia, Honduras, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Uganda, Zimbabwe, Namibia, Benin, the Philippines, South Korea, Nepal, Hungary, Poland, Czechoslovakia, Romania, the former German Democratic Republic, Albania, Bulgaria, and Turkey. Significant liberalization, typically a precursor to the establishment of democratic government, has begun in various other countries, including the U.S.S.R. and many African nations.

3. For example, when, after 16 years of military rule, General Augusto Pinochet prepared to turn the Chilean government over to an elected civilian president, he warned: "No one is going to touch my people. The day they do, the state of law will come to an end." AMERICAS WATCH, CHILE IN TRANSITION: HUMAN RIGHTS SINCE THE PLEBISCITE 1988-1989, at 72 (1989) [hereinafter AMERICAS WATCH CHILE REPORT]. In some Eastern European countries, remnants of the Communist Party, although recently removed from office, continue to exercise some autonomous power.

4. Weschler, *Afterword*, JUSTICE AND SOC'Y PROGRAM OF THE ASPEN INST., STATE CRIMES: PUNISHMENT OR PARDON 92 (1989) [hereinafter ASPEN INSTITUTE REPORT].

principles of international law.[5] Are amnesty laws permissible? Does international law impose any affirmative duties to punish human rights violations? If so, are there any principles of law that "mitigate" the general duties in light of the peculiar constraints prevailing in transitional societies? To the extent that current law is not dispositive, is new law desirable? In addressing these questions, I will propose a resolution of critical aspects of the policy debate through the elucidation of principles of international law heretofore misunderstood, ignored, or simply unexamined.

I will argue (in Part I) that the central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes. I will also argue that international law itself helps assure the survival of fragile democracies when its clear pronouncement removes certain atrocious crimes from the provincial realm of a country's internal politics and thereby places those crimes squarely within the scope of universal concern and the conscience of all civilized people.

I next argue (in Part II) that recently developed principles of international law, both customary[6] and conventional, already impose significant obligations in this regard. The most important conclusion in the sections analyzing conventional law is that three comprehensive human rights treaties that do not explicitly require States Parties to prosecute violations nonetheless impose a general duty to investigate allegations of torture, extra-legal killings, and forced disappearances, and, subject to evidentiary and other legitimate constraints, to prosecute those who are responsible. A state's complete failure to punish repeated or notorious instances of these offenses violates its obligations under customary international law.

These duties represent a departure from the traditional approach of international human rights law. While it has long been recognized that international law requires states to respect and ensure human rights, that same law has generally allowed governments to determine how their obligations will be fulfilled. But the measures used to secure human rights are no longer subject to the broad discretion of governments when it comes to a core set of fundamental rights that merit special protection. When torture, disappearances, and illegal killings occur, governments must make good-faith efforts to bring the wrongdoers to justice.

I next consider (in Part III) whether successor governments must prosecute all such offenses committed by a previous regime.[7] Analyzing the duties in light of their underlying rationales, I conclude that both the treaty and customary obligations to punish atrocious crimes are consistent with a limited program of prosecutions, but would be breached by wholesale impunity. Prosecutions of those most responsible for designing and implementing a past system of state violence or for the most notorious violations would best comport with common standards of justice.

Finally, I consider (in Part IV) whether new law clarifying governments' obligation to punish atrocious crimes should be developed. I support the current trend, evident in recent human rights instruments, toward specifying a duty to prosecute grave violations of physical integrity, and urge that future conventions should establish procedural measures enabling victims of such crimes (or their survivors) to act to ensure prosecution.

I. WHY PUNISH?

The debate over post-transition prosecutions[8] has focused on their potential role in ending cycles of state violence and promoting consolidation of demo-

5. *See, e.g.*, A. Henkin, *Conference Report*, in ASPEN INSTITUTE REPORT, *supra* note 4, at 1-2. Identification of relevant international legal standards will become increasingly important as challenges to amnesty laws are considered by international bodies that supervise states' compliance with human rights conventions. Challenges to amnesty laws enacted in Argentina, El Salvador, Suriname, and Uruguay have been lodged with the Inter-American Commission on Human Rights of the Organization of American States. The Commission has requested the Inter-American Court to accept a case challenging Suriname's amnesty law. Case 10,150, Informe 3/90, OEA/ser.L./V/II.77, doc. 23 (1990). Although the issue of accountability for past abuses has generated rich discussion, there has been relatively little analysis to date of applicable rules of international law. *But see* Goldman, *International Law and Amnesty Laws*, HUM. RTS. INTERNET REP., Winter 1988, at 9; Rogers, *Argentina's Obligation to Prosecute Military Officials for Torture*, 20 COLUM. HUM. RTS. L. REV. 259 (1989); Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990); J. Terry, Domestic Amnesties for Violators of International Human Rights: Sketching a Framework for International Legal Regulation (May 19, 1989) (unpublished manuscript on file with author).

6. Customary international law, which is binding on all states, arises from "a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT (THIRD)]; *see also* Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, 1060 (1945) (sources of international law applied by Court include "international custom, as evidence of a general practice accepted as law").

7. The legal analysis assumes that the violations were committed in the recent past, and does not consider whether the passage of time could extinguish a duty to prosecute atrocious crimes. *But see infra* notes 126, 252.

8. Human rights professionals have figured most prominently in the public debate. Other participants have included journalists, academics, and political leaders. While divided on many issues, commentators agree on two points. First, prosecutions for past crimes must accord with internationally recognized standards of due process. The potential for abuse of the prosecution power—underscored by the summary trial and execution of former Romanian leader Nicolae Ceausescu and his wife in December 1989—is cause for concern even for those who generally favor prosecutions. Second, some crimes must be punished pursuant to international law—a point conceded by those who oppose development of new law requiring governments to prosecute abuses of predecessor regimes. *See, e.g.*, Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in ASPEN INSTITUTE REPORT, *supra* note 4, at 35, 41-42. There appears, however, to be a significant gap between existing law requiring punishment and general perceptions of the law. Many analysts have assumed that international law places few restraints on a government's discretion regarding punishment of a prior regime's crimes. *See, e.g., id.* at 41-42; R. Teitel, How Are the New Democracies of the Southern Cone Dealing With the Legacy of Past Human Rights Abuses? (May 10, 1990) (unpublished discussion paper prepared for Council on Foreign Relations, Latin America Project, Issue Series #3); *Transitions to Democracy and the Rule of Law*, 5 AM. U.J. INT'L L. & POL'Y 965, 1080-81 (1990). In fact, however, current law imposes rather significant requirements regarding punishment of atrocious crimes. *See infra* Part II. A chief reason for this gap is that key sources of a duty to prosecute human rights crimes include conventions that do not explicitly require States Parties to punish violations, but which have authoritatively been interpreted to do so. Looking only at the text of the conventions, many have assumed that the treaties have no bearing on the question of punishment.

cratic transitions. These considerations have, in turn, inform a broader debate about the role that international law should play in shaping governments' policy toward violations of a prior regime.

A. *The Case for Prosecutions*

The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression.[9] By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence.[10] Trials may, as well, inspire societies that are re-examining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.[11]

Above all, however, the case for prosecutions turns on the consequences of *failing* to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct.[12] This may be tolerable when the law or the crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence and that have been violated on a massive scale.[13] Societies recently scourged by lawlessness need look no farther than their own past to discover the costs of impunity. Their history provides sobering cause to believe, with William Pitt, that tyranny begins where law ends.

9. *See* Garro & Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 343 (1987); Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 12 (1990). It might be objected that punishment of past crimes cannot be justified as necessary to deter future conduct. *See* R. Teitel, *supra* note 8, at 7, 9. But it is precisely by imposing penalties after a crime has occurred—when it is too late to deter the sanctioned conduct—that criminal law attempts to ensure future lawful behavior. *See* Fingarette, *Rethinking Criminal Law Excuses*, 89 YALE L.J. 1002, 1013-16 (1980).

10. In this respect, Malamud-Goti asserts, post-transition prosecutions "address[] the community as well as the potential offender, creating incentives for citizens to withdraw support from potential dictatorial regimes." Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in ASPEN INSTITUTE REPORT, *supra* note 4, at 82; *cf.* O. KIRCHHEIMER, POLITICAL JUSTICE 336 (1961).

11. Citing Hannah Arendt's view that "the first step on the road to total domination is to kill the juridicial person in man," David Remnick, the Moscow correspondent for *The Washington Post*, has observed: "Likewise, the first essential step toward liberty is the revival of the legal impulse in man." L. WESCHLER, A MIRACLE, A UNIVERSE 242 (1990) (quoting Remnick).

12. *Cf.* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 287 (1968) ("respect for law generally is likely to suffer if it is widely known that certain kinds of conduct, although nominally criminal, can be practiced with relative impunity"); Fingarette, *supra* note 9, at 1014 (unless society imposes a sanction when its laws are violated, the law "becomes functionally a mere appeal"; "the concept of law as a *requirement* becomes unintelligible") (emphasis in original).

13. A paramount function of law—and, indeed, of government—is to protect citizens from harm, particulary physical violence. *See* J. LOCKE, II TWO TREATISES OF GOVERNMENT ¶¶ 127-131 (G. Rutledge ed. 1857); R. POUND, SOCIAL CONTROL THROUGH LAW 25 (1942).

The harmful effects of i nity are compounded when prosecutions are foreclosed by an amnesty law[14] enacted by, or to appease, the military or other autonomous sectors. For "[t]he essential precondition for the effectiveness of law . . . is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own . . . criteria of equity . . . ."[15]

Some proponents believe that governments should prosecute their predecessors' atrocious crimes because the trials can advance a nation's transition to democracy.[16] By demonstrating that no sector is above the law, prosecutions of state crimes can foster respect for democratic institutions and thereby deepen a society's democratic culture.[17] Conversely, because law "is located in our myths and stories as a powerful attribute of legitimate authority,"[18] failure to enforce the law may undermine the legitimacy of a new government and breed cynicism toward civilian institutions.

Some analysts urge that prosecutions strengthen fragile democracies because the rule of law is integral to democracy itself.[19] This argument has several strands: Enforcement of legal safeguards against arbitrary state action is essential to the full exercise of political rights.[20] Moreover capitulations to military demands for impunity reflect, and may enhance, the military's capacity to exercise a veto power over government policies, thereby vitiating the sover-

14. The term "amnesty" usually refers to an official act prospectively barring criminal prosecutions, and is often contrasted with pardons, which typically exempt convicted criminals from serving their sentences, in whole or in part, without expunging the conviction. But these distinctions are inexact; pardons, like amnesties, can be used to foreclose prosecutions, and amnesties sometimes cover persons serving prison terms. *See* A. DAMICO, DEMOCRACY AND THE CASE FOR AMNESTY 5 (1975); K. MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 4-5 (1989). The word "amnesty"—like "amnesia"—derives from the Greek "*amnestia*," which means "forgetfulness" or "oblivion"; an amnesty constitutes a declaration that the government intends to obliterate (and not merely forgive) a crime. *See* K. MOORE, *supra*, at 5; Goldman, *Amnesty Laws, International Law and the American Convention on Human Rights*, 6 THE LAW GROUP DOCKET 1, 3 (1989) (citing BLACK'S LAW DICTIONARY definition of amnesty as "the abolition and forgetfulness of the offense," while "pardon is forgiveness").

15. E. P. THOMPSON, WHIGS AND HUNTERS 263 (1975). A popular conception of the rule of law is that a system of law replaces a private system of force. *See* K. DAVIS, DISCRETIONARY JUSTICE 28 (1969). Measured against this ideal, paralysis of legal institutions by an illegitimate threat of force is the very antithesis of the rule of law.

16. *E.g.*, Malamud-Goti, *supra* note 10, at 81.

17. *See id.*; Garro & Dahl, *supra* note 9, at 344. The Alfonsín government's prosecution of former junta leaders for human rights violations had a profound effect on Argentine society. Many Argentines felt enormous pride at their accomplishment in asserting the rule of law over former generals who had led the country during a period of sweeping state violence. (I am indebted to Professor Owen Fiss of Yale Law School for bringing this to my attention.)

18. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 180 n.7.

19. Professor Dahl, in contrast, asserts that it is theoretically possible for a country to be democratic without respecting the rule of law. He believes, nonetheless, that the political culture that supports stable democracies is also likely to give rise to a high public valuation of principles of fairness, legality and due process. R. Dahl, Democracy and Human Rights Under Different Conditions of Development 3 (June 20-23, 1988) (paper prepared for the Nobel Symposium on Human Rights).

20. *Cf.* S. Huntington, The Modest Meaning of Democracy 14 (Nov. 18, 1986) (consultation paper prepared for Carter Center of Emory University Conference, Atlanta, Ga.) (harassment and jailing of political opponents are incompatible with democracy).

eignty of the national polity.[21] In contrast, when a government prosecutes military personnel for human rights violations, it affirms the supremacy of publicly accountable civilian institutions.[22]

Because the values secured by trials are crucially important and the harmful effects of impunity substantial, proponents of punishment believe that the authority of international law should be brought to bear to assure prosecution of atrocious crimes. Further, to the extent that a deterrence rationale justifies prosecution of state crimes, the underlying objective is best served when international law precludes the possibility of impunity.[23]

B. *The Case Against Prosecutions*

The chief argument against a general rule requiring prosecutions is that fragile democracies may not be able to survive the destabilizing effects of politically charged trials.[24] Many countries emerging from dictatorship are polarized and unstable,[25] and may be further fractured by prosecutions of the prior regime's depredations. Under these circumstances, some urge, democratic consolidation can be furthered by implementing a policy of reconciliation embodied in an amnesty law covering past violations.[26]

In countries where the military retains substantial power after relinquishing office, efforts to prosecute past violations may provoke rebellions[27] or other confrontations that could weaken the authority of the civilian government.[28] And in countries where security forces have retained modest power relative to an elected government, prosecutions may induce the military to "close ranks."[29] In these circumstances, prosecutions could reinforce the military's propensity to challenge democratic institutions.[30]

In light of these constraints, some analysts believe that democratic consolidation may be best served if a precarious government stays the hand of prosecution. Their argument rests, in large measure, on the claim that transitional societies may not yet possess the attributes of a viable democracy—in particu-

21. *See* AMERICAS WATCH, ASIA WATCH, HELSINKI WATCH & THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1987, at 2 (1987) [hereinafter 1987 REAGAN REVIEW]; Petras, *Getting Away with Murder*, N.Y. Times, Sept. 7, 1990, at A27, col. 2 (as long as Chilean armed forces determine "when and where and against whom laws will apply, Chile does not measure up to any internationally accepted standard of democracy"); L. Whitehead, The Consolidation of Fragile Democracies: A Discussion with Illustrations 26-28 (Nov. 18, 1986) (consultation paper prepared for Carter Center of Emory University Conference, Atlanta, Ga.) (there can be no meaningful consolidation of democracy when a civilian government has to assure the military that human rights prosecutions will not be pursued).

22. Proponents also believe that prosecutions contribute to the rehabilitation of victims of past violations and, indeed, of society itself. Human rights activist Aryeh Neier asserts that punishment fulfills society's duty "to honor and redeem the suffering of the individual victim." L. WESCHLER, *supra* note 11, at 244; *see also* Neier, *What Should Be Done About the Guilty?*, N.Y. REV. BOOKS, Feb. 1, 1990, at 34. Finally, some advocates of prosecutions assert claims of an absolute duty, based upon fundamental conceptions of justice, to punish atrocious crimes. *See, e.g.*, Mignone, Estlund & Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 149 & n.119 (1984). *See generally* R. Teitel, *supra* note 8.

23. I am indebted to Professor Alan Schwartz of Yale Law School for this insight. *Cf.* H. PACKER, *supra* note 12, at 64 ("If people are to be deterred from engaging in criminal conduct by the punishment of those who have done so in the past, it is important that the imposition of punishment be as nearly certain as possible.").

24. *See* Zalaquett, *supra* note 8, at 27-28. A government's ability to prosecute a prior regime's abuses is partly a function of the circumstances of the political transition. The widest scope for punishment exists when the transition was brought about by external conquest, as happened in post-war Germany and Japan. Less latitude for punishment exists if a retreating military has been discredited but still retains autonomous power, and still less if the military relinquishes power to civilians when it could remain in power indefinitely, and thus is in a position to dictate the terms of a transition. *See id.* at 46-47; *see also* Stepan, *Paths Toward Redemocratization: Theoretical and Comparative Considerations*, in TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES 64 (G. O'Donnell, P. Schmitter & L. Whitehead eds. 1986).

25. This is particularly true of countries, like the Philippines, Chile, Argentina, and Uruguay, in which the armed forces committed grave violations against sectors perceived as political opponents of the state.

26. *E.g.*, Zalaquett, *supra* note 8, at 37-38; Lewis, *Revenge or Reconciliation?*, N.Y. Times, Apr. 10, 1990, at A21, col. 4. Uruguayan President Julio María Sanguinetti justified an amnesty law covering abuses of a previous military regime on this basis:

> The Uruguayan government has decided to take measures of magnanimity or clemency utilizing a mechanism provided for in the Constitution of the Republic (the amnesty). The 12 years of dictatorship have left scars which will need a long time to heal and it is good to begin to do so.
>
> The country needs reconciliation to face a difficult but promising future.

Letter from President Sanguinetti to Amnesty International (Mar. 31, 1987), *reprinted in* AMNESTY INTERNATIONAL, URUGUAY: LEGISLATION DEALING WITH PAST HUMAN RIGHTS VIOLATIONS, app. at 2 (1987), AI Index: AMR 52/02/87. For a contrasting view, see *The Administration of Justice and the Human Rights of Detainees, Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment, Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights*, 37 U.N. ESCOR Comm'n on Hum. Rts. at 9, para. 35, U.N. Doc. E/CN.4/Sub.2/1984/15 [hereinafter *U.N. Study on Amnesty Laws*] (Special Rapporteur asserts that "an amnesty covering persons guilty of conduct involving a serious infringement of human dignity . . . far from encouraging national reconciliation, would only increase tension . . . .").

27. Dissatisfaction with prosecutions of military officers for past human rights violations was a key factor in three rebellions against the government of Argentine President Raúl Alfonsín. *See Argentine Departs, Democracy Hardly Bankrupt*, N.Y. Times, July 8, 1989, at 2, col. 1; *Revolt by 400 Argentine Troops Quelled*, N.Y. Times, Dec. 3, 1988, at 3, col. 4. The Argentine military was prepared to accept prosecution of its leaders, but some factions rebelled when the scope of prosecutions broadened. *See infra* text accompanying note 271. The experience of other countries tends to refute the claim that impunity can secure military acceptance of civilian rule. Emboldened by impunity, the military has continued to assert control over the civilian governments of El Salvador, Guatemala, Haiti, and the Philippines; military factions have launched coup attempts against the civilian governments in Guatemala, Haiti, and the Philippines.

28. A civilian government may risk a humiliating challenge to its authority if it seeks to bring a recalcitrant military to account. This happened when Uruguayan courts summoned military defendants to appear before them to answer charges relating to rights violations committed in the 1970's. In late 1986, in the face of reports that the defendants would not respond to the summonses, the government of Uruguayan President Julio María Sanguinetti hastily pushed through Congress an amnesty law covering the controverted prosecutions, thereby seeking to avert a challenge to the supremacy of civilian institutions which the government was not prepared to face. *See* AMERICAS WATCH, CHALLENGING IMPUNITY: THE LEY DE CADUCIDAD AND THE REFERENDUM CAMPAIGN IN URUGUAY 14-15 (1989) [hereinafter AMERICAS WATCH URUGUAY REPORT].

29. Prosecutions of military leaders undertaken by the government of Argentine President Raúl Alfonsín are believed to have had this effect, reinforcing the military's tendency to operate autonomously. *See* Malamud-Goti, *supra* note 9, at 13; Zalaquett, *supra* note 8, at 57.

30. For a general analysis of the threat to democratization posed by various dimensions of military "prerogatives," see A. STEPAN, RETHINKING MILITARY POLITICS 68-92 (1988).

lar, the new governments may lack the power to bring . . military to account[31]—and holds that the international community should not press these governments to act as though they were fully consolidated when in fact the transition process has only begun. Stripped to its essence, their argument is one of lesser evils. Opponents of law requiring prosecutions concede that impunity erodes the rule of law. But, they argue, if a fragile democratic government institutes prosecutions, it may provoke its overthrow by sectors that are ill-disposed to respect human rights.[32]

C. *The Role of International Law*

As thus framed, the policy debate has tended to view the imperatives of the rule of law as somehow fundamentally at odds with political reality. This approach is unwarranted. The law itself can accommodate the constraints sur-

31. *See* L. Moreno Ocampo, About the Trials and Punishment of the Massive Violations of Human Rights in Argentina § 2.1.1 (Mar. 4-8, 1990) (paper prepared for conference on the Transition to Democracy in Argentina, Yale Law School, New Haven, Conn.); Zalaquett, *supra* note 8, at 27-28.

32. Still, opponents of prosecutions concede that a successor government cannot ignore the legacy of dictatorship; a policy that meaningfully addresses past violations is necessary in order to draw a line between the past and present, and to enable a scarred society to come to terms with its past so that it can begin the process of healing. For this reason, even those who oppose prosecutions believe that governments that succeed regimes responsible for atrocious and widespread abuses should investigate and officially acknowledge the violations. *See* ASPEN INSTITUTE REPORT, *supra* note 4, at 4-5; Zalaquett, *supra* note 8, at 30-34. Many of the arguments advanced in support of an official accounting echo justifications voiced in support of prosecutions. Like prosecutions, an official account of past violations serves an exemplary function, stigmatizes those responsible for atrocious crimes, and, by illuminating the sphere of darkness in which abuses can proliferate, prevents future violations. Because the objectives served by an official truthtelling process resemble those associated with punishment, some analysts have suggested that the former might obviate, or at any rate diminish, the perceived need for prosecutions. *See* R. Teitel, *supra* note 8, at 11-12.

Whatever salutary effects it can produce, an official truthtelling process is no substitute for enforcement of criminal law through prosecutions. Indeed, to the extent that such an undertaking purports to replace criminal punishment (rather than to promote distinct goals that punishment cannot serve), it diminishes the authority of the legal process; it implicitly concedes that the machinery of justice is powerless to punish even those crimes that any civilized society views as most pernicious. Further, the most authoritative rendering of the truth is possible only as a result of judicial inquiry, and major prosecutions can generate a comprehensive record of past violations. *Cf. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945, reprinted in* 39 AM. J. INT'L L. 178, 184 (Supp. 1945) [hereinafter *Jackson Report*] (stating that basis of case against major war criminals at Nuremberg must be "a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world," and asserting, "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence."); FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (Aug. 15, 1949) (written by Telford Taylor, Brig. Gen., U.S.A., Chief of Counsel for War Crimes) [hereinafter TAYLOR REPORT] (asserting that "[t]he documents and testimony of the Nuernberg record can be of the greatest value in showing the Germans the truth about the recent past."); R. CONOT, JUSTICE AT NUREMBERG xiii (1983) (quoting Telford Taylor saying at Nuremberg trial, "We cannot here make history over again. But we can see that it is written true.").

rounding transitional societi . . /hile securing crucially important values.[33] Addressing the dilemma of tenuous democracies through law assures that an appropriate balance is struck between the demands of justice and potentially conflicting values, such as political stability.[34]

The alternative—leaving the decision about prosecution to the unbridled discretion of governments—does nothing to assure the *bona fides* of their choice. Governments may forego trials to avert a perceived challenge to their authority, however remote or speculative, even if long-term national interests would be better served by prosecutions.[35] This consideration is by no means hypothetical; although numerous countries have begun transitions from repressive rule to democracy in recent years, relatively few successor governments

33. While an imprecise analogy, U.S. constitutional protection of speech provides an instructive example of how legal standards can protect fundamental rights without imperiling crucial national interests. Speech may be curbed, in narrow circumstances, if it poses an immediate threat to important governmental interests, but U.S. constitutional law protects fundamental values associated with expressive activity by forbidding interference with speech unless the restriction is justified by the appropriate legal standard—whether the "clear and present danger" test first enunciated by Justice Holmes, *see* Abrams v. United States, 250 U.S. 616, 627-28, 630 (1919) (Holmes, J., dissenting); Schenck v. United States, 249 U.S. 47, 52 (1919); or the "incitement to imminent lawless action" test of Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); or, as in the case of prior restraints on the press, upon proof that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people," New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring). While protecting overriding governmental interests, all of these tests seek to assure a free society—even at the risk of making governance a more precarious enterprise. Part III considers how relevant principles of international law can accommodate the constraints faced by societies emerging from dictatorship.

34. International law does this both by prescribing standards of conduct that take account of threats to public order and, at least with respect to conventional law, by establishing an oversight mechanism to ensure good faith compliance with those standards. Multilateral human rights conventions typically establish a body or bodies that are responsible for monitoring States Parties' compliance. These bodies have generally accorded states substantial discretion to determine how they will satisfy their treaty obligations, but nonetheless ensure that governments do not invoke inappropriate excuses for noncompliance. For an example of such treatment under the European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* Sept. 3, 1953) [hereinafter "European Convention"], see The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 71-76, paras. 152-65 (Eur. Comm'n of Hum. Rts.). *See generally* Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976-77).

35. *See* L. WESCHLER, *supra* note 11, at 244. *Cf.* Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with its Obligations Under Protocol II and Common Article 3*, 33 AM. U.L. REV. 41, 49 (1983) ("the real purpose" of amnesties covering criminal acts committed during internal conflicts, though ostensibly enacted to promote national reconciliation, "is to permit governments officials responsible for human rights violations to escape responsibility for their acts").

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have attempted prosecutions.[36] While many have asserted that prosecutions were impossible, the claim has typically been overstated.[37]

I am not, of course, suggesting that governments should press prosecutions to the point of provoking their own collapse. Rather, I am suggesting that, by generally requiring prosecutions, international law helps assure that governments do not forego trials simply because it seems politically expedient to do so. A critical distinction to be drawn here is between military insubordination and a challenge that poses a genuine and serious threat to national life. Because trials

36. Amnesty laws or decrees have been adopted, inter alia, in Argentina, Brazil, Chile, Uruguay, Guatemala, El Salvador, Nicaragua, Namibia, and Suriname, and de facto impunity has been conferred in other countries, including the Philippines and Haiti. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMPUNITY: PROSECUTIONS OF HUMAN RIGHTS VIOLATIONS IN THE PHILIPPINES (1991); LAWYERS COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI (1990). *But see 16 Convicted in Philippine Assassination*, Wash. Post, Sept. 29, 1990, at A15, col. 1; *The Duvalier Aide, at a Rowdy Trial, Condemned To Die*, N.Y. Times, July 17, 1986, at A1, col. 2 (reporting exceptional trials of abuses committed by prior regimes in Philippines and Haiti). Prosecutions for human rights violations by predecessor regimes have been undertaken in Guinea, Nicaragua, and the Central African Republic, *see* J. Terry, *supra* note 5, and investigations preparatory to prosecutions have been instituted in Uganda. The governments of several Eastern European countries, including Romania, Bulgaria, Czechoslovakia, Poland, and Germany, have instituted or are considering initiating criminal prosecutions for violent human rights crimes committed before the recent political transitions in those countries. *See Upheaval in the East: Army Executes Ceausescu and Wife for "Genocide" Role, Bucharest Says*, N.Y. Times, Dec. 26, 1989, at A1, col. 6; *Evolution in Europe: Ceausescu's Fallen Heir Faces Court*, N.Y. Times, May 27, 1990, at 14, col. 4; *Inquiry on Deaths Going Nowhere in Romania*, N.Y. Times, Feb. 14, 1991, at A10, col. 1; *Czechoslovakia Detains Ex-Communist Party Leader and 4 Others*, N.Y. Times, June 7, 1990, at A10, col. 1; *Bulgaria Presses Inquiries into the Communist Past*, N.Y. Times, June 6, 1991, at A15, col. 1; *Bulgaria's Ousted Dictator Agrees To Face His Accusers*, N.Y. Times, July 19, 1990, at A6, col. 5; *Poland Arrests 2 Police Generals in '84 Killing of Reformist Priest*, N.Y. Times, Oct. 9, 1990, at A8, col. 3; *Prosecutors for Unified Germany Seize Former Communist Officials*, N.Y. Times, Oct. 7, 1990, at 14, col. 1; *Honecker's Arrest Sought in Berlin Wall Shootings*, N.Y. Times, Dec. 2, 1990, at 23, col. 1; *Honecker Taken to Soviet Union; Germany Demanding His Return*, N.Y. Times, Mar. 15, 1991, at A1, col. 1; *4 Ex-Officials of East Germany Arrested*, N.Y. Times, May 22, 1991, at A3, col. 4; *Berlin Wall Guards Accused of Shooting Escapees*, N.Y. Times, June 16, 1991, at 6, col. 1; *End of the Line: Leaders at Communism's Finish*, N.Y. Times, Nov. 16, 1990, at A16, col. 1.

37. For example, officials in the government of Philippine President Corazon Aquino justified their failure to prosecute violations committed under the aegis of President Ferdinand Marcos on the basis that the effort would have amounted to "political suicide." A former spokesman for President Aquino explained, "This government had an obligation to survive." *Warning: Joining the Bar Is Hazardous to Your Health*, FAR E. ECON. REV., Nov. 3, 1988, at 81. Yet the Aquino government enjoyed considerable power relative to the armed forces in its early months in office, and was at that time in a position to press bold action without provoking a viable threat of military rebellion. Moreover its failure to hold the military to account scarcely assured stability; in its five years in office the Aquino government has weathered seven coup attempts. *See* D. Orentlicher, The Philippines Experience (Nov. 4-6, 1988) (paper presented at conference on State Crimes: Punishment or Pardon, Aspen Institute for Humanistic Studies, Wye Woods Conference Center).

Experts on Uruguay similarly believe that President Julio María Sanguinetti could have insisted upon some prosecutions of the military for past violations without derailing his country's transition to democracy. *E.g.*, Telephone Interview with Professor Robert Kogod Goldman (May 21, 1990). In August 1984, Uruguay's political parties and the military government entered into a pact governing the terms of a transition to civilian rule. It is generally understood that the parties to the pact agreed that the executive branch of the future government would not initiate prosecutions for rights violations committed under the military government's auspices, but would not interfere with cases already before the courts. In August 1986, President Sanguinetti introduced legislation that would have established a sweeping amnesty for past violations. A different amnesty bill was enacted in December 1986. A subsequent effort to overturn the amnesty by referendum failed to secure the necessary votes. *See* AMERICAS WATCH URUGUAY REPORT, *supra* note 28, at 11-15.

secure preeminent rights and values, governments should be expected to assume reasonable risks associated with prosecutions, including a risk of military discontent.[38]

If leaving prosecutions to governments' discretion fails to ensure appropriate decisions, it also deprives governments that wish to restore the rule of law of potentially crucial support. International law requiring punishment of atrocious crimes—and, more to the point, international pressure for compliance—can provide a counterweight to pressure from groups seeking impunity.[39]

On the other hand, a virtual certainty of punishment could deter some abusive regimes from voluntarily relinquishing power. On balance, however, this concern is outweighed by the more harmful effects of failing to establish an effective deterrent to systematic violations of fundamental rights, in part because the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur.[40]

Further, when prosecutions are undertaken pursuant to international law, they are less likely to be perceived—and opposed—as political revanchism. It is easy to believe that prosecutions are politically motivated when the decision to institute them is a matter of unbridled discretion; justice is readily mistaken for vengeance.[41] When, however, international law insists upon punishment of atrocious crimes, the prosecutions can, as Otto Kirchheimer said of the Nuremberg prosecutions for crimes against humanity, "define where the realm of politics ends or, rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity."[42]

38. *See* Garro & Dahl, *supra* note 9, at 343-44; Malamud-Goti, *supra* note 10, at 76.

39. This point was underscored by Luis Moreno Ocampo, who in the mid-1980's prosecuted former junta leaders for human rights violations committed in Argentina during the 1970's. Mr. Moreno Ocampo subsequently stated that his work would have been made easier if the government's program of prosecutions had been backed by the weight and authority of international law. (This observation was made during a conference in Buenos Aires on Argentina's transition to democracy, sponsored by the Yale Law School, during October and November 1989, in which the author participated.) Prosecutions based upon international legal obligations—and expectations of their fulfillment—may, in any event, be less likely to provoke organized opposition than prosecutions the initiation of which is perceived as optional. It is not surprising that outgoing military regimes have mounted strong opposition to prosecutions when the issue was understood to be negotiable. It is less clear that opposition in those circumstances is a reliable indicator of how the military would respond to mandatory prosecutions.

40. In Argentina, for example, the outgoing military regime opposed prosecutions but lacked the power to insist on impunity as a pre-condition to civilian rule. The last of three successive military juntas enacted a "self-amnesty" law, which was nullified by the Alfonsín government. *See* Garro & Dahl, *supra* note 9, at 301, 305-06.

41. For an example of this type of reasoning, see Lewis, *Revenge or Reconciliation?*, N.Y. Times, Apr. 10, 1990, at A21, col. 4.

42. O. KIRCHHEIMER, *supra* note 10, at 341. Kirchheimer's views about the effects of the Nuremberg prosecutions are instructive: "In spite of the Nuremberg trial's infirmities, the feeble beginning of transnational control of the crime against the human condition raises the Nuremberg judgment a notch above the level of political justice by fiat of a successor regime." *Id.* Precisely because the crimes prosecuted at Nuremberg were made subject to the "control" of international law, the trials helped establish "that the most atrocious offenses against the human condition lie beyond the pale of what may be considered contingent and fortuitous political action, judgment on which may change from regime to regime." *Id.*

While helping to "depoliticize" trials of human rights violators,[43] international law requiring prosecution does not prevent governments from instituting policies of national reconciliation.[44] The argument that amnesty laws may be necessary to mend social divisions falsely assumes that such laws are the only means of achieving reconciliation. There are other means.[45] Further, amnesty laws can be used to promote national reconciliation, provided they do not cover atrocious crimes which international law requires states to punish.[46]

By drawing a bright line between crimes that must be punished and those for which amnesties are permissible, international law helps answer an agonizing question confronting many transitional societies: How is it possible to seek accountability without setting off an endless chain of divisive recriminations? Writing of a proposal to purge Communist collaborators from formerly state-run enterprises, Polish Solidarity activist Adam Michnik evokes the dilemma confronting his nation in the wake of the prior regime's collapse:

> The struggle for freedom is beautiful. Anyone who has taken part in this struggle has felt, almost physically, how everything that is best and most precious within him was awakened. Revenge has a different psychology. Its logic is implacable. First, there is a purge of yesterday's adversaries, the partisans of the old regime. Then comes the purge of yesterday's fellow-oppositionists, who now oppose the idea of revenge. Finally, there is a purge of those who defend them. A psychology of vengeance and hatred develops. The mechanics of retaliation become unappeasable. . . .[47]

43. It is, of course, impossible fully to depoliticize prosecutions for human rights crimes—or for any crime that attracts a high level of public interest. Part III explores measures that can be taken to minimize the harmful political consequences of prosecutions.

44. Some analysts believe that forgiveness and national reconciliation cannot take place as long as justice is foreclosed. *See* L. WESCHLER, *supra* note 11, at 243 (quoting Hannah Arendt's view that "men are unable to forgive what they cannot punish"); *cf.* Neier, *Amnesty at the Point of a Gun Isn't Genuine*, N.Y. Times, Apr. 10, 1990, at A20, col. 5 (letter to the editor).

45. One of the most important measures taken by Nicaraguan President of Violeta Barrios de Chamorro to bridge divisions between her government and that of the Sandinista party she defeated was to retain as her defense minister Gen. Humberto Ortega Saavedra, who had served in the same capacity under the previous Sandinista government. *See Chamorro Takes Nicaragua Helm, Hails a New Era: Retains the Army's Top Sandinista in a Gesture of Reconciliation*, N.Y. Times, Apr. 26, 1990, at A1, col. 4.

46. An example of such an amnesty is the Colombian Amnesty Law (No. 35) of November 19, 1982, which did not apply to persons who killed noncombatants and those who otherwise behaved brutally. Sir Francis Bacon drew a distinction between crimes that can be subject to amnesty and those that cannot:

> [T]he King may pardon any Offence whatever . . . so far as the public is concerned in it, after it is over, and consequently may prevent a popular Action or a Statute, by pardoning the Offence before the suit is commenced; . . .
>
> But it seems agreed, that the King can by no previous Licence, Pardon or Dispensation, make an Offence dispunishable which is *Malum in se*; as being against the Law of Nature, or so far against the Public Good as to be indictable at Common Law, and that a Grant of this kind tending to encourage the doing of Evil, which is the chief End of Government to prevent, is plainly against Reason and the Common Good, and therefore void.

Goldman, *supra* note 14, at 3-4 (quoting Bacon).

47. Weschler, *A Reporter at Large*, THE NEW YORKER, Dec. 10, 1990, at 127.

Distinguishing "this sort of wholesale vengeance" from prosecutions for crimes, Michnik suggests an answer to Poland's dilemma: "In cases where laws have been broken," the perpetrators "should be indicted and tried, the law should take its course. But we have to remain a nation of laws—that is of crucial importance."[48]

II. THE DUTY TO PUNISH UNDER CURRENT INTERNATIONAL LAW

While analysts agree that governments confronting a legacy of state violence should comply with established rules of international law, they have generally demurred on the question of what, precisely, the law requires.[49] This tendency toward vagueness can be readily explained: the implications of the most pertinent areas of international law are not immediately obvious. International human rights law traditionally has allowed governments substantial discretion to determine the means they will use to ensure protected rights,[50] while international penal law has often focused on the power—not duty—of governments to punish violations committed outside their territorial jurisdiction.[51] When the law has required states to punish offenses committed in their territory, the duty traditionally has applied principally to crimes committed against foreign nationals.[52]

Increasingly, however, international law has required states to punish certain human rights crimes committed in their territorial jurisdiction. Several human rights treaties require States Parties to criminalize particular abuses, such as genocide and torture, investigate violations and seek to punish the wrongdoers.[53] On their face the more comprehensive treaties, such as the International Covenant on Civil and Political Rights,[54] are silent about a duty to punish violations of the rights they ensure. But authoritative interpretations of these treaties make clear that a State Party fails in its duty to ensure the cluster of rights protecting physical integrity if it does not investigate violations and seek

48. *Id.* at 126; *cf.* A. SOLZHENITSYN, *supra* note 1, at 177 ("It is unthinkable in the twentieth century to fail to distinguish between what constitutes an abominable atrocity that must be prosecuted and what constitutes that 'past' which 'ought not to be stirred up.'").

49. *See supra* note 8.

50. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777-78 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). International human rights undertakings have typically emphasized "obligations of result," leaving to states the determination of means for protecting the rights. *See* Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS 311 (L. Henkin ed. 1981). Increasingly, however, international human rights treaties specify "obligations of means" as well as result. Further, bodies that enforce human rights treaties have often specified means that States Parties must use to fulfill their convention-based obligations of result. *See infra* text accompanying notes 92-93.

51. *See infra* text accompanying notes 63-64.

52. *See infra* note 65 and accompanying text.

53. *See infra* Section B.

54. *Adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) [hereinafter "International Covenant"].

to punish those who are responsible.[55] Moreover a state's failure to punish repeated or notorious violations breaches the customary obligation to respect the same set of preeminent rights.[56]

A. *International Criminal Law*

1. *General Principles*

Each duty examined below applies to human rights violations that international law defines as criminal. While definitions of "international crimes" vary,[57] the term in its broadest sense comprises offenses which conventional or customary law either authorizes[58] or requires states to criminalize, prosecute, and/or punish. Although international law generally establishes rights and duties between and among states, international criminal law imposes obligations on individuals,[59] making them liable to criminal punishment.[60] It also imposes duties on states with respect to matters usually left to their discretion.[61] Thus, an amnesty law or an exercise of prosecutorial discretion that is valid under domestic law may nonetheless breach a state's international obligations.[62]

In the eighteenth century, offenses against the law of nations subject to criminal punishment fell into two categories. One comprised a narrow class of offenses, most notably piracy,[63] that were viewed as a common concern of nations and which states lacking a direct nexus to the crime could nonetheless punish.[64] The other comprised offenses, such as violations of safe conduct and infringements of the rights of ambassadors, which states were required to punish when committed by one of their citizens against a foreign national. Although different rationales supported international law's concern with these

55. *See infra* Section C.

56. *See infra* Section D.

57. *Compare* Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 56 (1947) (a crime against international law is "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state") *with* Dinstein, *International Criminal Law*, 20 ISR. L. REV. 206, 221 (1985) (while international crimes typically are grave offenses that "harm fundamental interests of the whole international community," an offense becomes an international crime only when defined as such by positive international law). Although it is not always clear in writings of international law scholars what consequences are believed to attach to "international crimes," the term is often used to refer to crimes that are subject to universal jurisdiction. *See, e.g.*, Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335-38 (1924-25). *But see* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 305 (4th ed. 1990) (noting distinction drawn by some publicists between breaches of international law that can be punished by any state, such as violations of the laws of war, and other offenses established by municipal law which international law authorizes any state to punish, such as piracy). The term "international criminal law" is sometimes used more broadly to refer to law pursuant to which "individuals are personally held to account for violations of the international order." Ruy & Silving, *International Criminal Law—A Search for Meaning*, in 1 INTERNATIONAL CRIMINAL LAW 25 (M. Bassiouni & V. Nanda eds. 1973). The International Law Commission's draft articles on state responsibility use the term "international crimes" to refer to the controversial concept of crimes of a state. *Draft Articles on State Responsibility*, [1976] 2 Y.B. INT'L L. COMM'N (pt. 2) at 119, U.N. Doc. A/CN.4/SER.A/1976/Add.1; T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 210 (1989). In recent decades the term has also been used to refer to crimes that would be punishable by an international criminal court if one were established. *See infra* note 66.

58. In general, international law recognizes a state's right to exercise criminal jurisdiction in situations where it has a significant relationship to the case. Jurisdiction has been recognized, for example, under the "territorial" principle, which applies when the crime occurred in the territory of the prosecuting state; the "passive personality" principle, which applies when the victim is a national of the prosecuting state; the "nationality" principle, which applies when the offender is a national of the prosecuting state; and the principle of "protective" jurisdiction, which recognizes states' right to prosecute crimes that threaten their national security or fundamental governmental functions, regardless of where the crimes were committed. *See* I. BROWNLIE, *supra* note 57, at 300-05; Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786-88 (1988). *See generally* Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935). *But see* S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (international law, rather than prohibiting exercise of jurisdiction when territorial principle does not apply, permits exercise of jurisdiction except when specifically prohibited).

59. *But see supra* note 57 (noting concept of crimes of a state).

60. The judgment of the International Military Tribunal at Nuremberg asserted:

> [I]nternational law imposes duties and liabilities upon individuals as well as upon States . . . . [I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

International Military Tribunal, *Judgment*, *reprinted in* 41 AM. J. INT'L L. 172, 220-21 (1947) [hereinafter "IMT Judgment"]. As long ago as the eighteenth century it was well established that individuals were liable to punishment for committing offenses against the law of nations. *See infra* note 65. But as positivist views of international law gained ascendency in the nineteenth century, international law was widely seen as a set of rules binding states in their mutual relations. Under this view, international law could not directly impose obligations upon individuals; only municipal law could do that. *See* Schwarzenberger, *The Problem of an International Criminal Law*, in INTERNATIONAL CRIMINAL LAW 3, 10, 16 (G. Mueller & E. Wise eds. 1965); *see also* Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407 (1943); *cf.* Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530, 553-56 (1943) (international law specifies some offenses as criminal, though enforcement is undertaken by municipal courts). The concept of crimes against international law, the commission of which gives rise to individual liability, acquired renewed support in the wake of World War II. *See* Wright, *supra* note 57, at 56. The development of international human rights law in the second half of the twentieth century has played a significant part in reviving and fortifying the view that individuals can be subjects of international law. *See generally* T. MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 33-36 (1987); Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

61. In the words of one writer, "When international law defines an act as an offence, the upshot is that the decision whether or not to prosecute offenders is not left to the unfettered discretion of States, which are subjected to international obligations in the matter." Dinstein, *supra* note 57, at 225.

62. *Cf.* 1 L. OPPENHEIM, INTERNATIONAL LAW 45 (H. Lauterpacht 8th ed. 1955) ("If a State . . . possess[es] such rules of Municipal Law as it is prohibited from having by the Law of Nations, it violates an international legal duty."); Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, art. 27, U.N. Doc. A/C.39/27 (1969), *reprinted in* 8 I.L.M 679 (1969) [hereinafter "Vienna Convention"]; Greco-Bulgarian Communities, 1930 P.C.I.J. (ser. B) No. 17, at 23; Polish Nationals in Danzig, 1931 P.C.I.J. (ser. A/B) No. 44, at 24; *see also* Goldman, *supra* note 14, at 4; Montealegre, *supra* note 35, at 50.

63. *See* 4 W. BLACKSTONE, COMMENTARIES *68.

64. A variety of treaties prohibiting slave trade were adopted in the nineteenth and early twentieth centuries. *See* 1 INTERNATIONAL CRIMINAL LAW 506-10 (M. Bassiouni & V. Nanda eds. 1973). Both slavery and slave trade are now generally recognized to be subject to universal jurisdiction. *See* RESTATEMENT (THIRD), *supra* note 6, § 702 reporters' note 4. The crime of brigandage, too, has long been subject to universal jurisdiction. *See* Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177, 190-94 (1945).

offenses,[65] in each instance national courts were the forum in which the law of nations was enforced.

In the wake of World War II, the concept of international crimes expanded to include offenses subject to the jurisdiction of an international tribunal.[66] More recently, the trend has been toward adoption of conventions that require States Parties to criminalize, prosecute, and/or punish certain offenses when committed in their territorial jurisdiction or under other specified circumstances.[67] These treaties, like the customary law of the eighteenth century, look to

65. Blackstone offered the following rationale for states' duty to punish offenses against the law of nations:

> [W]here the individuals of any state violate [the law of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured . . . to demand satisfaction and justice to be done on the offender, by the state to which he belongs.

4 W. BLACKSTONE, *supra* note 63, at *68. Although Blackstone went on to identify three "principle offences against the law of nations," *id.*, the quoted passage appears relevant to only two: "violation of safe-conducts," and "infringement of the rights of embassadors." *Id.* These offenses, when committed by a state's citizens, would have violated that state's duty toward the state whose nationals had been directly injured. If the first state fails to punish its offending citizen, Blackstone reasoned, it becomes "an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war." *Id.* Blackstone offered a different rationale for punishment of piracy, recognizing a right (not duty) of states to punish non-nationals (rather than their own citizens) for reasons of self-defense (rather than to redress an offense against another nation):

> As therefore [the pirate] has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

Id. at *71. *But see* Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 482-88 (1989) (in eighteenth century, governments viewed enforcement of law of nations as duty whose discharge was emblematic of civilized nations; while specific and varying interests justified punishment of particular offenses against law of nations, states viewed it as their duty to enforce law of nations as such).

66. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, art. VI, G.A. Res. 260 A (III), 78 U.N.T.S. 227 (*entered into force* Jan. 12, 1951) [hereinafter "Genocide Convention"]; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. V, *adopted* Nov. 30, 1973, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974) (*entered into force* July 18, 1976) [hereinafter "Apartheid Convention"]. The only instances in which such jurisdiction has been exercised were the prosecutions of major war criminals in Nuremberg by the International Military Tribunal established by the four Allied Powers, and by a similar tribunal, the International Military Tribunal for the Far East, established to try Japanese war criminals in Tokyo. Although efforts to establish a permanent international penal tribunal have been unsuccessful, the prospect of establishing such a court has had a significant impact in shaping the concept of international crimes. *See generally* 2 B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT 1-61 (1980); Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952).

67. *See* Dinstein, *supra* note 57, at 216-21. Some of these conventions also include provisions establishing universal jurisdiction, *see, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 5(2), *reprinted in* 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1984), 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (*entered into force* June 26, 1987) [hereinafter "Convention Against Torture"], or authorizing international tribunals to exercise criminal jurisdiction, *see, e.g.*, Genocide Convention, *supra* note 66, art. VI; Apartheid Convention, *supra* note 66, art. V. For a comprehensive listing of post-war conventions establishing crimes, see Clark, *The Influence of the Nuremberg Trial on the Development of International Law*, in

national courts for enforcement. But in contrast to the older law of nations requiring states to provide legal redress for injury to foreign nationals, modern treaties often require states to enforce the rights of their own citizens.

2. *Human Rights Crimes*

a. *The Nuremberg Precedent*

Although relatively few violations of human rights are international crimes, international criminal law has played an important—indeed, foundational—role in the development of human rights law. The principle of universality supported the Allied Powers' assertion of jurisdiction over Nazi war criminals for crimes against humanity,[68] the prosecution of which inaugurated the branch of international law recognizing and protecting human rights.[69]

To the extent that they reached Nazi offenses against German nationals, the Nuremberg prosecutions represented a radical innovation in international law. With few and limited exceptions, international law had not previously addressed a state's treatment of its own citizens,[70] much less imposed criminal sanctions for such conduct.[71] The Nuremberg prosecutions thus broadened the scope of international law in general, and of international criminal law in particular.

The Allied Powers and Nuremberg tribunals[72] justified the innovation on

THE NUREMBERG TRIAL AND INTERNATIONAL LAW 253-54 (G. Ginsburgs & V. Kudriavtsev eds. 1990).

68. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Randall, *supra* note 58, at 789; *see also Opening Statement of Prosecution*, United States v. Ohlendorf (Case No. 9), IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 46-47 (1950) [hereinafter TRIALS OF WAR CRIMINALS].

69. Although the branch of international law concerned with human rights had several pre-war antecedents, it was "born in, and out of the Second World War." Henkin, *Introduction*, in THE INTERNATIONAL BILL OF RIGHTS 5 (L. Henkin ed. 1981).

70. Antecedents to modern international human rights law are described in *id.* at 3-5, and in T. FARER, THE GRAND STRATEGY OF THE UNITED STATES IN LATIN AMERICA 63-65 (1988).

71. As noted previously, older principles of international law requiring states to punish delicts of their citizens committed in the states' territorial jurisdiction concerned conduct that violated the rights of other states. *See supra* note 65.

72. In all, thirteen cases against war criminals were tried at Nuremberg. The first was prosecuted before the International Military Tribunal (IMT), the judges and prosecutors of which were nationals of the four Allied Powers. Twelve subsequent prosecutions were brought before U.S. Military Tribunals. Additional war criminals were prosecuted before tribunals in German war zones occupied by other Allied nations; before an international tribunal in Tokyo; by the U.S. Army before military courts under the jurisdiction of the theater commander in Germany; by various other countries, including those that had been occupied by German forces during the war; and, eventually, by German national courts.

The IMT trial began on November 14, 1945 and lasted nine and one-half months. Twenty-two leading Nazi figures were prosecuted; all but three were convicted of various crimes within the jurisdiction of the IMT. For comprehensive accounts of the proceedings, see R. CONOT, *supra* note 32; A. TUSA & J. TUSA, THE NUREMBERG TRIAL (1984). Proceedings of the International Military Tribunal for the Far East, established in Tokyo to try war criminals from Japan, are described in A. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987). For discussion of human rights law generated by the Nuremberg trials, *see infra* Section E.

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several grounds,[73] two of which are of interest here.[74] First, crimes against humanity could be punished by an international court because the conduct, by its nature, offended humanity itself.[75] Because the crime originated in "humanity"—presumably under natural law[76]—its legal status and consequences transcended the province of municipal law.[77] A person who committed crimes

73. The following discussion addresses the Nuremberg tribunals' punishment of crimes against humanity, and does not consider justifications for their assertion of jurisdiction over other crimes. *But see infra* note 79.

74. The Allied nations' chief response to charges that they were applying ex post facto law was that international law already recognized the human rights crimes for which Nazi war criminals were prosecuted since those crimes violated principles common to the major legal systems of the world. *See Jackson Report*, *supra* note 32, at 184, 186; United States v. von Leeb (Case No. 12), XI TRIALS OF WAR CRIMINALS, *supra* note 68, at 510; R. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 183 (1962); Clark, *Crimes Against Humanity*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 193-94 (G. Ginsburgs & V. Kudriavtsev eds. 1990). Proponents of the prosecutions also asserted that the extremely atrocious nature of the crimes put the defendants on notice that their conduct offended the law of nations. *See* Wright, *supra* note 57, at 61. Further, the prosecuting nations noted that murder was proscribed by German law, and that the acts constituting crimes against humanity generally involved deliberate murders. *See The Legal Basis of the Nuremberg Trial*, United States Department of State, Office of International Information (1945), at XVIIA (also suggesting that, as sovereign power in Germany following unconditional surrender of German government, Allies were entitled to enact retroactive laws).

75. This view was implicit in the tribunals' answer to charges that they were imposing "victors' justice." The U.S. Military Tribunal asserted in the *Einsatzgruppen Case*:

> The defendants are in court not as members of a defeated nation but because they are charged with crime. They are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation.

United States v. Ohlendorf (Case No. 9), IV TRIALS OF WAR CRIMINALS, *supra* note 68, at 462. Similarly, the tribunal asserted: "Humanity is the sovereignty which has been offended and a tribunal is convoked to determine why." *Id.* at 497; *see also Opening Speech of Justice Robert H. Jackson*, Chief Prosecutor for the United States, Nov. 21, 1945, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 155 (1947) [hereinafter TRIAL OF MAJOR WAR CRIMINALS] (asserting to IMT, "The real complaining party at your bar is Civilization.").

76. *See The Legal Basis of the Nuremberg Trial*, *supra* note 74, at XVIII (actions of defendants before IMT "are certainly at least 'natural crimes' because they constitute inhuman acts"); *see also Final Speech of Sir Hartley Shawcross*, Chief Prosecutor for Great Britain, July 27, 1946, XIX TRIAL OF MAJOR WAR CRIMINALS, *supra* note 75, at 472; United States v. von Leeb (Case No. 12), XI TRIALS OF WAR CRIMINALS, *supra* note 68, at 476 (both quoting or citing passage from Grotius, *infra* note 77).

77. More than three centuries before the Nuremberg trials, the eminent Dutch jurist Hugo Grotius framed a natural law justification for foreign intervention that would support the prosecutions:

> The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.

2 H. GROTIUS, DE JURE BELLI ET PACIS ch. XX, § XL, para. 1 (1625) (Carnegie trans. 1925). The British jurist Richard Zouche similarly held that "when crimes are very atrocious and very plain," kings "have the right to demand satisfaction not only for wrongs done to themselves or their subjects, but also for wrongs to any person whomsoever, which are in flagrant violation of the law of nature and nations; since the power of punishing is not merely derived from civil law, but comes from natural law also." 2 R. ZOUCHE, IURIS ET IUDICII FECIALIS, SIVE, IURIS INTER GENTES, ET QUAESTIONUM DE EODEM EXPLICATIO 116 (1650), *reprinted in* THE CLASSICS OF INTERNATIONAL LAW (1911). The Swiss publicist Emerich de Vattel, too, found justification for an exception to the general rule that states could punish only crimes against themselves if the offense were so heinous that it offended all mankind. E. DE VATTEL, 1 LE DROIT DES GENS, ch. XIX, paras. 232-33 (1758).

against humanity was, like the pirate, *hostis humani generis*[78]—"an enemy of all mankind"—over whom any state could assert criminal jurisdiction.

It was a short step from recognition of crimes against humanity as a violation of international law to the assertion that such crimes could be punished by an international court.[79] The U.S. Military Tribunal in the *Einsatzgruppen Case* reasoned:

> Where law exists a court will rise . . . . It would be an admission of incapacity, in contradiction of every self-evident reality, that mankind . . . should be unable to maintain a tribunal holding inviolable the law of humanity, and, by doing so, preserve the human race itself.[80]

78. 4 W. BLACKSTONE, *supra* note 63, at *68 (quoting Sir Edward Coke); *see also* H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 162 (1866). The analogy of human rights criminals to pirates should not be overdrawn; many of the justifications for establishing universal jurisdiction over piracy are absent in the case of human rights violations. Those rationales include the fact that pirates' victims were genuinely international, *see* Cowles, *supra* note 64, at 185-87, lending many states a legitimate interest in prosecuting pirates; the notion (often factually incorrect) that pirates were stateless, *see* 1 L. OPPENHEIM, *supra* note 62, at 609, thereby giving every state the right to assert jurisdiction; and the fact that piracy could disrupt international commerce, *see* B. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 62 (1980), giving states generally a direct interest in deterring the crime through prosecution. In contrast, human rights crimes are, with some exceptions, committed by state officials or agents against their own citizens in their own territory, producing no direct injury to other states or their nationals. Accordingly, if universal jurisdiction was well established in international law by 1945, its extension to human rights offenses nonetheless represented a significant inroad into traditional notions of international law, which placed overwhelming emphasis on state sovereignty. One rationale for universal jurisdiction that is equally applicable to pirates and human rights violators is that both offenders commit acts so antithetical to common standards of civilization that they have, in effect, renounced the right to be protected by its laws. *Cf.* 2 A. GENTILI, DE IURE BELLI LIBRI TRES 22 (1612) (J. Rolfe trans. 1932) ("malefactors do not enjoy the privileges of a law to which they are foes"); 4 W. BLACKSTONE, *supra* note 63, at *71 (a pirate can be punished because "he has renounced all the benefits of society and government"). Moreover, in both instances international cooperation may be necessary to ensure apprehension. *See* Dickinson, *supra* note 57, at 338.

79. The IMT in fact had a hybrid character, reflecting diverse justifications cited for its assertion of jurisdiction. Jurisdiction was based in part upon the long-established right of belligerents to prosecute their enemies for violations of the laws of war committed during hostilities. *See* Wright, *supra* note 57, at 45, 49. Even this basis of jurisdiction was controverted, *see* Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT'L L. 770, 778-80 (1947), and the jurisdiction of the IMT in any event covered conduct that could not even arguably be prosecuted on this basis. Jurisdiction was also based on the prosecuting nations' status as occupying powers. *See* IMT Judgment, *supra* note 60, at 216 (the "making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."); *see also* Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 22 (1947); Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 210 (1946); Wright, *supra* note 57, at 51. The IMT also purported to operate as an international court applying the law of nations. *See* IMT Judgment, *supra* note 60, at 216 (the "Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, . . . it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."); *see also* R. WOETZEL, *supra* note 74, at 55-57. The IMT's status as an international tribunal was reinforced by the fact that the Nuremberg Charter, though executed by the United States, Great Britain, France and the Soviet Union, was ratified by nineteen other nations. The defendants were tried for crimes against international law, as codified in the Nuremberg Charter, without reference to German law. *See id.* at 35-36. Indeed, the Charter explicitly provided that the IMT would have jurisdiction over crimes against humanity "whether or not in violation of the domestic law of the country where perpetrated." *See infra* text accompanying note 220.

80. United States v. Ohlendorf, IV TRIALS OF WAR CRIMINALS, *supra* note 68, at 499-500; *cf.* United States v. von Leeb, XI TRIALS OF WAR CRIMINALS, *supra* note 68, at 480 (since there is "no doubt of the

Indeed, the notion that international judicial enforcement was the only means of genuinely establishing the rule of international law was a central premise of the Allied Powers' program of prosecution.[81]

Second, the Allied Powers sought to justify the novelty of judging matters traditionally subject to the exclusive sovereign power of states by linking crimes against humanity to conduct that had unambiguous international ramifications—international war. Crimes against humanity, the Allies asserted, are a menace to world peace; World War II supplied ample justification for their claim.[82] The Allied nations hewed closely to this rationale in establishing the jurisdiction of the International Military Tribunal ("IMT") over crimes against humanity. These could be prosecuted only when committed "in execution of or in connection with" one of the other two crimes subject to IMT jurisdiction: crimes against peace and war crimes.[83]

b. *Post-Nuremberg Developments*

In the wake of World War II, it may have seemed plausible to maintain that the international community had an interest in suppressing crimes against humanity because they threatened world peace. But in subsequent years, states were more inclined to avoid pressing human rights concerns with other governments, in large part because they feared that such actions would actually exacerbate international tensions.[84]

criminality of the acts with which the defendants are charged," the fact that no court had previously been established to try such violations is no bar to tribunal's assertion of jurisdiction).

81. *See* Kahn, *From Nuremberg to the Hague: The United States Position in* Nicaragua v. United States *and the Development of International Law*, 12 YALE J. INT'L L. 1, 11 (1987) (for parties and IMT, "adjudication was to be the process by which 'enforcement' of international law occurred"). Telford Taylor, who assisted in the prosecution of major war criminals before the IMT and led the subsequent prosecutions before U.S. Military Tribunals in Nuremberg, made the point this way: "No principle deserves to be called such unless men are willing to stake their consciences on its enforcement. That is the way law comes into being, and that is what was done at Nuernberg." TAYLOR REPORT, *supra* note 32, at 112.

82. Statements by prosecutors representing the Allied Powers and the decisions of the tribunals make constant reference to this theme. Telford Taylor stated the view succinctly in his final report on the U.S. prosecutions in Nuremberg: "The Second World War abundantly proved that dictatorship is the most constant and serious menace to world peace, as well as to the preservation of liberty and the maintenance of moral standards." TAYLOR REPORT, *supra* note 32, at 104; *see also* United States v. Altstoetter (Case No. 3), III TRIALS OF WAR CRIMINALS, *supra* note 68, at 982.

83. Charter of the International Military Tribunal, art. 6(c), 59 Stat. 1546, 1547 (1945), E.A.S. No. 472, 82 U.N.T.S. 284 [hereinafter Nuremberg Charter]. For further discussion of this subject, *see infra* text accompanying notes 229-37.

84. It took little time for this concern to prevail over international efforts to promote human rights. During its early years, as tensions between the U.S.S.R. and the United States mounted, the Commission on Human Rights of the United Nations faced substantial opposition, from both Eastern-bloc and Western nations, to its efforts to draft human rights conventions and to implement human rights guarantees. While the Commission was able to draft the nonbinding Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), in short order, it did not finish drafting the International Covenant on Civil and Political Rights, *supra* note 54, and the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976), both of which would be binding on States Parties, until the mid-1950s; the covenants were not adopted by the General Assembly until 1966, and they did not enter into force until

This reticence accounts for the failure of efforts, inspired by the Nuremberg prosecutions and contemplated in the Genocide Convention,[85] to create a permanent international criminal court.[86] Describing opposition to the creation of such a tribunal by state representatives who helped draft the Genocide Convention, one writer observed:

> [S]ince the Convention envisaged that members of governments might be authors of the crime [of genocide], there was the danger that the attempt to punish offenders through an international tribunal might jeopardize peace.[87]

In effect, then, one of the asserted justifications for the Nuremberg prosecutions—the claim that the international community should prosecute crimes against humanity because they threaten world peace—was turned on its head in the post-war years.[88] With this development, the vision nurtured by the Nuremberg precedent—that of a system of international criminal law whose authority depended upon its enforcement by a permanent international court—evanesced.[89]

1976.

85. *Supra* note 66.

86. The idea of establishing an international criminal court had been discussed for some decades before the Nuremberg prosecutions, *see* Manner, *supra* note 60, at 428-32, and in 1937 the League of Nations adopted a Convention for the Creation of an International Criminal Court. Although several states signed the Convention, none ratified it, and the treaty never entered into force. *See* 1 B. FERENCZ, *supra* note 66, at 54. Efforts to establish an international criminal court gained substantial momentum only after the Nuremberg prosecution. In its wake, there was some enthusiasm within the United States Department of State for establishing a permanent international court, but in a few short years that support dissipated. Interview with Telford Taylor in New York City (June 21, 1990). *See also* 2 B. FERENCZ, *supra* note 66, at 4-5. Subsequent efforts encountered especially strong antipathy during periods of pronounced international tension. *See generally id.* A proposal to create an International Court of Human Rights, presented to the working group that drafted the International Covenant on Civil and Political Rights, also was rejected. *See* Pechota, *The Development of the Covenant on Civil and Political Rights*, in THE INTERNATIONAL BILL OF RIGHTS 49 (L. Henkin ed. 1981).

87. L. KUPER, GENOCIDE 37 (1982); *cf.* 2 B. FERENCZ, *supra* note 66, at 46 (establishment of a permanent international criminal court was opposed on the basis that its existence "might even impair the possibilities of peace by interfering with the process of political conciliation").

88. This development was virtually inevitable; the prospect of states asserting a right even to criticize other nations' treatment of their own citizens—let alone to prosecute such conduct—would be anathema to governments long accustomed to nearly absolute sovereign prerogative in such matters. The fact that the only precedent for such prosecutions had been tied so directly to conquest in war could only reinforce states' inclination to associate international prosecutions with hostile inter-state relations. In this regard it is noteworthy that the only significant prospect of international prosecutions since the Nuremberg trials has also arisen in the wake of the prospective defendants' resounding defeat in war—this time, the Persian Gulf war of January-March 1991.

89. States have also been reluctant to file inter-state complaints pursuant to human rights conventions that establish such a procedure. As of May 30, 1991, the European Commission of Human Rights had received, since 1953, only 11 inter-state complaints (submitted by 21 applicant states) alleging violations of the European Convention, *supra* note 34. In the same period, it had received some 18,300 applications from individuals, of which approximately 2,000 were still pending on May 30, 1991. To date, no state has filed an inter-state complaint pursuant to Article 41 of the International Covenant, *supra* note 54. *See* de Zayas, *The Potential for the United States Joining the Covenant Family*, 20 GA. J. INT'L & COMP. LAW 299, 302 (1990).

In contrast, the other justification for the Allies' prosecution of crimes against humanity—the principle that every human being enjoys fundamental rights independent of domestic law—gained broad acceptance in subsequent decades. This principle has been affirmed in numerous international instruments, and widespread adherence to human rights conventions has reinforced the claim that human rights violations are a legitimate concern of all nations.[90] As human rights guarantees have acquired the status of positive international law, the legal fictions invoked by the Allied Powers to justify the Nuremberg prosecutions have diminished in importance—while, ironically, states' willingness to prosecute human rights violations committed outside their territory has dissipated.[91]

c. *Domestic Enforcement*

While issues of jurisdictional power dominated early developments in human rights law, more recent developments have emphasized domestic enforcement of international obligations. For example, human rights treaties drafted in recent years have often specified domestic means of enforcing rights recognized in earlier conventions, including criminal prosecution of violators.[92]

90. Virtually every nation has adhered to at least one international human rights agreement, Henkin, *supra* note 69, at 1, and human rights is now a prominent subject of international diplomacy. *See The Text of the Political Declaration*, N.Y. Times, July 11, 1990, at A4, col. 4; *The Group of 7 Statement: Concern From East Europe to China*, N.Y. Times, July 16, 1989, at 17, col. 1.

91. *But see supra* note 88 (noting possibility of international prosecutions for war crimes committed during recent Persian Gulf war). States have, in general, been more willing to assert universal jurisdiction to punish World War II criminals than to prosecute current offenders. A number of countries, including Israel and Australia, have enacted laws vesting domestic courts with jurisdiction over Nazi war crimes. *See Study as regards ensuring the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity and the exchange of documentation relating thereto: Report of the U.N. Commission on Human Rights*, U.N. Doc. E/CN.4/983, at 10, paras. 25, 29 (1969) [hereinafter *U.N. Study on Punishment of War Criminals*]. An Israeli court cited universal jurisdiction as one basis of its jurisdiction over Adolf Eichmann, who was prosecuted in Israel in 1961 for Nazi war crimes, including crimes against humanity and crimes against the Jewish people. Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 26 (Isr. Dist. Ct.—Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962). The Sixth Circuit cited the principle of universal jurisdiction to justify extraditing another war criminal, John Ivan Demjanjuk, to Israel to face charges of crimes against humanity and crimes against the Jewish people. Demjanjuk v. Petrovsky, 776 F.2d 571, 582-83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). The Israeli District Court in Jerusalem convicted Demjanjuk and sentenced him to death in 1988. A French court apparently invoked the principle of universality in rejecting a challenge to the legality of Nazi war criminal Klaus Barbie's arrest by French authorities in Guiana. The French *Chambre d'accusation* (of the Court of Appeal) found that the crimes against humanity with which Barbie was charged "do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign." *Excerpted in Barbie*, 78 I.L.R. 125, 130 (1988). This finding was affirmed by the Court of Cassation (Criminal Chamber) on October 6, 1983. *See id.* at 128-31. On July 4, 1987 Barbie was convicted by the *Cour d'Assises du Rhone* of 340 counts of 17 crimes against humanity, and was sentenced to life imprisonment. 78 I.L.R. 148 (1988) (editor's note).

92. The Convention Against Torture, *supra* note 67, adopted by the United Nations General Assembly in 1984, specifies a series of legal measures that States Parties must adopt to ensure suppression of torture—a practice already proscribed in the 1948 Universal Declaration of Human Rights, *supra* note 84, and in the International Covenant on Civil and Political Rights, *supra* note 54, which was adopted by the U.N. General Assembly in 1966. *See* J. BURGERS & H. DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 1 (1988); G.A. Res. 39/46 (1984), preambular para. 5 (General Assembly, adopting Convention Against Torture, expresses its desire to achieve "a more effective implementation of the existing prohibition under international and national law of the practice of torture . . ."). Similarly, the Inter-American Convention to Prevent and Punish Torture, *adopted* Dec. 9, 1985, OEA/ser.A./42 (1986), 67 O.A.S.T.S., *reprinted in* 25 I.L.M. 519 (1986) (*entered into force* 1987), which was adopted by the General Assembly of the Organization of American States (O.A.S.) in 1985, sets forth measures that States Parties must adopt to eradicate torture—a practice prohibited by the American Convention on Human Rights, *adopted* Jan. 7, 1970, O.A.S. Official Records, OEA/ser.K./XVI/1.1, doc. 65 rev. 1, corr. 1 (1970), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter "American Convention"]. Although obligatory for States Parties, the duties specified in these treaties are not the exclusive means states can use to enforce rights established by other sources of international law.

Notably, bodies that monitor compliance with several human rights treaties that are textually silent about punishment have made clear that investigation and prosecution play a necessary part in States Parties' fulfillment of certain duties under the conventions.[93]

Although surprising in light of the treaties' failure to mention punishment, these interpretations are a natural outgrowth of broad trends in international law, as are recent conventions explicitly requiring punishment of human rights crimes. International law has long relied upon criminal sanctions to secure compliance with norms deemed essential to international order.[94] When, more recently, international law established human rights guarantees,[95] it was therefore natural that criminal law would play a role in securing rights that are of paramount importance. And with the collapse of states' resolve to establish a permanent international criminal court, it was also inevitable that human rights law would revert to the older paradigm of international penal law, which envisaged that domestic courts would enforce criminal prohibitions.[96] Further, since human rights can be fully assured only when there are adequate safeguards in domestic law, it is scarcely surprising that states' duty to secure fundamental rights has been found to require an appropriate response by national courts when violations occur.

While modern law favors enforcement by courts of the state in which violations occur, that preference can be overridden if necessary to achieve the paramount aim of human rights criminal law: to prevent atrocious crimes by

93. This trend, which is examined in Section C, may be partly attributable to the fact that international organizations, having drafted and promulgated major human rights treaties some decades ago, are now increasingly concerned with monitoring implementation of the conventions. A more particular explanation may have to do with the nature of human rights violations committed by many governments in recent decades. Torture and extra-legal executions are often committed in secrecy, and a lack of government accountability is an essential element of forced "disappearances." *See* Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83, 94 (1990). As bodies that monitor compliance with human rights treaties began to examine these violations, it became increasingly important to identify states' affirmative duties to ensure fundamental rights, since direct state responsibility for violations often could not be established conclusively.

94. *See supra* notes 64-65 and accompanying text.

95. *See supra* text accompanying notes 69, 90.

96. *See supra* text accompanying note 65. More generally, for purposes of establishing state responsibility under international law, courts have long been regarded as organs of the state. *See* C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 68-69 (1928); Kelsen, *supra* note 60, at 538. Consistent with this approach, the performance of national courts in securing protected rights is one measure of a state's compliance with its international human rights obligations.

ensuring that offenders are punished. This scheme—a preference for domestic enforcement with allowance for "fallback" international jurisdiction—is embodied in several recent and draft conventions, which place primary responsibility for punishing proscribed conduct on the state where the crime occurred, but establish universal jurisdiction to ensure prosecution in the event that the government most responsible for suppressing violations fails to bring offenders to account.[97]

B. *Human Rights Conventions Specifying a Duty To Prosecute*

The most explicit obligations to punish human rights crimes that are likely to be relevant to societies emerging from dictatorship are established by the Convention on the Prevention and Punishment of the Crime of Genocide[98] ("Genocide Convention") and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment[99] ("Convention Against Torture").[100] Although both require States Parties to prosecute the conduct they proscribe, the two conventions embody profoundly different visions of international human rights law. Drafted in the wake of World War II, the Genocide Convention reflects a paradigm, inspired by the Nuremberg prosecutions, of a world order in which internationally recognized rights are enforced by an international tribunal. Establishment of a world court was a key objective of the convention's chief proponents, but their efforts were built on an edifice that was crumbling even as their labor progressed. By the time the drafters' work was completed, support for an international penal tribunal had so dissipated[101] that the convention's provision for jurisdiction by such a court was little more than an acknowledgment of a faded vision, and chief responsibility for prosecuting genocide fell to the state most responsible for the crimes.[102] Thus the Genocide Convention at once embodies a vanishing commitment to a system of international enforcement and an early manifestation of the more modern emphasis on domestic enforcement.[103]

The Convention Against Torture, which the General Assembly adopted thirty-six years after it adopted the Genocide Convention, reflects a pragmatic acceptance of the limited role of international enforcement in securing protected rights. No mention is made of an international tribunal. And while the Convention establishes a form of universal jurisdiction over torturers, chief responsibility for punishing violations lies with the state in which the crime occurred.

1. *The Genocide Convention*

The principle purpose of the Convention on the Prevention and Punishment of the Crime of Genocide was, as its name suggests, to prevent genocide[104] by ensuring punishment of the crime.[105] Virtually the entire convention is

97. *See infra* text accompanying notes 123-25; *see also* Clark, *supra* note 67, at 256.

98. *See supra* note 66. As of June 6, 1991, 101 countries had ratified the convention.

99. *See supra* note 67. As of June 6, 1991, 55 countries had ratified the convention.

100. Various other human rights treaties require States Parties to criminalize particular acts, *e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, art. 4, G.A. Res. 2106 A (XX) (*entered into force* Jan. 4, 1969); Apartheid Convention, *supra* note 66, art. V, or to punish violations of a particular right, *e.g.*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *adopted* Sept. 7, 1956, 3 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 40, 42-43. The four Geneva Conventions of 1949 also require States Parties to prosecute certain violations. Each of these conventions, which set forth standards of conduct relating to armed conflict, identifies several prohibitions the violation of which is deemed a "grave breach" of the convention. These include such acts as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement . . . ." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, art. 147, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, art. 50, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, art. 51, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, art. 130, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135. The conventions require High Contracting Parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" to the conventions, Geneva Conventions of 1949, arts. 146/49/50/129, and further provide:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, . . . hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Id. Although Article 3 common to all four conventions proscribes such conduct as torture and summary execution in the context of non-international armed conflict, it is generally thought that the "grave breaches" provisions apply only to acts committed during international armed conflicts. *See, e.g.*, T. MERON, *supra* note 57, at 33 n.93. Because this Article is concerned with the duty of successor governments vis-à-vis abuses committed against their own citizens, the duty to punish under the Geneva Conventions is not analyzed here.

101. *See supra* text accompanying notes 84-89.

102. *See infra* text accompanying notes 106-07.

103. *See supra* text accompanying notes 92-96.

104. Article II of the Genocide Convention, *supra* note 66, defines genocide as one of the following acts when committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

105. *See* U.N. Doc. E/AC.25/3 at 8 (1948) (remarks of United Nations Secretary General); U.N. GAOR, 178th, 179th plen. mtg., at 832 (1948) (remarks of delegate from Netherlands). While the *travaux preparatoires* suggest that one impetus behind the Convention was a desire to condemn World War II atrocities, *see, e.g.*, *id.* at 825 (remarks of delegate from France), the drafting records indicate that the overriding purpose was to prevent a recurrence by assuring punishment of offenders. *See, e.g.*, *id.* at 811 (remarks of Soviet delegate); *id.* at 819 (remarks of delegate from Pakistan); *id.* at 820 (remarks of U.S. delegate); *id.* at 823 (remarks of Australian delegate); *id.* at 840 (remarks of Polish delegate). Another impetus was a desire to correct what many viewed as a serious shortcoming of the Nuremberg prosecutions: the IMT's determination that it could convict Nazis of crimes against humanity only when the offenses were committed "in execution of or in connection with" crimes against peace or war crimes. *See* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression (Opinion and Judgment of the International Military Tribunal) 84 (1947), *quoted in Genocide: A Commentary on the*

designed to serve this purpose. Pursuant to Article I, Contracting Parties "confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish," and Article III sets forth various forms of participation in genocide that "shall be punishable." Article IV provides that persons "committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals," while Article V requires Contracting Parties to enact legislation necessary to give effect to the Convention "and, in particular, to provide effective penalties for persons guilty of genocide." Article VI specifies the tribunals that should try cases of genocide:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Since the "international penal tribunal" contemplated by the Convention was never created, the duty established by Article VI devolves upon the state in which the crimes occurred.

What has widely been viewed as a major flaw in the Genocide Convention—its reliance on domestic courts for punishment[106]—leaves unambiguous

Convention, 58 YALE L.J. 1142, 1143 (1949); U.N. GAOR, 178th, 179th plen. mtg., at 820 (1948) (comments of U.S. delegate); *id.* at 822-23 (remarks of delegate from Australia). This limitation had precluded prosecution of abominations against Germany's Jewish population before 1939, see *infra* note 230 and accompanying text; the definition of genocide contained in the Genocide Convention imposes no requirement of a nexus to war.

106. In the view of the U.S. delegate, "If the punishment of [genocide] was left to the State in question, the convention on genocide would be in the nature of a fraud." U.N. GAOR, 178th, 179th plen. mtg., at 821 (1948). Other delegates voiced similar doubts about the willingness of national courts to prosecute genocide. *See, e.g.*, *id.* at 823 (remarks of delegate from Australia); *id.* at 829 (remarks of delegate from Egypt); *see also* L. KUPER, *supra* note 87, at 37-38; *Genocide: A Commentary on the Convention*, *supra* note 105, at 1147. But a "storm of protest" was directed against a draft provision that would have required Contracting Parties to submit persons guilty of genocide for trial before an international court if 1) the states were unwilling to try or extradite the offenders, or 2) the offenders were acting with the support or on behalf of the state. L. KUPER, *supra* note 87, at 36-37. Opponents charged that an international court would infringe national sovereignty, *see* U.N. GAOR, 178th, 179th plen. mtg., at 815 (1948) (remarks of Soviet representative); *id.* at 842 (remarks of delegate from Poland), and, as noted earlier, expressed concern that international prosecution of offenders could jeopardize world peace. *See* text accompanying note 87, *supra*. While delegates to the drafting committee doubted states' willingness to prosecute acts of genocide committed in their territory, there was no question of Contracting Parties' duty to do so. Indeed, a proposal to include a provision contemplating reparations for genocide was defeated because some delegates feared that the draft provision would dilute the Convention's emphasis on criminal punishment. The provision had been included in the original draft convention prepared by the Secretary General. Draft Convention on the Crime of Genocide, art. XIII, U.N. Doc. E/447 (1947). Delegates who had opposed earlier proposals relating to an international penal tribunal were willing to accept the final text in part because efforts to include in the definition of genocide acts directed against "political groups" had been defeated. With this, the risk that states would be brought to account for persecuting political opponents had significantly diminished. *See* L. KUPER, *supra* note 87, at 38. Proposals to establish universal jurisdiction were also defeated. Again, opponents claimed that allowing courts to punish officials of another state would infringe national sovereignty and could provoke international tension. *See* N. ROBINSON, THE GENOCIDE CONVENTION 31-32 (1960).

Contracting Parties' duty to punish persons who commit genocide in the states' territory.[107] In practice, however, few post-transition situations would be covered by the Convention. Systematic repression is often directed against perceived or actual political opponents. But acts directed against "political groups" were excluded from the Convention's definition of genocide.[108] Also, even the most depraved violations would lie beyond the scope of the Convention unless "committed with intent to destroy, in whole or in part," one of the specified groups "as such."[109]

The jurisdiction established by the Genocide Convention is not exclusive. Scholars and judicial bodies concur that customary law establishes universal jurisdiction over genocide.[110] Moreover there is substantial support for the view that customary law requires states to prosecute acts of genocide committed in their territory. The International Court of Justice has asserted, in an advisory opinion, that the principles underlying the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligation."[111] Although the opinion does not specify which provisions reflect customary norms, those requiring punishment pursuant to the territorial principle,[112] which are the heart of the Convention, surely are included.[113] The

107. The duty probably would not arise under the Convention unless a state became a party before the acts constituting genocide took place. *See* Vienna Convention, *supra* note 62, art. 28 (establishing general rule that treaty provisions do not apply to acts that took place before entry into force of treaty for relevant party). An amnesty foreclosing prosecution of persons who committed genocide would, however, violate a state's obligations under customary law. *See infra* text accompanying notes 111-15.

108. *See supra* note 106. Proposals to include "political groups" in the definition were rejected in large part because delegates feared that their governments would face interference in their internal affairs if genocide were defined to include acts committed to destroy political groups. *See* L. KUPER, *supra* note 87, at 29. Kuper adds: "I think . . . that one may fairly say that the delegates, after all, represented governments in power, and that many of these governments wished to retain an unrestricted freedom to suppress political opposition." *Id.* at 30.

109. Genocide Convention, *supra* note 66, art. II. For example, the majority of persons killed by the Khmer Rouge, whose savage policies caused the deaths of over a million Cambodians in the 1970's, may not have been victims of genocide because it is not clear that the Khmer Rouge intended to kill members of a national group "as such." *See generally* B. Kiernan, The Cambodian Genocide: Issues and Responses (paper presented at conference on Genocide: The Theory—The Reality, Yale Law School, New Haven, Conn., Feb. 16, 1991). The United Nations Special Rapporteur on Genocide has stated that the Khmer Rouge was guilty of genocide "[e]ven under the most restricted definition, since the victims included target groups such as the Chams (an Islamic minority) and the Buddhist monks." *Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker*, 38 U.N. ESCOR Comm'n on Hum. Rts. at 10 n.17, U.N. Doc. E/CN.4/Sub.2/1985/6.

110. *See, e.g.*, Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 39 (Isr. Dist. Ct.—Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962); RESTATEMENT (THIRD), *supra* note 6, § 404, reporters' note 1 (1987); Randall, *supra* note 58, at 836.

111. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, at 23.

112. *See supra* note 58.

113. In a passage preceding the above-quoted language, the Court observed that "it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law . . .'" *Id.* The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES suggests that the Convention's definition of genocide also reflects customary law. RESTATEMENT (THIRD), *supra* note 6, § 702 comment d.

Restatement (Third) of Foreign Relations Law of the Uni... States supports this view:

> A state violates customary law if it practices or encourages genocide, *fails to make genocide a crime or to punish persons guilty of it*, or otherwise condones genocide. Parties to the Genocide Convention are bound also by the provisions requiring states to punish persons guilty of conspiracy, direct and public incitement, or attempt to commit genocide, or complicity in genocide, and to extradite persons accused of genocide.[114]

In this view, customary law requires all states to punish persons who commit genocide in their territorial jurisdiction,[115] while Parties to the Genocide Convention are additionally required to punish persons who participate less directly in the crime.

2. *The Convention Against Torture.*

Like the Genocide Convention, the Convention Against Torture imposes an unambiguous duty to prosecute the acts it defines as criminal.[116] States Parties pledge to "ensure that all acts of torture are offences under [their] criminal law,"[117] and, under specified circumstances, to undertake measures to establish jurisdiction over such offenses.[118] Article 7 requires that States Parties either extradite an alleged torturer or "submit the case to [their] competent authorities for the purpose of prosecution."[119]

In contrast to the analogous provision in the Genocide Convention, the duty established by Article 7 was understood to be a practical and effective means

114. *Id.* (emphasis added).

115. For reasons indicated *infra* note 198 and text accompanying notes 198-99, it is possible that the customary duty framed by the *Restatement* would be violated only by a complete failure to punish genocide, and not by a failure to punish every individual who participated in the crime.

116. The Inter-American Convention to Prevent and Punish Torture, *supra* note 92, similarly requires States Parties to criminalize torture and to punish violations. *Id.*, arts. 6, 12.

117. Convention Against Torture, *supra* note 67, art. 4. Article 1 defines "torture" as:

> 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 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.

118. *Id.*, art. 5. This article effectively establishes a form of universal jurisdiction. *See infra* note 123 and accompanying text.

119. This provision was designed to ensure that "no offender would have the opportunity to escape the consequences of his acts of torture." *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 36 U.N. ESCOR Comm'n on Hum. Rts. at 11, para. 61, U.N. Doc. E/CN.4/1367 (1980).

of suppressing torture.[120] ... much is evident both from statements of the drafting committee[121] and from the text of the Convention, which establishes an array of domestic measures designed to assure freedom from torture.[122]

While focusing on domestic means of preventing torture, the Convention also establishes a form of universal jurisdiction to ensure punishment in the event a State Party fails to prosecute torturers.[123] Drafted primarily to address situations in which a complicit government is unwilling to prosecute its officials for torture,[124] this provision would also make it "more difficult for the perpetrators to escape the consequences of their acts by fleeing to another country."[125]

The explicit duty to institute criminal proceedings against alleged torturers precludes adherents to the Convention Against Torture from enacting, or at least applying, an amnesty law that forecloses prosecution of torturers.[126] The committee established to monitor compliance with the Convention[127] has made clear, however, that the duty arises only when the alleged torture occurred after the Convention entered into force with respect to the State Party.[128]

120. This difference between the Convention Against Torture and the Genocide Convention stems from the nature of the conduct proscribed in the two treaties. Genocide is, by its nature, likely to involve state complicity. Although torture, too, is often committed pursuant to state policy, it is more likely than genocide to be inflicted by state agents acting in contravention of official policy.

121. The first draft convention contained relatively weak language: "Each State Party shall, except [in the case of extradition], ensure that criminal proceedings are instituted in accordance with its national law . . . ." *Summary Prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV)*, 35 U.N. ESCOR Comm'n on Hum. Rts. at 16, U.N. Doc. E/CN.4/1314 (1978). The language of the final text of Article 7 was substituted at the suggestion of the French delegation, which urged that it was "essential to retain the principle of the advisability of instituting proceedings." *Id.* at 17, para. 81.

122. *E.g.*, Convention Against Torture, *supra* note 67, art. 14 (civil remedies for torture); *id.*, art. 10 (training of law-enforcement personnel).

123. *Id.*, art. 5(2). This provision would ensure that "[n]o one guilty of torture [would] feel safe from prosecution." *Summary Records of the 32nd Meeting*, 40 U.N. ESCOR Comm'n on Hum. Rts. (32d mtg.) at 16, para. 85, U.N. Doc. E/CN.4/1984/SR.32 (delegate from Germany). Although some delegations were at first reluctant to accept a provision establishing universal jurisdiction, by early 1984 no state opposed its inclusion in the draft convention. *See Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 40 U.N. ESCOR Comm'n on Hum. Rts. (32d mtg.) at 5, para. 26, U.N. Doc. E/CN.4/1984/72.

124. *See Report of the Working Group on the Draft Convention Against Torture*, 38 U.N. ESCOR Comm'n on Hum. Rts. at 7, para. 40, U.N. Doc. E/CN.4/1982/L.40.

125. J. BURGERS & H. DANELIUS, *supra* note 92, at 58.

126. Nevertheless, a State Party might be allowed to enact a statute of limitations covering prosecutions for torture, provided the torture did not constitute a crime against humanity. *See infra* note 252. It would, however, probably be inconsistent with a State Party's obligations under the Convention to enact a statute of limitations that failed to provide a reasonable time for instituting criminal proceedings. In a situation where criminal prosecution was foreclosed because torture was carried out pursuant to state policy, the statute of limitations should be considered to have tolled during the period when prosecutions were effectively impossible.

127. Convention Against Torture, *supra* note 67, art. 17.

128. At its third session, the Committee Against Torture held inadmissible three communications challenging the application of two laws enacted by the government of Argentina that precluded prosecution of military authorities allegedly responsible for torturing to death relatives of the complainants. Both laws were enacted after Argentina had signed and ratified the Convention Against Torture but before the Convention entered into force, and the torture that was the basis of the communications had occurred before the Convention was even drafted. The Committee held that the Convention did not apply to the acts, including the legislative enactments, that occurred before the Convention entered into force, but observed

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C. *Comprehensive Human Rights Conventions*

In contrast to the conventions on torture and genocide, three comprehensive human rights treaties—the International Covenant on Civil and Political Rights ("International Covenant"),[129] the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"),[130] and the American Convention on Human Rights ("American Convention")[131]—do not explicitly require States Parties to prosecute or punish violations of rights set forth in the conventions. Authoritative interpretations make clear, however, that these treaties require States Parties generally to investigate serious violations of physical integrity—in particular, torture, extra-legal executions, and forced disappearances—and to bring to justice those who are responsible. The rationale behind these duties is straightforward: prosecution and punishment are the most effective—and therefore only adequate—means of ensuring a narrow class of rights that merit special protection.

The duties derive from States Parties' affirmative obligation to ensure rights set forth in these conventions. Adherents to all three treaties pledge not only to respect enumerated rights, but also to ensure that persons subject to their jurisdiction enjoy the full exercise of those rights.[132] The International Covenant and American Convention further require States Parties to adopt legislation or other measures necessary to give effect to the rights and freedoms recognized in the treaties,[133] and all three conventions require Parties to ensure that individuals whose rights are violated have an effective remedy before a competent body, even if the violation was committed by someone acting in an official capacity.[134] To underscore the importance of ensuring the right to life through legal guarantees, each convention provides that the right to life shall be protected by law.[135]

1. *International Covenant on Civil and Political Rights*

The possibility of requiring States Parties to punish violations was never seriously considered by the drafters of the International Covenant. The United Nations Commission on Human Rights, which drafted the Covenant, debated extensively the nature of a State Party's duty under Article 2(3) to provide an "effective remedy" for violations of the Covenant, and in this context briefly considered explicitly requiring States Parties to punish violators. The delegate from the Philippines proposed adding a new subparagraph to Article 2(3), providing that "violators shall swiftly be brought to the law, especially when they are public officials."[136] The proposal was rejected without significant

that the government of Argentina was nonetheless "morally bound to provide a remedy to victims of torture and to their dependents." O.R., M.M. and M.S. v. Argentina, Comms. Nos. 1/1988, 2/1988 and 3/1988, Decisions of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. CAT/C/3/D/1, 2, and 3/1988, Annex, para. 9 (1989).

129. *See supra* note 54. As of June 6, 1991, 95 countries had ratified this convention.

130. *See supra* note 34. The European Convention has been ratified by 23 states.

131. *See supra* note 92. As of 1990, 22 of the 32 member states of the Organization of American States had ratified the American Convention. This Article does not consider duties imposed by the Banjul Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, *reprinted in* 21 I.L.M. 58 (1982) [hereinafter "Banjul Charter"], because the Charter does not explicitly require States Parties to investigate or prosecute violations of its substantive guarantees, and the commission established to monitor States Parties' compliance has not yet rendered any decisions interpreting the Charter.

132. A Party to the International Covenant undertakes "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in the convention. International Covenant, *supra* note 54, art. 2(1). Parties to the American Convention similarly "undertake to respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. . . ." American Convention, *supra* note 92, art. 1(1), and Parties to the European Convention pledge to "secure to everyone within their jurisdiction the rights and freedoms" set forth the Convention. European Convention, *supra* note 34, art. 1. Professor Buergenthal writes that the duty to "ensure" rights set forth in the International Covenant "implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights." Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 77 (L. Henkin ed. 1981) (footnote omitted). Although the Banjul Charter differs significantly from the other comprehensive conventions, it too establishes affirmative obligations. The Charter provides that States Parties "shall recognize the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them." Banjul Charter, *supra* note 131, art. 1. It also declares that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and *guaranteed* in the . . . Charter.", *id.*, art. 2 (emphasis added), and shall have "the right to an appeal to competent national organs against acts violating his fundamental rights. . . ." *Id.*, art. 7(1)(a).

133. International Covenant, *supra* note 54, art. 2(1); American Convention, *supra* note 92, art. 2.

134. International Covenant, *supra* note 54, art. 2(3); American Convention, *supra* note 92, art. 25; European Convention, *supra* note 34, art. 13. In cases challenging amnesty laws enacted in Argentina and Uruguay that are currently pending before the Inter-American Commission on Human Rights, counsel for the petitioners have argued that the laws breach the American Convention's guarantee of legal redress (Article 25), as well as States Parties' affirmative duty under Article 1(1) to "ensure" rights enumerated in the Convention. The cases are Case 10.240, E.S.M.A. (Argentina); Case 10.029, de los Santos Mendoza (Uruguay); Case 10.036, Balbi (Uruguay); Case 10.305, Menotti Cobas et al. (Uruguay); Case 10.145, Rodriguez Larreta (Uruguay); Case 10.372, Brieba (Uruguay); Case 10.372, Ortiz (Uruguay); Case 10.374, Sanjurjo Casal (Uruguay); and Case 10.375, Paitta (Uruguay). The Commission's decisions on the merits are expected to be rendered in September 1991.

135. International Covenant, *supra* note 54, art. 6(1); American Convention, *supra* note 92, art. 4(1); European Convention, *supra* note 34, art. 2(1). Article 6(1) of the International Covenant was intended to ensure in particular that human life is protected "against unwarranted actions by public authorities as well as by private persons." *Annotations on the text of the draft International Covenants on Human Rights*, 10 U.N. GAOR Annex (Agenda Item 28, Part II) at 30, para. 4, U.N. Doc. A/2929 (1955). *See also* M. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 120 (1987). Interpreting Article 2(1) of the European Convention, a former President of the European Commission of Human Rights has written that it could "reasonably be implied that the State must make the deliberate taking of life by individuals a punishable offence." J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 37 (1987). Citing an early, unpublished decision, Fawcett wrote that a Contracting State's failure to prosecute such offenses nonetheless could not "be made the ground of an individual application to the Commission." *Id.*, *citing* 809/60 Recueil (1962) 1. More recently, however, a state's failure to provide for prosecution of a rapist was the ground of an individual application, resulting in a determination by the European Court of Human Rights that the state had breached Article 8 (respect for private life) of the European Convention. *See infra* text accompanying notes 182-88.

136. 6 U.N. ESCOR Comm'n on Hum. Rts. at 6, para. 24, U.N. Doc. E/CN.4/SR.195 (1950). The Philippine government had also prepared a proposal to add the following sentence to paragraph 2: "The perpetrators shall be duly and swiftly repressed, especially when they are public officials." This proposal was not voted upon. M. BOSSUYT, *supra* note 135, at 65, *citing* U.N. Doc. E/CN.4/365 (1950). The Philippine delegation made the following statement in support of the proposed amendment: "This addition

discussion,[137] but the general debate over Article 2(3) provides some insight into the delegates' possible concerns.

First, the Commission sought to ensure the broadest possible range of remedies for violations of human rights, and eschewed language implying that judicial remedies were the exclusive form contemplated by the Covenant.[138] Second, delegates sought to avoid language that would give rise to the same consequences regardless of the seriousness of a state's infraction.[139] More generally, Article 2(3) was designed principally to ensure that states provided noncriminal remedies, such as restitution or an order to desist wrongful conduct,[140] and delegates may have viewed the Philippine proposal to be out of place in such an article.[141]

places upon the State the responsibility of taking the initiative in the investigation and prosecution of abusive acts. The victim is too often under the influence of fear, so the Government itself should act with energy to bring the criminals swiftly to justice." *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles*, 6 U.N. ESCOR Comm'n on Hum. Rts. at 15, U.N. Doc. E/CN.4/365 (1950).

137. *See* 6 U.N. ESCOR Comm'n on Hum. Rts. at 6, para. 24, U.N. Doc. E/CN.4/SR.195 (1950). The Summary Record of the meeting in which the vote occurred reports only that, following defeat of the proposed amendment, the Philippine delegate "said that the vote should not be taken to mean that the Commission was indifferent to the fate of violators of human rights." *Id.*, para. 25.

138. An initial draft ensuring "an effective remedy before the competent national tribunals" was opposed by the Chairwoman of the Commission, Eleanor Roosevelt, because it "appeared to imply that all violations of the Covenant would take the form of justiciable issues subject to adjudication by the courts or by the judicial process, with the usual relief given by courts, such as damages or injunctions." 6 U.N. ESCOR Comm'n on Hum. Rts. at 20, para. 74, U.N. Doc. E/CN.4/SR.138 (1950). But, she asserted, the most effective remedy for violations might sometimes lie in the political realm, through legislative action. *Id.* at 20-21, para. 74; *see also* 18 U.N. GAOR 3d Comm. at 248, para. 9, U.N. Doc. A/C.3/SR.1259 (1963) (delegate from Chile asserts that expansion of remedies to include relief from "political" branches was "in no way intended to make the political authorities the sole guardians and defenders of human rights, but simply to make available to the victims of violations of human rights the greatest possible number of remedies from the greatest possible number of authorities."); *id.* at 247-48, para. 8 (delegate from France asserts that in some cases, the only remedy available might come from nonjudicial bodies).

139. Commenting on the early draft language requiring States Parties to provide a remedy before "the competent national tribunals," *see supra* note 138, the Chairwoman said:

> [W]here the exercise of discretion and judgment by administrative officials was involved it would seem highly improper to penalize government officials for errors of judgment, as distinguished from malicious misconduct. It would therefore be undesirable to require a penalty in such a case without making due allowance for the facts involved.

6 U.N. ESCOR Comm'n on Hum. Rts. at 21, para. 74, U.N. Doc. E/CN.4/SR.138 (1950). By implication, the Chairwoman seemed to regard judicial penalties to be appropriate when infractions were the product of "malicious conduct" and were otherwise appropriate in light of the "facts involved."

140. *See, e.g.*, 18 U.N. GAOR 3d Comm. at 247, para. 8, U.N. Doc. A/C.3/SR.1259 (1963) (statement of delegate from France).

141. In virtually every legal system, civil remedies and criminal prosecutions serve different functions. One writer describes the distinction this way:

> Criminal law is generally considered to be that field of jurisprudence which is concerned with wrongs against society. Such a wrong may arise by reason of an act directed against an isolated individual, but it is the tort against the social structure, resulting from such act, which is punishable. The trial of the wrongdoer is not for the purpose of furnishing redress to the person or persons injured—that is left to the processes of the civil law. The purposes of the criminal law are rather to punish the wrongdoer for his offense against the mores of society and to deter others from acting likewise.

J. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 9 (1954); *see also* Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 173 (1987) (while criminal sanctions are concerned solely with punishment and deterrence, civil

But if the drafters did not seriously consider requiring States Parties to prosecute violations of the Covenant,[142] nothing in the drafting history is inconsistent with such a duty. The text could, moreover, reasonably be interpreted to require States Parties to ensure at least some rights through use of criminal sanctions.[143]

The Human Rights Committee established to monitor compliance with the Covenant has, in fact, repeatedly asserted that States Parties must investigate summary executions, torture, and unresolved disappearances; bring to justice those who are responsible; and provide compensation to victims. These pronouncements stand in notable contrast to the Committee's more characteristic practice of granting states substantial leeway to determine how they will implement the Covenant[144] and to fashion an appropriate remedy when found in breach of their treaty obligations.[145]

remedies are designed to compensate victims as well as to sanction and deter wrongdoers). Authoritative interpretations make clear that the International Covenant imposes a duty criminally to prosecute certain violations that is distinct from the duty to provide effective civil remedies. *See infra* text accompanying notes 147-48, 155-56, 160.

142. The most extensive consideration of punishment arose during debate over Article 15. That debate reflected a strong consensus in favor of prosecuting certain violations, but the delegates were principally concerned with punishment of war criminals pursuant to principles of international law established outside the parameters of the Covenant, and not with domestic enforcement of the Covenant. Article 15(2) provides that the general ex post facto proscription set forth in Article 15(1) shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." The initial impetus behind this provision was the delegates' desire to ensure that Article 15(1) did not inadvertently call into question the validity of the prosecutions of war criminals at Nuremberg and Tokyo. *See* 2 U.N. ESCOR Comm'n on Hum. Rts. at 12, U.N. Doc. E/CN.4/SR.36 (1947); 6 U.N. ESCOR Comm'n on Hum. Rts. at 12, para. 57, U.N. Doc. E/CN.4/SR.159 (1950). But as the drafting progressed, many delegates supported the provision for more affirmative reasons as well: it would ensure that persons who committed crimes against humanity did not escape punishment simply because national law did not recognize the offense. *See* 15 U.N. GAOR 3d Comm. at 131, para. 20, U.N. Doc. A/C.3/SR.1007 (1960) (delegate from United Kingdom, citing prospect of amnesty being granted for genocide, argues that if "such crimes against humanity came to be considered a less serious crime than they were felt to be at present, criminals who had been guilty of them might escape scot free. That must be avoided at all costs . . . ."); 15 U.N. GAOR 3d Comm. at 134, para. 3, U.N. Doc. A/C.3/SR.1008 (1960) (delegate from Poland asserts that if war crimes like those punished at Nuremberg "should be perpetrated in the future, they must be judged with the same severity . . . ."); *id.* at 135, para. 14 (delegate from Yugoslavia supports Article 15(2), which "provided that crimes against humanity should always be punished.").

143. That the duties set forth in the Covenant could be given greater precision through subsequent interpretation clearly was contemplated by the delegates to the drafting committee. *See, e.g.*, 9 U.N. GAOR 3d Comm. at 96, para. 9, U.N. Doc. A/C.3/SR.562 (1954). Several writers have found a duty to discipline wrongdoers to be implicit in states' duty to "ensure" rights. Professor Buergenthal writes: "The obligation to 'ensure' rights creates affirmative obligations on the state—for example, to discipline its officials . . . ." Buergenthal, *supra* note 132, at 77; *see also* Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS 119 (L. Henkin ed. 1981) (States Parties to Covenant arguably must exercise due diligence to prevent intentional deprivation of life by individuals, "as well as to apprehend murderers and to prosecute them in order to deter future takings of life").

144. *See* CCPR/C/21, General comment 3/13, para. (1) (Human Rights Committee observes that the International Covenant "generally leaves it to the States Parties concerned to choose their method of implementation . . . .").

145. *See, e.g.*, Varela Nuñez v. Uruguay, Comm. No. 108/1981, 38 U.N. GAOR Supp. (No. 40) Annex XXIII, para. 11, U.N. Doc. A/38/40 (1983) (State Party must provide "effective remedies pursuant to article 2(3) of the Covenant" for violating right to travel by denying complainant a passport). The Committee has, however, occasionally found that States Parties are required to perform specific acts, even when physical

a. *Torture*

In "general comments"[146] interpreting Article 7 of the Covenant, which prohibits torture and cruel, inhuman or degrading treatment or punishment, the Committee has asserted:

> [I]t is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. *Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible*, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.[147]

As this comment makes clear, a state's duty to investigate allegations of torture and hold the wrongdoers responsible exists over and above its duty to provide victims an effective civil remedy.[148]

harm is not threatened. In one case, finding a violation of the right to be free from arbitrary detention, the Committee expressed the view that the offending State should provide the detainee a "fresh trial." Sendic v. Uruguay, Comm. No. 63/1979, 37 U.N. GAOR Supp. (No. 40) Annex VII, para. 21, U.N. Doc. A/37/40 (1982); *see also* Magana v. Zaire, Comm. No. 90/1981, 38 U.N. GAOR Supp. (No. 40) Annex XIX, para. 9, U.N. Doc. A/38/40 (1983) (State Party is under obligation to return complainant's property). Moreover, pursuant to the Covenant's explicit provision that persons unlawfully arrested or detained "shall have an enforceable right to compensation" (Article 9(5)), the Committee has repeatedly found compensation due to victims of arbitrary detention. *E.g.*, Viana Acosta v. Uruguay, Comm. No. 110/1981, 39 U.N. GAOR Supp. (No. 40) Annex XI, para. 15, U.N. Doc. A/39/40 (1984); Cámpora v. Uruguay, Comm No. 66/1980, 36 U.N. GAOR Supp. (No. 40) Annex VIII, paras. 19 and 20, U.N. Doc. A/36/40 (1981). The Committee has also repeatedly expressed the view that States Parties should provide immediate medical care to detainees in cases where physical harm is threatened. *See, e.g.*, Larrosa v. Uruguay, Comm. No. 88/1981, 38 U.N. GAOR Supp. (No. 40) Annex XVI, para. 13, U.N. Doc. A/38/40 (1983); Nieto v. Uruguay, Comm. No. 92/1981, 38 U.N. GAOR Supp. (No. 40) Annex XX, para. 12, U.N. Doc. A/38/40 (1983).

146. States Parties undertake to prepare periodic reports describing measures they have taken to implement the Covenant, and the Committee is directed to transmit both the reports and "such general comments as it may consider appropriate" to the States Parties and, if it wishes, to the Economic and Social Council. International Covenant, *supra* note 54, art. 40. Professor Schachter notes that some States Parties' compliance reports have made reference to "the role of procurators, ombudsmen and comparable officials who have the responsibility of investigating and instituting action against authorities who have abused their power or otherwise infringed on human rights." He observes that "ideally the procurator generals, directors of public prosecutions, and parliamentary commissioners could be effective instruments for holding governmental officials accountable for their acts." Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS 330 (L. Henkin ed. 1981). The Committee has periodically prepared "general comments" interpreting specific articles of the Covenant.

147. Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex V, general comment 7(16), para. 1, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982) (emphasis added).

148. The obligatory nature of these measures is suggested by comparing the use of the term "must" in the quoted language with the word "may" in the discussion that follows. Immediately following the above-quoted passage, the Committee introduces a series of additional measures, such as training of law-enforcement personnel, with the phrase, "Among the safeguards which may make control effective are. . . ."

Whether the requirement . . .t offenders "be held responsible" necessarily connotes criminal penalties is unclear. The United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[149] suggests, however, that criminal punishment would be appropriate with respect to torture, while other disciplinary action might be appropriate for less serious forms of ill-treatment.[150]

Subsequent decisions on individual communications have reinforced the Committee's "general comment" on Article 7.[151] For example, in *Muteba v. Zaire*,[152] the Committee found that the government of Zaire had committed torture in violation of Article 7, and concluded that the government was "under an obligation to . . . conduct an inquiry into the circumstances of [the victim's] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future."[153]

b. *Extra-legal Executions*

In a case involving the arrest and subsequent killing of "15 prominent persons . . ., including journalists, lawyers, professors and businessmen,"[154] the Committee found that Surinamese military police had intentionally deprived the victims of life in violation of Article 6(1) of the Covenant, and urged the government "to take effective steps (i) to investigate the killings . . .; (ii) to

149. G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). This declaration was a precursor to the 1984 Convention Against Torture.

150. Article 10 of the Declaration provides that criminal proceedings should be instituted against persons who allegedly committed torture, and that, "[i]f an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings."

151. The Committee is empowered to "receive and consider" communications from individuals who are subject to the jurisdiction of states that have ratified an Optional Protocol and who claim to have suffered a violation of any of the rights protected by the Covenant. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 59, art. 1, U.N. Doc. A/6316 (1966). While the Optional Protocol does not empower the Committee to order states to afford remedies for violations, it authorizes the Committee to "forward its views to the State Party concerned and to the individual" after considering the communication in closed session. *Id.*, art. 5(4) and (3). In practice, the Committee has expressed (and published) its views as to whether States Parties' conduct violates their duties under the Covenant, and regarding the steps that should or must be taken to rectify a breach. Pursuant to Article 41 of the Covenant, States Parties can also recognize the competence of the Committee to receive inter-state complaints and to attempt conciliation between the complaining state and the state allegedly in breach of its obligations. No such complaint has ever been filed. *See supra* note 89.

152. Comm. No. 124/1982, 39 U.N. GAOR Supp. (No. 40) Annex XIII, U.N. Doc. A/39/40 (1984).

153. *Id.*, para. 13. Curiously, in a case preceding *Muteba v. Zaire*, the Committee found the Uruguayan government responsible for torture but did not state that an investigation or prosecution was required. The Committee did, however, express the view that the government was "under an obligation . . . to take steps to ensure that similar violations do not occur in the future." Estrella v. Uruguay, Comm. No. 74/1980, 38 U.N. GAOR Supp. (No. 40) Annex XII, para. 11, U.N. Doc. A/38/40 (1983), a mandate broad enough to include investigation and prosecution. *See also* Gilboa v. Uruguay, Comm. No. 147/1983, 41 U.N. GAOR Supp. (No. 40) Annex VIII, U.N. Doc. A/41/40 (1985).

154. Baboeram v. Suriname, Comm. Nos. 146/1983 and 148-154/1983, 40 U.N. GAOR Supp. (No. 40) Annex X, para. 13.2, U.N. Doc. A/40/40 (1985).

bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname."[155] Similarly, finding the government of Uruguay in breach of Article 6 for the death-in-detention of Hugo Haroldo Dermit Barbato, the Committee expressed "the view that the State party *is under an obligation* to take effective steps . . . *to establish the facts of Hugo Dermit's death, to bring to justice any persons found to be responsible for his death* and to pay appropriate compensation to his family."[156]

c. *Disappearances*

Although "disappearances" are not proscribed as such in the International Covenant,[157] the Committee has interpreted the Covenant to impose a duty to "investigate, punish and compensate" when disappearances occur. In the *Bleier*[158] and *Quinteros*[159] cases, the Committee concluded that the government of Uruguay should take effective steps: (a) to establish what had happened to the victims, and, in the *Quinteros* case, to secure the victim's release from detention; (b) to bring to justice any persons found to be responsible for the victims' disappearance and ill-treatment and, in the *Bleier* case, for the victim's

155. *Id.*, para. 16. In earlier "general comments" on Article 6, the Committee alluded to a duty to punish, but did not elaborate: "The Committee considers that States Parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces." Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex V, para. 3, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982).

156. Dermit v. Uruguay, Comm. No. 84/1981, 38 U.N. GAOR Supp. (No. 40) Annex IX, para. 11.a, U.N. Doc. A/38/40 (1983) (emphasis added). In one case in which the Committee found a State Party's conduct to have violated Article 6, it found compensation due but did not urge the State to undertake an investigation and prosecution. In that case, however, the government had already carried out an administrative inquiry into the incident, dismissed responsible police officers and criminally prosecuted the alleged offenders. The defendants were acquitted on the basis of an emergency decree in force at the time of their conduct; the Human Rights Committee expressed the view that "the right to life was not adequately protected by the law of Colombia as required by article 6 (1)," Camargo v. Colombia, Comm. No. R.11/45, 37 U.N. GAOR Supp. (No. 40) Annex XI, para. 13.1, U.N. Doc. A/37/40 (1982), and that "the State party should take the necessary measures . . . to ensure that the right to life is duly protected by amending the law." *Id.*, para. 15.

157. A "disappearance" is a forced abduction by agents of the state, followed by a complete denial of knowledge of the victim's whereabouts and of other forms of accountability by state officials. Disappearances violate the right to be free from arbitrary arrest and detention, which is protected by guarantees set forth in Articles 9 and 14. When followed by torture or summary execution, a disappearance also entails a violation of Article 7 or 6, respectively. In "general comments" on Article 6, the Committee has observed that ". . . States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life." Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex V, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982).

158. Bleier v. Uruguay, Comm. No. R.7/30, 37 U.N. GAOR Supp. (No. 40) Annex X, U.N. Doc A/37/40 (1982).

159. Quinteros v. Uruguay, Comm. No. 107/1981, 38 U.N. GAOR Supp. (No. 40) Annex XXII, U.N. Doc. A/38/40 (1983).

probable death; (c) to pay compensation for the wrongs suffered; and (d) to ensure that similar violations do not occur in the future.[160]

Because the Committee has not set forth a rationale for its views in these cases, it is not clear whether it regards investigation and punishment to be generally required when torture, extra-legal killings, or disappearances occur, or merely the most appropriate response in the cases it has considered.[161] The distinction may, in any event, be inconsequential. Implicit in the Committee's decisions is the view that investigation and prosecution are the most effective means of securing the right to life and the right to be free from torture and forced disappearance. In view of the paramount importance that the Committee has attached to these three rights, it is reasonable to assume that States Parties must use the most effective means available to ensure their enjoyment.[162]

Under this interpretation of the Committee's jurisprudence, prosecution leading to an appropriate sanction is generally required when a disappearance, an extra-legal execution, or torture is credibly alleged. Some departures from

160. Bleier v. Uruguay, Comm. No. R.7/30, 37 U.N. GAOR Supp. (No. 40) Annex X, para. 15, U.N. Doc. A/37/40 (1982); Quinteros v. Uruguay, Comm. No. 107/1981, 38 U.N. GAOR Supp. (No. 40) Annex XXII, para. 16, U.N. Doc. A/38/40 (1983). The Committee's views in the *Quinteros* case make clear that a duty to clarify the fate of the "disappeared" is owed to the victim's family for reasons distinct from the deterrence rationale supporting the general duty to investigate possible criminal conduct. The case had been submitted by the mother of a woman who had been missing for five years. The Committee found that, in light of the "anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts . . . [the mother] too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7." Accordingly, the Committee asserted, the mother "has the right to know what has happened to her daughter." *Id.*, para. 14.

The duty to investigate, prosecute and provide compensation may not apply if the disappearance is later acknowledged and the victim survives. In *Dermit* the Committee found the government of Uruguay in violation of Article 6 because of the death-in-detention of Hugo Dermit and in violation of Articles 9 and 14 because of the arbitrary arrest and detention of Guillermo Dermit. Guillermo Dermit's arrest and detention was unacknowledged for 17 days, leading the Committee to assert that he "disappeared on 2 December 1980." Dermit v. Uruguay, Comm. No. 84/1981, 38 U.N. GAOR Supp. (No. 40) Annex IX, para. 8.3, U.N. Doc. A/38/40 (1983). While finding the government liable to provide an investigation, prosecution and compensation with respect to Hugo Dermit's death, in his younger brother's case the Committee found Uruguay responsible for "ensur[ing] strict observance of all the procedural guarantees prescribed by . . . the Covenant"; for transmitting a copy of its views to Guillermo Dermit; and for ensuring that similar violations did not recur. *Id.*, para. 11. *Compare* A. & H. Sanjuan Arevalo v. Colombia, Comm. No. 181/1984, 45 U.N. GAOR Supp. (No. 40) Annex IX, para. 11, U.N. Doc. A/45/40 (1989) (in case involving unresolved disappearance of two brothers, Committee finds breach of Articles 6 and 9 despite ongoing investigations and disciplinary proceedings by State Party).

Although the decisions in *Bleier*, *Quinteros* and *Sanjuan Arevalo* implied that disappearances are a continuing violation of the Covenant as long as the fate of the victim is unresolved, the Committee has held inadmissible a communication concerning disappearances that took place before the Covenant entered into force with respect to the respondent state, even though the victims' fate had never been clarified. S.E. v. Argentina, Comm. No. 275/1988, 45 U.N. GAOR Supp. (No. 40) Annex X, para. 5.3, U.N. Doc. A/45/40 (1990).

161. In the *Bleier* case the Committee "urge[d]" the government of Uruguay to take the steps enumerated *supra*; in the subsequent *Quinteros* case it expressed the view that the government "should" take those steps.

162. This interpretation of the Committee's jurisprudence is similar to another legal argument advanced by several international law experts: Under both customary and conventional law, a narrow class of fundamental rights are nonderogable. If governments are required to uphold those rights in all circumstances, including situations of public emergency, they should not be permitted to suspend operation of the legal machinery necessary to ensure the rights. *See* Goldman, *supra* note 5, at 11; *see also* Part III, Section B.

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this norm might be justified, however. The clearest justification would be evidentiary constraints, provided they were not the product of government malfeasance. A measure of flexibility is implied, moreover, in the Committee's use of such phrases as "bring to justice" and "hold responsible." While these terms seem to contemplate appropriately severe criminal penalties, in some instances administrative disciplinary procedures might satisfy a state's duty. Clearly, however, a State Party's routine failure to punish extra-legal killings, torture, and disappearances would constitute a breach of its duties.

While the Committee has made clear that punishment plays a necessary part in States Parties' fulfillment of certain duties under the Covenant, it has stopped short of recognizing a right by individuals to ensure that a particular person is prosecuted. In *H.C.M.A. v. the Netherlands*,[163] the Committee rejected the complainant's claim that Article 14(1) of the Covenant, which guarantees the right to a fair trial, establishes a right "to see another person criminally prosecuted."[164]

2. *American Convention on Human Rights*

The American Convention, like the International Covenant, has been interpreted to require States Parties to investigate and punish serious violations of physical integrity.[165] In its first contentious case,[166] the Inter-American Court of Human Rights interpreted Article 1(1) of the American Convention to impose on each State Party a "legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[167] The decision was rendered in the *Velásquez Rodríguez Case*, brought by the Inter-American Commission on Human Rights against the government of Honduras for the unresolved disappearance of Manfredo Velásquez in September 1981. Although the fate of the victim could not be established conclusively, the Court heard testimony indicating that he had been tortured and killed by Honduran security forces.

The Court found the Honduran government responsible for multiple violations of the American Convention, basing much of its analysis on the affirmative duties established by Article 1(1).[168] Writing of the duty, pursuant to Article 1(1), to "ensure" rights set forth in the Convention, the Court asserted:

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the *States must prevent, investigate and punish any violation of the rights recognized by the Convention* and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation . . . .[169]

These obligations are not fulfilled if an investigation is a "mere formality preordained to be ineffective"; instead, it "must be undertaken in a serious manner . . . ."[170] Significantly, the Court found that Honduras' duties under the Convention persisted even though the government in power at the time of its decision was not the same one that had presided over the practice of disappearances whose victims included Manfredo Velásquez.[171]

163. Comm. No. 213/1986, 44 U.N. GAOR Supp. (No. 40), U.N. Doc. A/44/40 (1989).

164. *Id.*, para. 11.6. The complainant had unsuccessfully challenged a Dutch military prosecutor's decision not to prosecute a police officer who had allegedly maltreated the complainant at the time of his arrest. There was no suggestion in the Committee's decision that failure to prosecute police for violating citizens' rights was a general pattern in the Netherlands. The Committee noted that the Dutch Parliament was then considering legislation that would enable citizens to appeal decisions by the military prosecutor not to prosecute cases—a right already available with respect to civilian prosecutors' determinations. *Id.*, paras. 4.4 and 4.5; *see also* S.E. v. Argentina, Comm. No. 275/1988, 45 U.N. GAOR Supp. (No. 40) Annex X, para. 5.5, U.N. Doc. A/45/40 (1990) (citing H.C.M.A. v. the Netherlands in *dictum*).

165. The *travaux preparatoires* contain little indication that punishment was contemplated as a necessary means of enforcing the American Convention. Discussion of the role of the judiciary arose principally in the context of Article 25, which establishes a right to effective remedies, and of provisions prohibiting arbitrary arrest and detention and ensuring due process protections for criminal defendants.

166. The Court is empowered both to render advisory opinions interpreting the Convention (as well as other treaties concerning the protection of human rights in the Americas), American Convention, *supra* note 92, art. 64, and to consider "contentious cases" alleging a violation of the Convention by a State Party that has recognized its competence, *id.*, art. 62. *See generally* Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982); Méndez & Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507, 527-30 (1990).

167. Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (1988) (judgment). The *Velásquez Rodríguez Case* was one of three cases filed with the Court by the Inter-American Commission on Human Rights alleging Honduran government responsibility for disappearances, and was the first to result in a decision on the merits. The chief findings summarized below were affirmed in the judgment of January 20, 1989 in the Godínez Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 5 (1989). The Court did not find the Honduran government responsible for the disappearances alleged in the third companion case. *See* Fairén Garbi and Solís Corrales Case, Inter-Am. Ct. H.R. (ser. C) No. 6, para. 158 (1989) (judgment).

168. *See supra* note 132. The Court found Article 1(1) to be "essential" in determining whether conduct infringing one of the rights set forth in the Convention could be attributed to the government, giving rise to state responsibility for a violation of the Convention. Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 164 (1988) (judgment).

169. *Id.*, para. 166 (emphasis added). Similarly, the Court asserted:

> The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

Id., para. 176; *see also id.*, para. 174.

170. *Id.*, para. 177. The Court implied that an investigation undertaken by the same body accused of responsibility for alleged disappearances prima facie fails to satisfy this standard. *See id.*, para. 180.

171. The Court wrote:

> According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.

Although the judgment suggested that a duty to punish applies to "every" violation of the American Convention,[172] it is unlikely that the Court intended the obligation to extend to all violations, regardless of the severity of the breach. Instead, the Court's reasoning should, pending further clarification, be confined to the especially serious violations raised in the case before it—disappearances, probable torture, and probable extra-judicial execution.[173]

The judgment in the *Velásquez Rodríguez Case* was prefigured by numerous decisions of the Inter-American Commission on Human Rights interpreting the American Declaration of the Rights and Duties of Man[174] ("American Declaration") and the American Convention.[175] In cases involving violations of Article I of the Declaration, which assures the right to life, liberty, and personal security, the Commission has repeatedly recommended that the offending state "order a thorough and impartial investigation" and, in accordance with domestic law, "punish the individual or individuals responsible."[176] It has similarly recommended that States Parties to the American Convention investigate serious

Id., para. 184. The Court emphasized that the duty to clarify the fate of someone who has disappeared, and to inform the victim's relatives of the results of these efforts, persists as long as the victim's fate remains uncertain. *Id.*, para. 181.

172. *Id.*, para. 176.

173. It is also unclear why the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance of Manfredo Velásquez. The most likely explanation is that the Court viewed the acts of declaring Honduras in breach of its duties and of enunciating States Parties' affirmative obligations under the American Convention to be less of an intrusion on sovereignty than ordering the government to institute criminal proceedings. *Cf.* T. MERON, *supra* note 57, at 145 (decisions ordering injunctive relief "tend to generate tension between international authority and state sovereignty," whereas "a declaration of a right by an international judicial body does not significantly clash with the right of a sovereign state to choose the necessary remedies"). Still, the Court found that Honduras was required to pay compensation to the victim's relatives. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 194(5) (1988) (judgment). In its judgments on damages in *Velásquez* and *Godínez*, the Court referred to its earlier judgments on the merits as establishing a duty to prevent, investigate and punish violations and stated that the duty remains binding until the government fully complies. Judgment of July 21, 1989 (damages), Velásquez Rodriguez Case, paras. 34-36; Judgment of July 21, 1989 (damages), Godínez Cruz Case, paras. 32-34.

174. *Adopted* May 2, 1948, OEA/ser.L./V/II.23, doc. 21 rev. 6 (1979).

175. The Commission was created to further respect for human rights among O.A.S. member states. Declaration at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Aug. 12-18, 1959, Final Act, OAS Official Records, OEA/ser.C./II.5, at 4-6 (1959). The Commission's statute provides that it promotes the observance of human rights. "Human rights" refers to rights set forth in the American Convention in relation to States Parties, and to rights set forth in the American Declaration with respect to other states that are O.A.S. members. Statute of the Inter-American Commission on Human Rights, art. 1. In 1965, the Second Special Inter-American Conference empowered the Commission to examine communications alleging human rights violations, to request information from the relevant government, to make appropriate recommendations and to publish observations on matters covered in the communications in its annual report. Resolution XXII, "Expanded Functions of the Inter-American Commission on Human Rights," Final Act of the Second Special Inter-American Conference, OAS/ser.E./XIII.1, at 45-46 (1965). The American Convention, adopted five years later, explicitly authorizes the Commission to receive both individual and inter-state petitions alleging violations of the Convention by States Parties. 1985 INTER-AM. Y.B. ON HUM. RTS. 66-68. For a description of the Commission's powers and activities, see Méndez & Vivanco, *supra* note 166, at 519-27.

176. Case 1870, INTER-AM. C.H.R. 52, OEA/ser.L./V/II.43, doc. 21 (1978); *see also* Case 1967, INTER-AM. C.H.R. 55, OEA/ser.L./V/II.43, doc. 21 (1978); Case 1783, para. 3, IACHR, TEN YEARS OF ACTIVITIES, 1971-1981 at 142-46; Case 2126, INTER-AM. C.H.R. 77, OEA/ser.L./V/II.47, doc. 13 rev. 1 (1979); Case 2088, INTER-AM. C.H.R. 38, OEA/ser.L./V/II.50, doc. 13 rev. 1 (1980).

violations of physical integrity and that they "try and punish those responsible for their occurrence," as well as provide compensation.[177]

Despite these decisions, in 1986 the Commission expressed a general inclination to allow national authorities to determine the validity of amnesty laws enacted by previous governments, subject to the qualification that the truth about past violations must be fully known.[178] More recently, however, the Commission's Chairman has voiced strong opposition to amnesty laws that foreclose prosecution of atrocious crimes:

> A compact by which a whole nation is called upon to suspend its memories of torture, murder, forcible "disappearances" of loved ones, a compact which would have citizens pretend that the tragic losses and suffering which they have undergone never occurred, this . . . is no bargain. This is not amnesty; it is forcible amnesia. The "peace" that is bought at this price is supported by a thread slenderer even than the thread by which the sword of Damocles was suspended.[179]

The Chairman suggested that such amnesties violate rights set forth in the American Convention and Declaration: "The rights set out in the American Convention on Human Rights and in the American Declaration of the Rights and Duties of Man by their very nature cannot be subject to extinction by national fiat."

3. *European Convention for the Protection of Human Rights and Fundamental Freedoms*

The European Court and Commission of Human Rights[180] have had comparatively few occasions to elucidate the role of punishment in securing rights set forth in the European Convention. Decisions of both bodies make clear, however, that punishment plays a part in Contracting States' fulfillment of certain duties under the Convention.[181]

177. *E.g.*, Case 10.150, Informe 3/90 (Suriname), OEA/ser.L./V/II.77, doc. 23, at 14 (1990).

178. INTER-AM. HUM. RTS., OEA/ser.L./V/II.68, doc. 8 rev.1 (1986).

179. Speech by Ambassador Oliver H. Jackman before the First Committee of the XIX Regular Meeting of the General Assembly to Present the Annual Report of the IACHR, Nov. 1989.

180. The European Commission can receive both individual petitions and inter-state complaints alleging violations of the Convention by Contracting States. European Convention, *supra* note 34, arts. 24, 25. When it finds a petition admissible, the Commission attempts a friendly settlement of the dispute. When this cannot be achieved, the Commission prepares a detailed report setting forth its finding of facts and its conclusions regarding whether there has been a breach of the Convention. *Id.*, arts. 28-31. Within three months of the transmittal of such reports to the parties and to the Council of Ministers, the government-parties or the Commission can refer the case to the European Court of Human Rights. *Id.*, art. 48. If the Court determines that it has jurisdiction over the case, it determines whether there has been a breach of the Convention; its judgment is final and binding. *Id.*, arts. 50, 52. *See generally* Higgins, *The European Convention on Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 505-11 (T. Meron ed. 1984).

181. The European Commission has, however, repeatedly rejected claims that Article 6 of the Convention, which guarantees the right to a fair trial, establishes a right to have criminal proceedings instituted

In *X and Y v. Netherlands*,[182] the Court found the Dutch government in breach of the European Convention by virtue of a gap in Dutch law that had precluded a victim of rape from instituting criminal proceedings against her attacker. The victim, Miss Y, was mentally handicapped, and had been deemed incompetent to initiate a criminal complaint. The relevant provision of the Netherlands Criminal Code could be invoked only by a victim, and Miss Y's attacker escaped prosecution.[183]

The Court found that the respondent state's failure to provide for prosecution of Miss Y's assailant violated its affirmative duty to secure her enjoyment of the right to respect for private life, as guaranteed in Article 8 of the Convention. Acknowledging that in general Contracting States enjoy a "margin of appreciation" in determining the means they will use to secure rights protected by Article 8,[184] the Court found, nonetheless, that only the criminal law is an adequate means of protecting the crucial values at stake in this case:

> [T]he protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.[185]

On this basis, the Court rejected the Dutch government's claim that the applicant's ability to seek civil damages or an injunction against her attacker discharged its duties under the Convention.[186] Finding the Dutch government partly responsible for the harm suffered by the applicant in consequence of her rape, the Court ordered the government to pay compensation.[187]

against officials or third persons. *See, e.g.*, X v. Federal Republic of Germany, 24 Collection of Decisions 50, 61-62 (1967); Kiss v. United Kingdom, 7 Decisions and Reports 55, 64 (1976).

182. 91 Eur. Ct. H.R. (ser. A) (1985) (judgment).

183. Miss Y's father believed her to be incapable of signing a complaint, and signed one on her behalf. The police officer who received the complaint also regarded Miss Y to be incapable of signing the complaint in light of her "mental condition." *Id.*, paras. 9-10. Despite the father's complaint, the public prosecutor decided not to prosecute the attacker provided he did not repeat the crime. *Id.*, para. 11. The victim's father appealed this decision to a Court of Appeal. The appeal was dismissed on the ground that the principal provision of Dutch criminal law that might have been a basis for prosecution could be invoked only if the victim herself took action—but this was precluded by virtue of her incapacity. *Id.*, para. 12. The gap in protection afforded by Dutch law was narrow; under most provisions of the Netherlands Criminal Code establishing sexual offenses, institution of criminal proceedings did not require a complaint by the victim. *See id.*, paras. 15, 27. Still, the lacuna was substantial enough to place the Dutch government in breach of the European Convention. *See id.*, para. 30; *infra* text accompanying notes 184-87.

184. 91 Eur. Ct. H.R. (ser. A), para. 24 (1985) (judgment).

185. *Id.*, para. 27.

186. *See id.*, paras. 24-25. The Court noted that the Delegate of the European Commission of Human Rights had argued that "the need for protection existed *erga omnes*, whilst an injunction could only be directed to a limited circle of persons," and that "the civil law lacked the deterrent effect that was inherent in the criminal law." *Id.*, para. 26.

187. *Id.*, para. 40. The only remedial power explicitly given the Court under the European Convention is to "afford just satisfaction to the injured party." European Convention, *supra* note 34, art. 50. The Court can afford just satisfaction if it finds that a Contracting Party has violated the Convention and the Party's domestic law "allows only partial reparation to be made for the consequences" of the breach. *Id.* In *Ireland v. United Kingdom*, the Court held that it "cannot direct the respondent State to institute criminal or disciplinary proceedings against those members of the security forces" found to have violated Article 3 by inflicting cruel, inhuman or degrading treatment on detainees or against "those who condoned or tolerated such breaches." Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 95, concluding para. 10 (1978) (judgment); *see also id.* at 72, para. 187.

In their analyses of the European Convention's admissibility requirement that applicants exhaust domestic remedies, the Court and Commission have indirectly affirmed the principle that punishment plays a necessary part in Contracting States' duty to secure certain rights set forth in the Convention.[188] Both bodies have found that applicants need not exhaust domestic remedies if their complaint concerns an "administrative practice,"[189] characterized by "repetition of acts, and official tolerance."[190] The term "official tolerance" means

> that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible though cognisant of such acts, *take no action to punish them* or prevent their repetition; or that higher authority, in face of numerous allegations, manifests indifference by *refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied.*[191]

188. In various other contexts, the Commission has seemingly assumed that criminal prosecution plays a necessary part in Contracting States' fulfillment of their duty to secure certain fundamental rights. For example, the headnote to one decision, in which the Commission rejected a claim that the U.K. government should have done more than it did to prevent the murder of the applicant's brother by Irish Republican Army terrorists, asserts: "The obligation to protect the right to life *is not limited for the High Contracting Parties to the duty to prosecute those who put life in danger* but implies positive preventive measures appropriate to the general situation. In the present case, however, this obligation did not go so far as to provide individual protection." Mrs. W. v. United Kingdom, 32 Collection of Decisions 190, 190 (1983) (emphasis added). (Curiously, the decision itself is not so explicit in recognizing a "duty to prosecute those who put life in danger." The Commission noted that an alleged killer was awaiting trial for murder, *id.* at 199, para. 10, and that the applicant had argued that the European Convention required the U.K. to take measures beyond criminal prosecution to protect the right to life. *Id.*, para. 11. But its conclusions on this issue were confined to the observation that the Convention "may indeed give rise to positive obligations on the part of the State," *id.* at 200, para. 12, and that the Commission "cannot find that the United Kingdom was required under the Convention to protect the applicant's brother by measures going beyond those actually taken by the authorities . . . ." *id.*, para. 15.) The Commission's report of the friendly settlement reached in the case of *France, Norway, Denmark, Sweden and The Netherlands v. Turkey* noted that measures taken by Turkey to respond to allegations of torture included "criminal prosecutions and convictions concerning cases of torture." 8 EUR. HUM. RTS. REP. 205, 213 (1985).

189. The Court has defined an administrative practice as "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system. . . ." Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 64, para. 159 (1978) (judgment). Where there is an administrative practice, the Commission has reasoned, the assumption underlying the exhaustion requirement—that an effective remedy is available in domestic law—does not apply. The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 194, paras. 24, 25 (Eur. Comm'n of Hum. Rts.).

190. *Id.* at 195, para. 28.

191. *Id.* at 196, para. 29 (emphasis added).

The European Court has termed such a practice "incompatible" with the European Convention,[192] reasoning that "under the Convention [higher State] authorities are . . . under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected."[193]

D. *Customary Law: Disappearances, Extra-legal Executions, and Torture*

Although publicists disagree about the range of human rights protected by customary law,[194] there is general agreement that customary law prohibits torture, disappearances, and extra-legal executions and that these prohibitions are peremptory norms.[195] But if the legal status of these prohibitions is clear, their precise meaning is not. Some experts believe that a single violation of a right protected by customary law engages international responsibility, while others assert that state responsibility is generated only when violations have occurred on a systematic basis[196] or as a matter of state policy.[197]

Still less clear is whether customary law's prohibition of torture, extra-legal killing, and involuntary disappearance imports a duty to prosecute violations when they occur, or whether, instead, customary law requires only that governments not directly inflict these abuses. Even under the latter view, however, it is necessary to determine what constitutes sufficiently direct government participation in violations to generate state responsibility.

The *Restatement (Third) of the Foreign Relations Law of the United States* adopts the view that a complete failure to punish repeated or notorious violations of rights protected by customary law renders a government sufficiently complicit to generate state responsibility. Asserting that a state violates customary law "if, as a matter of state policy, it practices, encourages or condones," inter alia, torture, murder, or disappearances,[198] the *Restatement* suggests that

192. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 64, para. 159 (1978) (judgment).

193. *Id.* The Court linked this obligation to Contracting States' affirmative duty to "secure" rights:

> The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 [rights in Convention to be "secured" without discrimination on any ground], and . . . Article 1 ("shall secure"), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels.

Id. at 91, para. 239.

194. For discussion of different catalogues of human rights protected by customary law, see T. MERON, *supra* note 57, at 94-99.

195. *See* RESTATEMENT (THIRD), *supra* note 6, § 702 comment n and reporters' note 11; J. BURGERS & H. DANELIUS, *supra* note 92, at 12; Goldman, *supra* note 5, at 4. For general discussion of peremptory norms (rules that have *jus cogens* status), see M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 338-50 (1980); I. BROWNLIE, *supra* note 57, at 512-517; *see also* Vienna Convention, *supra* note 62, art. 53.

196. For discussion of these issues, see T. MERON, *supra* note 57, at 103.

197. RESTATEMENT (THIRD), *supra* note 6, § 702.

198. *Id.* Other practices which the *Restatement* identifies as violations of customary law are genocide; slavery or slave trade; cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized human rights. *Id.*

"[a] government may be presumed to have encouraged or condoned [these] acts . . . if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators."[199]

The *Restatement*'s approach is not novel. Arbitral tribunals have interpreted the traditional rule of customary law establishing state responsibility for injury to aliens to require states to "act vigorously and diligently to punish crimes against aliens."[200] The analysis of the Mexican-American Claims Commission in the *Janes* case evokes the reasoning of the *Restatement*: "If the nonprosecution and nonpunishment of crimes (or of specific crimes) in a certain period and place occurs with regularity such nonrepression may even assume the character of a nonprevention and be treated as such."[201]

A wide range of activities of the United Nations and other intergovernmental organizations reinforce the view that punishment plays a necessary part in states' duty under customary law to ensure the rights to life, freedom from torture, and freedom from involuntary disappearance. For example, reports prepared by Special Rapporteurs, Special Representatives, and Working Groups appointed by the Commission on Human Rights of the United Nations to report on human rights conditions in particular countries[202] or on particular types of human rights violations[203] have repeatedly condemned governments' failure to punish torture, disappearances, and extra-legal executions.[204] Echoing the

199. *Id.*, comment b.

200. *Id.*, § 711, reporters' note 2, *citing* the following decisions of Mexican-American Claims Commission: *Kennedy*, G.C.C. 289 (1926) (responsibility generated by failure to impose adequate penalty); *Mallen*, *id.* at 254 (1927) (responsibility generated by failure to enforce penalty); *West*, *id.* at 404 (1927) (amnesty and pardon unduly granted).

201. *In re Janes* (U.S. v. Mex.), 4 REP. INT'L ARB. AWARDS 82, 89-90 (1926). In this case the Commission ordered the Mexican government to provide damages to the United States on behalf of relatives of a United States citizen whose murder had been inadequately investigated by Mexican authorities, constituting a denial of justice.

202. Reports have been prepared on such countries as Chile, El Salvador, Afghanistan, Iran, and Guatemala. Reports have also been prepared by special "experts" appointed by the Commission to provide advisory services in the field of human rights to particular governments. The latter, like the former, have given substantial attention to the role of investigation and prosecution of serious human rights violations. *See, e.g.*, *Report on Haiti by the Expert, Mr. Philippe Texier, prepared in conformity with Commission on Human Rights resolution 1989/73*, 46 U.N. ESCOR Comm'n on Hum. Rts., paras. 55, 61, 67, 87, 91, 102, 106(c) & (e), U.N. Doc. E/CN.4/1990/44; *Report by the Expert, Mr. Héctor Gros Espiell, on Guatemala, prepared in accordance with paragraph 9 of Commission resolution 1989/74*, 46 U.N. ESCOR Comm'n on Hum. Rts., paras. 48, 49, 57, 66(c), U.N. Doc. E/CN.4/1990/45.

203. "Theme" rapporteurs and working groups have been appointed to report upon such violations as religious discrimination, torture, disappearances, extra-legal executions, and arbitrary detention. For discussion of three of the theme rapporteurs, see Weissbrodt, *The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights*, 80 AM. J. INT'L L. 685 (1986).

204. These reports often cite the International Covenant, various U.N. human rights declarations and customary international law as the bases of the rights examined. Several resolutions adopted by the Commission on Human Rights suggest that a duty to prevent human rights violations may inhere in member states' human rights obligations under the U.N. Charter, a legally binding instrument. Article 1 provides that the purposes of the United Nations include the achievement of international cooperation "in promoting and encouraging respect for human rights . . . ." Pursuant to Articles 55 and 56 of the Charter, member states pledge to take action to achieve "universal respect for, and observance of, human rights." In language that evokes the human rights provisions of the Charter, the United Nations Commission on Human Rights has asserted "that the obligation to promote and protect human rights and fundamental freedoms calls not

reasoning of the *Restatement*, these reports have asserted that a state's failure to punish repeated violations of physical integrity encourages further violations.[205] Although these reports are not authoritative interpretations of international law, resolutions of the U.N. General Assembly have endorsed many of the reports' conclusions regarding punishment of persons responsible for torture, disappearances, and extra-legal executions.[206]

The duty to prosecute grave violations of physical integrity has been rendered explicit in a number of international instruments drafted in recent years. These include the Inter-American Convention to Prevent and Punish Torture;[207] a Draft Declaration on the Protection of All Persons From Enforced or Involuntary Disappearances[208] prepared under United Nations auspices;[209] a Draft Inter-American Convention on the Forced Disappearance of Persons;[210] and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions[211] endorsed by the U.N. General Assembly.[212] While not conclusive, the frequent reiteration of a duty to punish grave violations of physical integrity in international instruments is evidence that the duty is—or is emerging as—a customary norm.[213]

only for measures to guarantee the protection of human rights and fundamental freedoms but also for measures intended effectively to prevent any violation of those rights." Comm'n on Hum. Rts. Res. 1988/51; Comm'n on Hum. Rts. Res. 1988/50.

205. *E.g.*, *Report prepared by the Special Rapporteur on the situation of human rights in Chile in accordance with paragraph 11 of the Commission on Human Rights resolution 1983/38 of 8 March 1983*, U.N. Doc. A/38/385, para. 341 (1983) (impunity enjoyed by Chilean security organs "is the cause, and an undoubted encouragement in the commission, of multiple violations of fundamental rights"); *Final report on the situation of human rights in El Salvador submitted to the Commission on Human Rights by Mr. José Antonio Pastor Ridruejo in fulfillment of the mandate conferred under Commission resolution 1986/39*, 43 U.N. ESCOR Comm'n on Hum. Rts. at 13, para. 60, U.N. Doc. E/CN.4/1987/21 (failure of Salvadoran courts to render convictions that bear reasonable relationship to number of violations of right to life creates "climate of impunity"); *Report of the Working Group on Enforced or Involuntary Disappearances*, 45 U.N. ESCOR Comm'n on Hum. Rts. at 85, para. 312, U.N. Doc. E/CN.4/1989/18 (impunity in the face of repeated disappearances "creates conditions conducive to the persistence of such practices"); *Report of the Working Group on Enforced or Involuntary Disappearances*, 47 U.N. ESCOR Comm'n on Hum. Rts. at 86, para. 406 ("impunity is perhaps the single most important factor contributing to the phenomenon of disappearance. Perpetrators of human rights violations . . . become all the more irresponsible if they are not held to account before a court of law.").

206. *E.g.*, G.A. Res. 37/185, para. 10 (1982) (urging Salvadoran judiciary to "assume its obligation to . . . prosecute and to punish those found responsible for assassinations, acts of torture and other forms of cruel, inhuman or degrading treatment"); G.A. Res. 36/157, para. 4(e) (1981) (urging Chilean authorities to "investigate and clarify the fate of persons who have disappeared for political reasons, to inform the relatives of those persons of the outcome of the investigation and to prosecute and punish those responsible for such disappearances"); G.A. Res. 33/173, para. 1(b) (1978) (calling upon governments to "ensure that law enforcement and security authorities or organizations are fully accountable, especially in law, in the discharge of their duties, such accountability to include legal responsibility for unjustifiable excesses which might lead to enforced or involuntary disappearances. . . .").

207. *Supra* note 92.

208. U.N. Doc. E/CN.4/1991/49 [hereinafter "Draft Declaration on Disappearances"].

209. The draft declaration provides that every state "shall ensure that all forms of partipation in enforced or involuntary disappearance . . . are specific crimes of the gravest kind under its criminal law," *id.*, art. 4, and that, "[w]henever there are reasonable grounds to believe that an enforced or involuntary disappearance has been committed, the State shall promptly refer the matter [for an impartial] investigation, even if there has been no formal complaint." *Id.*, art. 13(1). The draft further provides that states shall ensure that a person alleged to have committed a disappearance is brought to justice either through prosecution or extradition "regardless of the individual's nationality or the place where the offence was committed." *Id.*, art. 14. The draft also asserts a duty to ensure that persons alleging that an involuntary disappearance has occurred have a right to file a complaint and to have the complaint promptly and impartially investigated. *Id.*, art. 13(1).

E. *Customary Law: Crimes Against Humanity*

The search for legal standards governing transitional societies' policy toward past abuses has led to renewed interest in the substantive law generated by the Nuremberg prosecutions. Several analysts and organizations interpret that law to require punishment of crimes against humanity.[214] While their view is well-founded, the law of crimes against humanity is difficult to apply, in part because the meaning of the term is shrouded in ambiguity. With no precedent

210. INTER-AM. C.H.R. 352, OEA/ser.L./V/II.74, doc. 10 rev. 1 (1988). The draft convention requires States Parties "to prevent and to punish the perpetrators of forced disappearance of persons," *id.*, art. 1, and to establish jurisdiction over acts constituting forced disappearances committed in their jurisdiction and under several other circumstances. *Id.*, art. 5. The draft convention also provides that "perpetrators of forced disappearances shall not benefit from any legal act adopted by the Executive or Legislative branches of government that might have the effect of exempting such persons from punishment." *Id.*, art. 8.

211. Ecosoc. Res. 1989/65, Annex (*endorsed by* G.A. Res. 44/162 (1989)). These principles, which seek to give effect to the internationally-recognized right to life, provide, inter alia:

> 1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences.

The first principle appearing under the heading "Investigation" begins: "9. There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions . . . ." The Principles further establish a duty to "bring to justice" persons identified in the investigation under the principle *aut dedere aut judicare* (either extradite or try). *Id.*, para. 18. The Special Rapporteur on Summary or Arbitrary Executions has expressed the view that "[a]ny Government's practice that fails to reach the standards set out in the principles may be regarded as an indication of the Government's responsibility, even if no government officials are found to be directly involved in the acts of summary or arbitrary execution." *Report by the Special Rapporteur, Mr. S. Amos Wako, pursuant to Economic and Social Council resolution 1988/38*, 46 U.N. ESCOR Comm'n on Hum. Rts. at 105, para. 463, E/CN.4/1990/22.

212. Moreover principles designed to implement the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, 40 U.N. GAOR Supp. (No. 53) at 213, U.N. Doc. A/40/53 (1985), call upon states to investigate deaths and serious injuries apparently caused by law enforcement or other professional personnel and to prosecute or extradite those who are responsible. *Implementation Principles R4(d).5 and R4(d).6, reprinted in* INTERNATIONAL PROTECTION OF VICTIMS 31-32 (M. Bassiouni ed. 1988). The implementation principles also prohibit immunity from prosecution for public officials and agents. *Id.*, *Implementation Principle R4(d).8.*

213. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 882-884 (2d Cir. 1980); T. MERON, *supra* note 57, at 93-94. Further evidence that a rule has attained the status of customary law may be found in the practice of states in their diplomatic relations. In this regard it is noteworthy that the U.S. government has repeatedly pressed foreign governments to prosecute serious human rights violations. *See, e.g.*, *Salvador Promises Quayle Full Inquiry on Jesuits*, N.Y. Times, Jan. 28, 1990, at A3, col. 1; *Salvadoran Chief, in U.S., Vows to Solve Jesuit Case*, N.Y. Times, Sept. 25, 1990, at A3, col. 3; Samuel T. Dickens, *Assassins in Managua*, N.Y. Times, April 16, 1991, at A23, col. 2 (opinion piece).

214. *See, e.g.*, AMERICAS WATCH CHILE REPORT, *supra* note 3, at 84; HUMAN RIGHTS WATCH, SPECIAL ISSUE: ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES 2 (Dec. 1989); Zalaquett, *From Dictatorship to Democracy: Kicking Out the Generals Is Only the First Chapter*, THE NEW REPUBLIC, Dec. 16, 1985, at 20; *see also* Rogers, *supra* note 5, at 276; AMERICAS WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA 81 (1987) [hereinafter AMERICAS WATCH ARGENTINA REPORT].

to guide them, the Nuremberg tribunals developed somewhat differing interpretations of the scope of the crime.[215] Subsequent legal developments have done little to clarify the issues raised by Nuremberg case law: the most significant efforts to clarify and codify the law applied at Nuremberg have occurred outside the rubric of crimes against humanity,[216] and various efforts to enlarge the scope of the crime have generated more controversy than consensus.[217] Further, it is not immediately obvious that Nuremberg law establishes an *obligation* to punish crimes against humanity; the most controversial legal issue surrounding the prosecution of those crimes at Nuremberg was whether the Allied nations had the *power* to prosecute acts committed by German nationals against other Germans.[218]

But if the law of crimes against humanity is somewhat lacking in clarity, its normative implications are clear. The Nuremberg precedent, as subsequently ratified, reflects the international community's resolve that atrocious crimes carried out as part of a mass campaign of persecution must not go unpunished.

215. *See infra* note 231. Although prosecuting German nationals for offenses against other Germans represented an innovation in international law, the offense of crimes against humanity had been prefigured by the 1907 Hague Convention's reference to "laws of humanity" as a principle governing the conduct of international war, Preamble, Fourth Hague Convention Respecting the Laws and Customs of War on Land, *done* October 18, 1907, 36 Stat. 2277, T.S. No. 539; a 1915 declaration of the governments of France, Great Britain and Russia describing the massacres of Armenians in Turkey as "crimes against humanity," *see* HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAW OF WAR 189, compiled by the United Nations War Crimes Commission, His Majesty's Stationery Office (1948); and the determination of a commission appointed by the Preliminary Peace Conference at the conclusion of World War I that the Allied nations should prosecute "persons belonging to to enemy countries . . . who have been guilty of offences against . . . the laws of humanity," *quoted in* Schwelb, *supra* note 79, at 181.

216. Crimes against humanity prosecuted at Nuremberg fell into two categories: 1) violations of the rights of civilian populations in German-occupied territories, and 2) violations of the rights of civilian populations in Germany. The first category overlapped with the category of "war crimes" subject to the jurisdiction of the IMT, and some offenses prosecuted at Nuremberg were found simultaneously to constitute war crimes and crimes against humanity. Crimes against humanity that were also war crimes were subsequently codified and clarified, along with other rules of humanitarian law, in the four Geneva Conventions of 1949. Although each of the conventions requires High Contracting Parties to punish certain offenses that were punishable as war crimes/crimes against humanity under the Nuremberg Charter, *see supra* note 100, the term "crimes against humanity" does not appear in any of the four conventions. The Genocide Convention establishes a duty to punish the principal crime against humanity committed in German territory against German nationals—genocide—but its definition of the crime is not coextensive with crimes against humanity punished at Nuremberg. The conduct made punishable by the Convention does not require a nexus to war, and in that respect is broader than crimes against humanity as defined in the Charter. *See infra* text accompanying notes 220, 229. But the Convention's definition of genocide is narrower than the Charter's definition of crimes against humanity insofar as the former imposes an intent requirement that was not included in the Charter. Moreover the Genocide Convention excludes "political groups" from targets of genocide; in contrast, the Nuremberg Charter included political grounds as a basis of persecution constituting a crime against humanity. *See infra* text accompanying note 220. While numerous other conventions adopted since World War II have expanded the catalogue of rights that governments must assure to individuals subject to their jurisdiction, these conventions generally have not purported to develop the law of crimes against humanity.

217. *See infra* text accompanying notes 238-40.

218. *See supra* text accompanying notes 70-83.

1. *Definition of Crime Against Humanity*

Article 6(c) of the Nuremberg Charter, as amended by the so-called "Berlin Protocol,"[219] defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[220]

The definition of crimes against humanity set forth in Control Council Law No. 10, which established the jurisdiction of military tribunals operating in the Allied Powers' respective zones of occupation,[221] closely tracked the Charter definition.[222]

As interpreted by the IMT and the U.S. Military Tribunals in Nuremberg,[223] crimes against humanity had several elements. First, they comprised only grave crimes such as murder and extermination, and not less serious forms of "inhumane acts."[224] Second, inhumane acts constituted crimes against hu-

219. *Executed* Oct. 6, 1945, E.A.S. No. 472.

220. Nuremberg Charter, *supra* note 83, art. 6(c). The Berlin Protocol substituted a comma for a semicolon between "war" and "or" in the English and French texts of Article 6(c). The Protocol essentially brought the English and French texts into conformity with the Russian text.

221. Article III of Control Council Law No. 10, which was adopted by the Allied Powers on December 20, 1945, delegated to each occupying power the right to arrest suspected war criminals and to initiate prosecutions within its zone. For data relating to prosecutions undertaken pursuant to this instrument, see A. RUCKERL, THE INVESTIGATION OF NAZI CRIMES 1945-1978, at 29-31 (1980).

222. Article II(1)(c) defined Crimes against Humanity as:

> Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

223. *See supra* note 72. The twelve prosecutions undertaken by U.S. tribunals in Nuremberg began in October 1946 and ended in April 1949. The U.S. tribunals prosecuted 185 defendants who had held important positions in the German High Command, government ministries, private industry, the Gestapo, the SS and other organizations.

224. *See infra* note 227. The definition of crimes against humanity in both the Charter and Control Council Law potentially covered a sweeping range of conduct. Both instruments defined the crime to include not only enumerated acts such as murder and extermination, but also "other inhumane acts," and the Control Council Law used the phrase "including but not limited to . . ." in its enumeration of acts constituting crimes against humanity. *See supra* text accompanying note 220 and *supra* note 222. But as one legal expert observed, applying the *eiusdem generis* rule, the term "other inhumane acts" in Article 6(c) of the Charter should be interpreted to include "only serious crimes of a character similar to murder, extermination, enslavement, and deportation." Schwelb, *supra* note 79, at 191. This principle of construction is equally pertinent to the enumerated "inhumane acts" set forth in Control Council Law No. 10, which specifically mentions imprisonment, rape and torture in addition to the acts set forth in the Charter's definition. Applying the *eiusdem generis* rule, the term "imprisonment" should probably be understood to refer to the type of internment in concentration camps for which Nazis were prosecuted by the Allied nations.

manity only when committed on a mass scale.[225] Further, despite language in the Charter and Control Council Law indicating that "inhumane acts" and "persecutions" are distinct crimes against humanity,[226] the decisions of various Nuremberg tribunals suggest that "persecution" constitutes a crime against humanity only when it entails atrocious "inhumane acts."[227] Summing up the law generated by the twelve post-IMT prosecutions in Nuremberg, Brigadier General Telford Taylor, United States Chief of Counsel for War Crimes, wrote that "the concept of 'crimes against humanity' comprises atrocities which are part of a campaign of discrimination or persecution."[228]

225. This element is implied in the phrase "any civilian *population*," which appears in both the Charter and Control Council Law's definition of crimes against humanity. A U.S. military tribunal endorsed this interpretation of the Control Council Law in the *Justice Case*. Making clear that it was interpreting Control Council Law No. 10 in a manner consistent with its view of international law, the tribunal asserted "that crimes against humanity as defined in C. C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution." United States v. Altstoetter (Case No. 3), III TRIALS OF WAR CRIMINALS, *supra* note 68, at 982; *see also id.* at 984-85. The tribunal noted that, although the record was "replete with evidence of specific criminal acts," they were "not the crimes charged in the indictment," but instead constituted "evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment." *Id.* at 985. Still, defendants in the *Einsatzgruppen Case* were charged with direct responsibility for numerous specific atrocities, and a particular murder was also specifically charged in the *Ministries Case*. *See* TAYLOR REPORT, *supra* note 32, at 73. Thus, it appears that individual instances of murder and the like were punishable as crimes against humanity if undertaken as part of a mass program of similar crimes.

According to one writer, the Supreme Court of the British Zone found in one case that a mass element was not essential to the legal definition of crimes against humanity since isolated acts, such as torture or rape, fall within the concept of "inhumane acts." Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi no. 10 du Conseil de contrôle allié* (Paris 1960), at 347, *cited in Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind*, U.N. Doc A/CN.4/398, at 59, para. 44 (1986). Yet any "isolated acts" considered in the British-prosecuted case presumably took place in the context of massive Nazi atrocities. Although some writers have asserted that a mass element is not necessarily integral to crimes against humanity, *see id.* at 58-59, paras. 33-42, the view asserted in the *Justice Case* is a more authoritative statement of the law.

226. *See supra* text accompanying note 220 and *supra* note 222.

227. For example the tribunal that presided over the *Flick Case* concluded that discriminatory expropriation of Jewish property did not constitute a crime against humanity. Applying the *eiusdem generis* rule, the tribunal reasoned that the phrase "other persecutions" in Control Council Law No. 10 "must be deemed to include only such as affect the life and liberty of the oppressed peoples." United States v. Flick (Case No. 5), VI TRIALS OF WAR CRIMINALS, *supra* note 68, at 1215. Citing the *Flick Case*, the tribunal that presided over the *I.G. Farben Case* ruled that plunder and spoliation of properties located in German-occupied countries, while constituting war crimes, "would not constitute crimes against humanity, as the acts alleged related wholly to offenses against property." United States v. Krauch (Case No. 6), VIII TRIALS OF WAR CRIMINALS, *supra* note 68, at 1129. The tribunal that presided over the *Ministries Case* found that certain decrees that discriminated against Jews in food rationing, while evincing "rank discrimination" and a "callous social sense," did not produce sufficiently harsh consequences to constitute crimes against humanity. United States v. von Weizsaecker (Case No. 11), XIV TRIALS OF WAR CRIMINALS, *supra* note 68, at 558.

228. TAYLOR REPORT, *supra* note 32, at 64; *see also id.* at 69 (referring to crimes against humanity as "atrocities committed in the course or as a result of racial or religious persecutions"). The quintessential crime against humanity punished at Nuremberg was genocide. Although neither the Charter nor IMT used this term, it appeared in the indictment of the Major War Criminals. U.S. prosecutors frequently charged defendants with genocide in the subsequent Nuremberg trials, and various U.S. Military Tribunals cited genocide as the principal crime against humanity committed by Nazi defendants. *E.g.*, United States v. Altstoetter (Case No. 3), III TRIALS OF WAR CRIMINALS, *supra* note 68, at 983; United States v. Greifelt (Case No. 8), IV TRIALS OF WAR CRIMINALS, *supra* note 68, at 88. Rendered before the United Nations adopted the Genocide Convention, these judgments generally used the term "genocide" in a less restrictive sense than it was defined in that Convention. For example in the *Justice Case* the U.S. tribunal cited the definition of genocide set forth in a then recently-adopted resolution of the United Nations General Assembly, which declared genocide to be "a denial of the right of existence of entire human groups . . . ." United States v. Altstoetter, *supra*, at 983 (quoting *The Crime of Genocide*, G.A. Res. 96 (I), U.N. Doc. A/64/Add.1, at 188 (1946)).

Finally, crimes against humanity were punished at Nuremberg only if they had a nexus to war.[229] The legal status of the nexus requirement—then and now—is ambiguous, however. The IMT interpreted Article 6(c) generally to exclude acts of persecution against Germany's Jewish population committed before the onset of war in 1939, but the judgment left unclear whether the tribunal believed the nexus requirement to be an element of crimes against humanity as prohibited by the law of nations, or merely a limitation on its jurisdiction.[230] Decisions of U.S. tribunals in subsequent Nuremberg trials failed to resolve this ambiguity.[231] And while post-Nuremberg developments have

229. By substituting a comma for a semi-colon in the Charter's definition of crimes against humanity, *see supra* note 220, the Berlin Protocol indicated that the phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal" qualified the entire definition of crimes against humanity, and not just acts involving persecution. *See* Schwelb, *supra* note 79, at 188. As previously noted, the other two crimes subject to the jurisdiction of the IMT were crimes against peace and war crimes. *See supra* text accompanying note 83.

230. After reviewing conduct involving persecution of Jews in Germany before 1939, the IMT, which declared that it was "bound by the Charter, in the definition which it gives [of] Crimes against Humanity," IMT Judgment, *supra* note 60, at 248, concluded:

> The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any [crime within the jurisdiction of the Tribunal]. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity *within the meaning of the Charter*, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

Id. at 249 (emphasis added). *See generally* Clark, *Crimes Against Humanity*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 195-96 (G. Ginsburgs & V. Kudriavtsev eds. 1990) (expressing view that, in applying nexus requirement, the IMT was concerned with questions of its jurisdiction and proof, and not with concept of crimes against humanity more broadly).

231. Although the definition of crimes against humanity set forth in Control Council Law No. 10 closely tracked the Charter definition, it omitted the language requiring a nexus to a war-related offense. *See supra* note 222. Other provisions suggested, however, that the linkage persisted in the Control Council law. The Preamble asserted that the law "was enacted to give effect to the . . . London Agreement of 8 August, 1945 and the Charter issued pursuant thereto," and Article I provided that the Nuremberg Charter was made an integral part of the Control Council Law.

The judgment in one case brought under this law asserted that crimes against humanity were not limited to war-related acts, United States v. Ohlendorf (Case No. 9), IV TRIALS OF WAR CRIMINALS, *supra* note 68, at 499, and the decision in another case contained language that was supportive of this view. United States v. Altstoetter (Case No. 3), III TRIALS OF WAR CRIMINALS, *supra* note 68, at 974; 979. But two other tribunals concluded that they had no jurisdiction over conduct charged as crimes against humanity that occurred before the war. United States v. Flick (Case No. 5), VI TRIALS OF WAR CRIMINALS, *supra* note 68, at 1213; United States v. von Weizsaecker (Case No. 11), XIV TRIALS OF WAR CRIMINALS, *supra* note 68, at 553, 558.

tended to free crimes against humanity from a ..artime context,[232] the trend has been inconclusive.[233]

If post-Nuremberg developments have failed decisively to resolve the nexus issue, they have removed the requirement's justification. Subsequent ratification of the principles of law applied by the IMT[234] has obviated the ex post facto concerns underlying insistence on the nexus requirement at Nuremberg.[235] And there are compelling reasons to punish crimes against humanity regardless of their nexus to war. As Justice Jackson, Chief of Counsel for the United States, argued in his opening speech before the IMT, a crime against humanity is an offense that becomes the concern of the international community not only when its repercussions literally traverse national borders, but also when (and because) it surpasses "in magnitude and savagery any limits of what is tolerable by modern civilization."[236] Punishment of such conduct—whether or not connected to war—is necessary to vindicate constitutional principles of the international legal order.[237]

A variety of post-Nuremberg efforts to enlarge the scope of crimes against humanity have brought more confusion than clarity to the term's meaning. These initiatives range from U.N. resolutions, conventions, and other documents denouncing apartheid and other forms of racial discrimination as crimes against

232. *See* Carey, *Procedures for International Protection of Human Rights*, 53 IOWA L. REV. 291, 299 (1967) and *infra* notes 233, 238-39.

233. A codification of the "Nürnberg Principles" adopted by the United Nations General Assembly in 1950 preserved a nexus requirement, but the principles were intended to be a restatement of Charter/IMT law rather than of potentially broader international law. *Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950), *reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 374. When, at the request of the General Assembly, the International Law Commission (ILC) prepared a Draft Code of Offenses Against the Peace and Security of Mankind, it omitted a nexus-to-war element from the definition of crimes against humanity set forth in this draft international criminal code. *See* 1954 U.N.Y.B. at 409. In the ILC's fourth report on the draft code, its Special Rapporteur asserted that the autonomy of crimes against humanity from war crimes "has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict." *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur*, 38 U.N. GAOR C.4 at 56, U.N. Doc. A/CN.4/398 (1986). But the draft code remains just that, and is unlikely to be adopted in the foreseeable future—if ever. Various other international instruments purporting to expand the concept of crimes against humanity have omitted a nexus requirement, but these have failed to command the consensus necessary to generate a new rule of customary international law. *See infra* text accompanying notes 238-40.

234. *See infra* text accompanying notes 241-45.

235. *See supra* text accompanying notes 70-74, 82-83.

236. *Opening Speech of Justice Robert H. Jackson*, *supra* note 75, at 127.

237. Violations of fundamental human rights committed on a mass scale are, in general, of paramount concern in international penal law. This is reflected in the ILC's Draft Articles on State Responsibility, which provide that "international crimes"—a term the ILC uses to refer to crimes of a state rather than of an individual—include "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*." *Draft Articles on State Responsibility*, art. 19, para. 3(c), [1976] 2 Y.B. INT'L L. COMM'N (pt. 2), at 95, U.N. Doc. E/CN.4/Ser.A/1976/Add.1 (Part 2) (1977). *Cf.* T. MERON, *supra* note 57, at 215 (ILC's "concept of state crimes suggests that the international community cannot be relied upon to tolerate endlessly certain egregious violations of human rights").

humanity[238] to a dra.. international criminal code including breaches of international obligations essential to safeguarding the environment in its definition of the crime.[239] Although numerous, efforts to broaden the scope of crimes against humanity have typically failed to garner broad consensus.[240]

238. *E.g.*, G.A. Res. 2022, 20 U.N. GAOR Supp. (No. 14) at 150, para. 4, U.N. Doc. A/6014 (1966) (condemning "the policies of racial discrimination and segregation practised in Southern Rhodesia, which constitute a crime against humanity"); G.A. Res. 2074, 20 U.N. GAOR Supp. (No. 14), para. 4, U.N. Doc. A6014 (1966) (condemning "the policies of *apartheid* and racial discrimination practised by the Government of South Africa in South West Africa, which constitute a crime against humanity"); G.A. Res. 2189, para. 6 (1967) (declaring "that the practice of apartheid, as also all forms of racial discrimination, constitutes a crime against humanity"); G.A. Res. 2202, para. 1 (1966) (condemning "the policies of apartheid practised by the Government of South Africa as a crime against humanity"); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18) at 40, art. 1(b), U.N. Doc. A/7218 (1968); and Apartheid Convention, *supra* note 66, art. 1. The former convention incorporated apartheid-related conduct in its definition of crimes against humanity, and added a new category—eviction by armed attack or occupation. This clause was proposed by representatives of the United Arab Republic and Lebanon, who argued that Israel's occupation practices had resulted in "some of the most evil crimes against humanity which were being committed at present." *Quoted in* Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 490 (1971). The apartheid resolutions and conventions enlarge the concept of crimes against humanity beyond that recognized by the Nuremberg tribunals, which effectively linked the element of "persecution" to "inhumane acts" entailing extraordinary savagery, such as mass extermination and enslavement. *See supra* text accompanying notes 226-28. While apartheid itself may not constitute a crime against humanity under customary law, atrocious crimes carried out on a mass scale as a means of enforcing apartheid would fall squarely within the definition of the customary law crime. Outside the rubric of crimes against humanity, systematic racial discrimination violates customary law. RESTATEMENT (THIRD), *supra* note 6, § 702.

239. *Fourth report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur*, 38 U.N. GAOR C.4 at 86, U.N. Doc. A/CN.4/398 (1986). In addition, the General Assembly of the Organization of American States has affirmed that involuntary disappearances constitute crimes against humanity. *E.g.*, AG/RES.742 (XIV-0/84); AG/RES.666 (XIII-0/83). *See also* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 153 (1988) (judgment); Godínez Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 5, para. 161 (1989) (judgment) (noting that international doctrine and practice have often characterized disappearances as crimes against humanity); *see also* Draft Inter-American Convention on the Forced Disappearance of Persons, *supra* note 210, art. 4 (declaring forced disappearance to be a crime against humanity). There can be no doubt that forced disappearances constitute "inhumane acts" within the Nuremberg Charter's definition of crimes against humanity. *See supra* text accompanying note 224. Moreover the type of disappearances condemned by the O.A.S. General Assembly would generally fall within the rubric of politically-based persecutions recognized in the Charter definition; disappearances in Latin America have typically been directed against perceived political opponents of the government. If, however, the O.A.S. resolutions purport to recognize disappearances as crimes against humanity regardless of the scale on which they are carried out (this is unclear from the text of the resolutions), the O.A.S. actions would enlarge the crime beyond that recognized by the Nuremberg tribunals. *See supra* note 225 and accompanying text. While such an expansion might enjoy the consensus necessary to establish a new rule of customary law within the Inter-American system, a similarly strong consensus probably has not yet emerged beyond the O.A.S. member countries. The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities has, however, suggested that the Economic and Social Council request the U.N. General Assembly to invite the ILC to consider including disappearances in its draft code of offences against the peace and security of mankind, with a view to declaring disappearances a crime against humanity. E.S.C. Res. 1982/12, U.N. Doc. E/1982/12.

240. In contrast to the General Assembly's 1948 resolution recognizing genocide as an international crime, *supra* note 228, which was adopted unanimously, the previously-cited resolutions condemning apartheid as a crime against humanity were adopted by a predominantly African-Asian majority, with most Western nations abstaining. *See* Goldenberg, *Crimes Against Humanity—1945-1970*, 10 WESTERN ONT. L. REV. 1, 38 (1971). Similarly, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 238, was supported by less than half of the member states of the United Nations. Miller, *supra* note 238, at 477. Much of the dissension surrounding this convention pertained to its inclusion of apartheid and "eviction" as crimes against humanity. *See generally id.* The

In contrast, the international community has been far more united in affirming the law of crimes against humanity applied at Nuremberg. Significant acts of ratification include the following:

*On December 11, 1946, the United Nations General Assembly unanimously adopted a resolution "[a]ffirm[ing] the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal."[241]

*On November 21, 1947, the General Assembly established the International Law Commission (ILC) as a permanent body whose purpose would be to promote "the progressive development of international law and its codification,"[242] and adopted a resolution directing the ILC to "[f]ormulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."[243] On December 12, 1950, the General Assembly adopted the "Nürnberg Principles" prepared by the ILC pursuant to its earlier resolution.[244]

*The principles of law applied at Nuremberg subsequently were incorporated into the municipal law of numerous countries.[245]

The Nuremberg principles of law have had an enduring impact on one category of offenders in particular: Nazi war criminals. Many countries have prosecuted Nazi criminals in the decades since the Nuremberg prosecutions were concluded,[246] and efforts to bring World War II criminals to justice continue to the present day.[247]

Convention's provisions relating to crimes against humanity were so controversial that another convention on the same subject was subsequently drafted under the auspices of the Council of Europe. Dinstein, *supra* note 57, at 232. The European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, *opened for signature* Jan. 25, 1974, *reprinted in* 13 I.L.M. 540 (1974), omits apartheid from its definition of crimes against humanity.

241. *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1946).

242. G.A. Res. 174 (II) Annex, art. 1(1) (1947).

243. G.A. Res. 177 (II), para. (a) (1947).

244. *Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR Supp. (No. 12) at 11-14, U.N. Doc. A/1316 (1950).

245. R. WOETZEL, *supra* note 74, at xii; *see also U.N. Study on Punishment of War Criminals*, *supra* note 91, at 4, para. 10.

246. *See id.* at 107-10 (summarizing data regarding thousands of prosecutions undertaken by various countries against persons suspected of committing war crimes and/or crimes against humanity during World War II). Some countries whose domestic law does not provide for prosecution of Nazi war criminals, including the United States, nonetheless actively cooperate with prosecuting nations by extraditing alleged war criminals.

247. *See Britain Moving to Allow Trials of Suspected Nazis*, N.Y. Times, May 2, 1991, at A6, col. 1; *Delay in Trial of Suspect Accused of War Crimes Has France Astir*, N.Y. Times, Oct. 28, 1990, at 16, col. 1; *War-Crimes Suspect Seeks to Stay in Canada*, N.Y. Times, July 10, 1990, at A2, col. 2; *Israel Court Hears Appeal in War Crimes Case*, N.Y. Times, May 15, 1990, at A11, col. 1; *Argentina to Extradite Ex-SS Man*, N.Y. Times, Mar. 25, 1990, at 25, col. 4.

2. *Punishment: Permissive or Obligatory?*

U.N. actions ratifying the law applied at Nuremberg have, on the whole, maintained that law's emphasis on permissive international jurisdiction.[248] Despite this focus, the law is fairly interpreted to require, and not merely to authorize, states to punish crimes against humanity when committed in their own jurisdiction. Correctly understood, the emphasis on permissive international jurisdiction signifies the strength of international law's insistence that crimes against humanity must be punished: that principle is so important that it justifies an exception to the bedrock principle of international law—respect for national sovereignty.[249]

Post-Nuremberg developments have underscored the international community's resolve to ensure that crimes against humanity are punished. For example, *Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*[250] ("Principles of Cooperation"), adopted by the U.N. General Assembly in 1973, provide that "crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."[251] Two conventions adopted since 1968

248. For example, the "Nürnberg Principles" adopted by the General Assembly declare that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment," *Principle I*, *Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950), and identify crimes against humanity—along with crimes against peace and war crimes—as acts that are "*punishable* as crimes under international law." *Principle VI*, *id.* at 13-14 (emphasis added). Despite this phrasing, an expert on these legal developments has characterized the "Nürnberg Principles" as "confirming that international law required international crimes to be punished . . . ." 2 B. FERENCZ, *supra* note 66, at 22.

249. The nature of crimes against humanity made it virtually impossible to address the question of punishing Nazi criminals from any perspective other than that of international enforcement. The U.S. Military Tribunal that presided over the *Einsatzgruppen Case* reasoned:

> Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.

United States v. Ohlendorf (Case No. 9), IV TRIALS OF WAR CRIMINALS, *supra* note 68, at 498. *Cf.* 2 B. FERENCZ, *supra* note 66, at 23 (asserting that, "[b]y its very nature 'crimes against humanity' seemed to recognize the need for a Court representing all of humankind"). When, however, a democratic government took root in Germany, it assumed responsibility for prosecuting Nazi criminals. Between 1959 and 1981, German courts convicted some 6,000 war criminals. Herz, *Denazification and Related Policies*, in FROM DICTATORSHIP TO DEMOCRACY 20 (J. Herz ed. 1982).

250. G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 79, U.N. Doc. A/9030 (1973).

251. *Id.*, *Principle 1*. Other resolutions calling on states to cooperate to ensure prosecution and punishment of crimes against humanity include G.A. Res. 2583, 24 U.N. GAOR Supp. (Np. 30) at 58, U.N. Doc. A/7630 (1969); G.A. Res. 2712, 25 U.N. GAOR Supp. (No. 28) at 78-79, U.N. Doc. A/8028 (1970); and G.A. Res. 2840, 26 U.N. GAOR Supp. (No. 29) at 88, U.N. Doc. A/8429 (1971). A resolution adopted in 1967 provided that states would not grant asylum to any person who was seriously suspected of committing war crimes, crimes against peace or crimes against humanity. *Declaration on Territorial Asylum*, G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

provide that crimes against humanity shall not be subject to any statute of limitations.[252]

Preeminent values underlying the international legal order are best served if a government whose predecessors committed crimes against humanity assumes responsibility for punishment. Prosecution under these circumstances reconciles international law's insistence on the one hand that crimes against humanity must not escape punishment, and its concern on the other hand to respect national sovereignty. The Principles of Cooperation exemplify this approach. Principle 2 provides: "Every State has the right to try its own nationals for . . . crimes against humanity," and Principle 5 provides: "Persons against whom there is evidence that they have committed . . . crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connexion, States shall co-operate on questions of extraditing such persons."

3. *Enduring Significance of Crimes Against Humanity*

While some aspects of the law relating to crimes against humanity remain ambiguous, that law's core principle is both clear and widely accepted: atrocious acts committed on a mass scale against racial, religious, or political groups must be punished. To some extent, the significance of this law as a distinct source of obligation has been eclipsed by the development of more expansive duties to punish atrocious human rights violations. States Parties to the conventions examined in Section II.C are generally required to punish torture, illegal killings, and disappearances, a broader duty than that imposed by the customary law of crimes against humanity. And customary law is now breached by a state's complete failure to punish repeated or notorious instances of these offenses, regardless of the animus of the violations.[253] Further, customary law relating to genocide imposes a duty to punish conduct that overlaps substantially with crimes against humanity.[254]

But if the law of crimes against humanity is increasingly redundant of other law, it has not become superfluous. In the absence of effective enforcement machinery, international law's power to induce compliance with its prescriptions turns on the strength of the norms themselves.[255] It is, perhaps, in this respect

252. *See supra* note 240. Although the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 238, does not explicitly provide that States Parties must prosecute crimes against humanity, it was adopted to fill what the drafters perceived as a gap in international law which, in their view, already required punishment but failed to make clear that no statute of limitations should apply. *See* Miller, *supra* note 238, at 477. In the *Barbie* case, the French Court of Cassation found that the non-applicability of statutes of limitations to crimes against humanity is a rule of customary law. *Barbie*, 78 I.L.R. 132, 135 (1988) (Judgment of Jan. 26, 1984, Cass. Crim., Fr.).

253. *See supra* text accompanying notes 198-99.

254. *See supra* notes 216, 228.

255. *See* Orentlicher, *The Power of an Idea: The Impact of United States Human Rights Policy*, 1 TRANSNAT'L L. & CONTEMP. PROB. 43, 65 (1991); Reisman, *Sanctions and Enforcement*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 403 (M. McDougal & W. M. Reisman eds. 1981).

that the enduring significance of crimes against humanity is best understood. The law proscribing crimes against humanity has commanded a uniquely powerful commitment by the world community, which has resolved emphatically that it will not countenance impunity for massive atrocities against persecuted groups.

III. APPLICATION OF GENERAL RULE TO TRANSITIONAL SOCIETIES

If international law generally requires states to punish serious violations of physical integrity,[256] must a successor government attempt to prosecute every such violation committed with impunity during a recent dictatorship? Or does international law provide a basis for "mitigating" the duty in light of the peculiar constraints prevailing in transitional societies?

In addressing these questions, it is important to begin by making clear what is not at issue. First, the fact that a democratically elected government succeeds a repressive regime has no bearing on the state's international obligations. It is well-established that a change in government does not relieve a state of its duties under international law.[257] Accordingly, if an outgoing government failed to discharge its duty to punish atrocious crimes, its successor is generally bound to fulfill the obligation.

Second, that prosecutions may be inexpedient politically is no excuse for a government's failure to discharge its legal obligations. International law does not, of course, require states to take action that poses a serious threat to vital national interests.[258] But a state cannot evade its duty to punish atrocious crimes merely to appease disaffected military forces or to promote national reconciliation.[259] However desirable the objectives, the government must find other means to achieve them. Ratification of an amnesty law through some form of democratic procedure[260] would not alter this conclusion; nations cannot

256. The phrase "serious violations of physical integrity" is used here to refer to torture, disappearances and illegal killings; it is not intended to cover other violations of physical integrity proscribed by human rights conventions, such as subjecting detainees to inhumane conditions.

257. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 184 (1988) (judgment); L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 266 (2d ed. 1987).

258. *See infra* Section B.

259. *See supra* text accompanying notes 25-26, 38.

260. José Zalaquett urges that a policy addressing abuses of the past—including an amnesty—"must be approved in a manner that reflects the will of the people," such as by popular referendum. Zalaquett, *supra* note 8, at 34. Others have challenged this view, asserting that only the victim of a violation can forgive her tormentor. *See* L. WESCHLER, *supra* note 11, at 244. Zalaquett's suggestion is particularly troubling in light of the fact that victims of human rights violations are usually members of politically weak social groups. Surely a political majority should not be allowed to determine whether these victims' rights will be protected by law enforcement. *Cf.* L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 80 (1990) ("The whole *point* of an independent judiciary is to be 'antidemocratic,' to preserve from transient majorities those

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extinguish their international obligations by enacting inconsistent domestic law.[261]

A. *Mitigating the Burden*

Somewhat more difficult issues are raised by the question whether international law can accommodate the peculiar constraints faced by nations that have recently emerged from a protracted period of lawlessness. In a country like Argentina, where some 9,000 persons are estimated to have disappeared during the military juntas' "dirty war against subversion,"[262] a requirement that the government attempt to prosecute everyone who may be criminally liable could place impossible demands on the judiciary.[263] Even a well-functioning judicial system would be incapable of discharging such a burden;[264] much less can this be expected following the wholesale collapse of judicial process.

Further, the experiences of countries that have recently emerged from dictatorship suggest that post-transition trials may provoke political instability if the prosecutions are not confined within principled limits. A particularly instructive example is the experience of Argentina, where the most ambitious effort to prosecute past violations among countries swept by the recent tide of democratic transitions was undertaken by the government of Raúl Alfonsín. His government, which entered office in December 1983, prosecuted nine former junta members and several other officers for abuses committed during Argentina's "dirty war against subversion" in the late 1970's and early '80's. But military uprisings provoked largely by efforts to prosecute active-duty, mid-level officers led the government to retreat from further prosecutions; ultimately, it secured passage of two s that effectively amnestied most violations by junior and mid-level officers.[265]

By all accounts, a key flaw in implementation of Alfonsín's prosecution program was its protracted nature.[266] The prosecutions extended substantially longer than the architects of the program had anticipated.[267] While there was strong public support for prosecutions at the outset of Alfonsín's presidency, this waned as time elapsed and other issues—in particular, those pertaining to Argentina's disintegrating economy—rose to greater public prominence.[268] Simultaneously, the military, which at the outset of Alfonsín's term was weakened by its recent humiliation in the Falklands/Malvinas war, gradually recomposed itself and become a more viable threat to the Alfonsín government.[269] For a variety of reasons, then, it became increasingly clear that the nation could not sustain indefinitely drawn-out prosecutions.[270]

The Alfonsín government also faced growing hostility from military factions as the scope of prosecutions broadened beyond the top commanders. Although

human rights . . . to which our legal and political system is committed. Without this role there would be nothing to stop a bare majority of our citizens from deciding tomorrow that the minority should be enslaved . . . .") (emphasis in original).

261. *See* Montealegre, *supra* note 35, at 50 ("Only the community of nations that created [a crime defined by international law] can abolish it."); *see also* sources cited *supra* note 62.

262. NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 10 (1986).

263. Some experts on Argentina believe, however, that evidentiary constraints could have confined the number of human rights trials to a manageable level even without laws limiting the scope of prosecutions. *E.g.*, Interview with Professor Alejandro Garro, New York City (July 31, 1990).

264. It has been observed that a key reason why some continental European countries have been able to maintain a system of mandatory prosecution for serious offenses is that their criminal justice systems are capable of processing the cases. *See Damaška, The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 122-24 (1981); Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 466-67 (1974) [hereinafter Langbein, *Controlling Discretion*]. In contrast, prosecutorial discretion is thought to have developed in the United States in large part because the combined impact of high crime rates and extensive procedural rights makes it impossible for U.S. courts to process every serious crime that is potentially prosecutable. *See* Langbein, *supra*, at 445-46; Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW AND SOC'Y 261, 265, 267 (Winter 1979). As these analyses suggest, a prerequisite of any law requiring prosecution of particular offenses is that the national judiciary must be capable of handling the burden imposed by that law.

265. In December 1986, President Alfonsín secured enactment of the "full stop" law (*ley de punto final*), Law No. 23492, December 24, 1986, which set a 60-day limit on the initiation of new criminal complaints relating to human rights violations committed during the "dirty war." Although the law was designed to bring a close to prosecutions of military officers, it instead drew a flood of new complaints filed before the deadline. This stoked military discontent, which President Alfonsín sought to quell by securing passage of the "due obedience" law (*ley de obediencia debida*), Law No. 23521, June 4, 1987. That law established an irrebuttable presumption that military officials, with the exception of certain commanders, committed human rights abuses under coercion, and rendered them immune from prosecution on this basis. The Alfonsín government's unseemly retreat detracted from its achievement in bringing past junta members to account, and arguably emboldened military rebels to launch further revolts. *See* Neier, *supra* note 22, at 34. In consequence, even those who endorse the general outcome of Alfonsín's prosecutions—convicting high-level officers without completing more wide-ranging prosecutions—believe that the manner in which the result was achieved was detrimental. *See id.*; AMERICAS WATCH ARGENTINA REPORT, *supra* note 214, at 83.

266. Several developments caused delays that the Alfonsín government did not anticipate. Substantial time was lost when the Supreme Council of the Armed Forces, which had original jurisdiction over the trials of military officers, resisted judging them. *See* Garro & Dahl, *supra* note 9, at 319-20. Pursuant to legislation enacted at the instance of the Alfonsín administration, the cases were removed to a civilian court. In the meantime, the better part of a year was lost due to the Supreme Council's recalcitrance. Further, the civilian courts that had jurisdiction over cases filed by private parties tended to move slowly on those cases until prodded into swifter action by enactment of the "full stop" law. *See supra* note 265.

267. *See* Malamud-Goti, *supra* note 10, at 74.

268. This phenomenon is common to many countries in which an elected government succeeds a repressive one. Elsewhere I have argued that the most auspicious time for Philippine President Corazon Aquino to institute prosecutions of military personnel for crimes committed during the tenure of her predecessor, Ferdinand Marcos, was in the months immediately following Aquino's inauguration. During that period Aquino had a strong mandate to redress the rights violations of the Marcos period, and enjoyed greater power over the military than she would ever again possess. D. Orentlicher, *supra* note 37. Telford Taylor, the chief United States prosecutor of war criminals at Nuremberg following the Allied Powers' joint prosecution of Major War Criminals, similarly found that public support for prosecutions waned as time passed and international concerns shifted elsewhere. *See* TAYLOR REPORT, *supra* note 32, at 105.

269. *See* Malamud-Goti, *supra* note 10, at 74.

270. Various efforts by the Alfonsín administration to restrict the scope of prosecutions were thwarted by other branches of government. For example, a bill prepared by the Alfonsín government establishing the basis of prosecutions was amended, at the instance of a Senator from a small provincial party, in a manner that opened the possibility of prosecuting a relatively large number of soldiers. For further discussion of this subject, see L. Moreno Ocampo, *supra* note 31, § 1.3.

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many officers had accepted prosecution of the commanders most responsible for implementing the "dirty war," the military grew restive when prosecutions began to sweep more broadly, in large part because this was thought to tarnish the military institutionally.[271]

Prosecutions in the mid-1970's of Greek military police for torture committed during the preceding period of military rule provide a contrasting example. From the outset, the Karamanlis government made clear that prosecutions would not be indefinite. It set a six-month deadline on the filing of private prosecutions against high-level officials, and a three-month deadline for suits against other officials.[272] Although the prosecutions in Greece provoked military discontent, the response was far less destabilizing than the military backlash in Argentina.[273]

The contrasting experiences of Argentina and Greece suggest that the demands of justice and political stability are best reconciled through a program of prosecutions that has defined limits. To the extent that the purpose of prosecutions is to vindicate the authority of the law and deter repetition of recent crimes,[274] it is not necessary that a transitional government prosecute all who participated in a previous system of violations. These and other objectives served by post-transition prosecutions can be accomplished with exemplary trials,[275] provided the criteria used to select defendants do not vitiate the justifying aims of prosecutions by, for example, cynically targeting scapegoats. Once the chief aims of criminal law enforcement are achieved, further

271. *See* Malamud-Goti, *supra* note 10, at 73-74; Neier, *supra* note 22, at 34. Neier speculates that, "if the prosecutions had been limited to [junta members], the military uprisings against the Alfonsín government might never have taken place." *Id.*

272. All of the prosecutions for human rights violations that ensued were the result of private initiative.

273. The Karamanlis government was threatened by four conspiracies to re-establish military government. *See* Danopoulos, *Beating a Hasty Retreat: The Greek Military Withdraws from Power*, in THE DECLINE OF MILITARY REGIMES 246 (C. Danopoulos ed. 1988). The Karamanlis government was more successful than the Alfonsín government in establishing control over the military. Although various circumstantial factors, such as the military's preoccupation with Turkish aggression, reduced the threat of a successful military coup, the Greek military's ultimate acceptance of civilian authority is also a tribute to the effectiveness of the Karamanlis government's policies. While responding to legitimate military needs by increasing defense appropriations and maintaining generous benefits, such as medical care and housing for military officers, the Karamanlis government constantly asserted the principle of civilian supremacy, and made concerted efforts to persuade military officers of the merits of democracy. *See id.* at 249. For a thoughtful analysis of these issues, see Keith Syrett, Torture Trials and the Transition to Democracy in Greece from 1974 (1989) (unpublished manuscript on file with author).

274. *See supra* text accompanying notes 9-15.

275. As Professor Packer has observed, the social institution of criminal punishment achieves a deterrent effect by establishing a general warning that violation of a law carries the threat of punishment, coupled with the "occasional spectacle of its actual infliction." H. PACKER, *supra* note 12, at 42. Thus, while a "minimum of punishment [is] needed to keep the threat credible," *id.* at 63, it is not necessary to prosecute every violation to deter criminal conduct. *See also* K. DAVIS, *supra* note 15, at 168 ("The proper objective of an enforcement program is not the unrealistic one of penalizing all violators but the practical one of penalizing enough violators to induce a satisfactory degree of compliance.").

prosecutions have "diminishing returns" and may reverse progress toward consolidating a democratic transition.[276]

1. *Application of Customary International Law*

The duty to punish human rights crimes imposed by customary law can readily accommodate the constraints faced by transitional societies. Applying the *Restatement* rule, customary law would be violated by complete impunity for repeated or notorious instances of torture, extra-legal executions, and disappearances,[277] but would not require prosecution of every person who committed such an offense. Prosecution of those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge governments' customary-law obligation not to condone or encourage such violations,[278] provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.

2. *Application of Comprehensive Human Rights Conventions*

More complex issues are raised by the question whether a government of a state that has ratified the International Covenant, the European Convention, or the American Convention must attempt to prosecute all serious violations of the right to physical integrity committed, following the convention's entry into force for the state, by or with the acquiescence of a previous regime. Decisions interpreting these conventions include some indications that States Parties are in general expected to investigate every violation of the rights to life, freedom from torture, and freedom from involuntary disappearances, and to prosecute those who are responsible.[279] A rigid application of the general rule that a state's international obligations persist despite a change in government[280] might, then, require successor governments to prosecute virtually

276. Malamud-Goti, *supra* note 9, at 13-14. José Zalaquett suggests that a circumscribed program of prosecutions might afford transitional governments an opportunity to offer inducements, such as immunity or leniency in exchange for military testimony, that could both improve the prospects of establishing responsibility and diminish the military's propensity to "close ranks." Zalaquett, *supra* note 8, at 57; Zalaquett, *From Dictatorship to Democracy: Kicking Out the Generals Is Only the First Chapter*, THE NEW REPUBLIC 20 (Dec. 16, 1985).

277. *See supra* notes 198-99 and accompanying text.

278. *Id.*

279. For example, in the *Velásquez Rodríguez Case* the Inter-American Court repeatedly asserts that a State Party to the American Convention must investigate and punish "any" and "every" violation of the rights protected by the convention. *See supra* note 169 and accompanying text. In *X and Y v. Netherlands*, the European Court found the Dutch government responsible for violating the European Convention because a gap in Dutch law prevented the applicant from initiating a criminal complaint against her rapist, even though Dutch law generally provided for such a procedure and, more generally, for prosecution of rape. *See supra* note 183 and text accompanying notes 182-85.

280. *See supra* text accompanying note 257.

every violation of those three rights that has not yet been punished.[281] Yet, for reasons suggested above, such a requirement could produce untenable results.

Pursuant to general canons of construction, the comprehensive treaties should be interpreted in a manner that avoids imposing impossible obligations or duties whose discharge would prove harmful.[282] A functional analysis[283] of the general rule requiring prosecution of torture, extra-legal killings, and disappearances provides a principled basis for such an interpretation.[284]

As noted earlier, the duty to punish these three crimes is squarely grounded on a deterrence rationale.[285] Believing criminal sanctions to be the most effective means of securing rights deemed of paramount importance, bodies such as the Human Rights Committee and the Inter-American Commission have found investigation leading to punishment to be the most appropriate response to violations of those rights.[286] The deterrence rationale supporting their decisions generally favors prosecution of each violation, since criminal laws are

281. In the *Velásquez Rodríguez Case* the Inter-American Court suggested that the American Convention is not necessarily violated by a State Party's failure to punish a violation: "In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective." Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 177 (1988) (judgment). *See also id.* at para. 181 (alluding to "the hypothetical case that those individually responsible for crimes . . . cannot be legally punished under certain circumstances"). The Court presumably intended to acknowledge that legitimate factors, such as insufficiency of evidence, may justify a failure to prosecute, provided an investigation was undertaken in good faith.

282. *Cf.* [1978] 2 Y.B. INT'L L. COMM'N (pt. 1), at 75, para. 33, U.N. Doc. A/CN.4/315 (1977) (quoting Schwarzenberger's view that treaty obligations "are likely to be interpreted in a manner which circumscribes them so as to exclude situations of both absolute and relative impossibility from the very scope of such duties"); *id.* at 133 (quoting assertion by Professor Alfred von Verdross of principle that "international duties must not be taken so far as to result in self-destruction").

283. By "functional analysis," I mean an analysis of the application of a general rule of law to a particular situation in light of the rationale supporting the general rule.

284. A functional analysis may be more appropriate with respect to the duty to institute criminal proceedings imposed by comprehensive human rights treaties than with respect to the duty to punish explicitly established by the Genocide Convention and the Convention Against Torture. In the former instance, the duty has arisen as a matter of interpretation of States Parties' explicit duty to ensure several enumerated rights; the duty to punish exists because it is deemed instrumental to the effective enjoyment of those rights. Accordingly, a greater degree of flexibility may be justified in identifying the scope of that duty than would be appropriate with respect to a duty to punish that is explicitly set forth in a convention. Still, accommodation of the constraints faced by transitional governments may be possible under the torture and genocide conventions on the basis that unforeseen developments—such as the debilitating effects of a protracted period of lawlessness—render full compliance impossible. *Cf.* Vienna Convention, *supra* note 62, arts. 61 (impossibility of performance) and 62 (unforeseen, fundamental change of circumstances). Application of these excuses for non-compliance is problematic, however. Under the Vienna Convention on the Law of Treaties, the excuses cannot be invoked by a State Party that brought about the conditions of impossibility or the fundamental change in circumstances by breaching an obligation owed to another State Party under the treaty or pursuant to another source of international duty. *Id.* For analysis of this issue in another context, see *infra* text accompanying notes 333-45.

285. This is implicit in the fact that the duty to prosecute is consistently identified with, and based upon, States Parties' obligation to "ensure" or "secure" enumerated rights. And, as the European Court explicitly stated in its judgment in *X and Y v. Netherlands*, only criminal punishment is an adequate deterrent to violations of rights that are of crucial importance. *See supra* text accompanying note 185.

286. *See supra* text accompanying notes 161-62, 176-77.

most likely to deter potential violators when the threat of punishment is as nearly certain as possible. For this reason, the conventions can fairly be interpreted to require successor governments to investigate and seek to punish each violation committed on their own watch. Similarly, the prior government should have made good faith efforts to prosecute each violation committed during its tenure. But the same logic would not compel prosecution of all offenders once massive violations have occurred with impunity. In these circumstances, full enforcement is neither capable of preventing the crimes that have already occurred, nor necessary effectively to deter potential lawbreakers of the future. A bounded program of exemplary punishment could have a significant deterrent effect, and thus achieve the aim justifying the general duty to punish atrocious crimes.

In contrast, a failure to punish *any* of the past violations would thwart the deterrence objective underlying the general duty to punish. If a government established complete impunity for atrocious crimes committed on a sweeping scale, its action would, as the *Restatement* reasoned, have the effect of tolerating or condoning the past violations and thereby encouraging similar ones.[287] This result is plainly incompatible with states' convention-based duty to undertake affirmative measures to prevent violations of physical integrity.[288]

While limitations on prosecutions may be compatible with states' international obligations, a policy that exonerates large numbers of persons who committed atrocious crimes offends common standards of justice and diminishes respect for the law. The best means of accommodating competing values might be to combine a finite program of prosecutions with legislation establishing a statute of limitations governing further prosecutions.[289] Such legislation[290] would minimize the destabilizing effects of trials[291] while affirming the rule of law.

3. *Selection Criteria*

The possibility of limited prosecutions raises the difficult issue of appropriate criteria for selecting defendants. Although selective prosecution is accepted

287. *See supra* text accompanying notes 198-99; *see also supra* text accompanying notes 12-13.

288. A similar conclusion follows from application of the doctrine *pacta sunt servanda*, an integral element of which is the principle of good faith performance. *See* Vienna Convention, *supra* note 62, art. 26. Wholesale impunity for a system of atrocious crimes surely violates States Parties' commitment to perform their duties under the comprehensive human rights conventions in good faith.

289. The distinction drawn here has particular relevance for countries in which both the government and private parties can initiate criminal proceedings, but may also be pertinent to countries where only the government can institute prosecutions. In the latter, the "selective prosecutions" referred to would be pursued as a matter of high governmental priority (in Argentina, prosecutions of former junta leaders were ordered by presidential decree), while additional prosecutions would be left to the initiative of individual prosecutors' offices.

290. Any time limit established by law should be reasonable. *See supra* note 126.

291. *See supra* text accompanying notes 265-73.

in principle in virtually all legal systems,[292] its exercise poses the risk of arbitrariness[293] and may threaten the principle of equality before the law.[294]

These risks are minimized, however, if the criteria used to select defendants reflect appropriate distinctions based upon degrees of culpability.[295] Such distinctions are drawn in every country's criminal law.[296] They are reflected both in gradations of punishment prescribed by penal law and in enforcement patterns, which typically reflect a priority on prosecuting persons responsible for the most serious offenses. Moreover, in cases involving criminal syndicates, greatest priority is generally placed upon convicting leaders.[297] Accordingly, prosecutions by a transitional government that focused on those most responsible for designing and implementing a past system of rights violations[298] or

292. Even legal systems that require prosecution of certain offenses generally allow prosecutors to exercise discretion with respect to less serious offenses. *See* Damaška, *supra* note 264, at 122; Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 250 (1977); Langbein, *Controlling Discretion*, *supra* note 264, at 450-451.

293. *See* H. PACKER, *supra* note 12, at 290. *See generally* K. DAVIS, *supra* note 15. An effort to prosecute virtually everyone who may be liable for crimes committed during a past program of repression also can generate arbitrary enforcement practices. For an account of problems of this kind encountered in the denazification program in post-war Germany, see Herz, *supra* note 249.

294. The right to equality before the law is enshrined in Article 7 of the Univeral Declaration of Human Rights, *supra* note 84, and in all of the comprehensive human rights conventions. International Covenant, *supra* note 54, art. 14; Banjul Charter, *supra* note 131, art. 3; American Convention, *supra* note 92, art. 24; European Convention, *supra* note 34, art. 14.

295. Moreover the appearance of arbitrariness is lessened if it is clear that a failure to attempt full enforcement is based in large part on resource constraints. *Cf.* H. PACKER, *supra* note 12, at 291 (when enforcement of a criminal law is "taken seriously but resources are inadequate to provide anything like full enforcement, the discrimination [in enforcement among violators] becomes less flagrant but remains objectionable").

296. Whether justified on retributivist, utilitarian or other grounds, all legal systems assign more serious penalties to more serious crimes. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY chs. 1, 7 (1968); C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT, chs. VII-VII, XXXVII (1872); J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, chs. XIV-XVI (1823). The seriousness of a crime is generally thought to depend upon both the harm it produces and the culpability of the offender. *See* von Hirsh, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?,"* 1 CRIM. L. FORUM 259, 266 (1990).

297. This priority underlies the common practice in the United States of allowing low-level participants in organized crime to plead guilty to a relatively minor offense or to receive immunity in exchange for testimony that will help convict their superiors. *Cf.* H. ABADINSKY, SOCIAL SERVICE IN CRIMINAL JUSTICE 95 (1979) (factors determining whether charges will be brought include whether potential defendant would be "valuable as a witness in another trial or against parties involved with him"); American Bar Association Project on Standards for Criminal Justice, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, § 3.9(b)(vii) (1971) (in exercising discretion in the charging function, a prosecutor may properly consider the "cooperation of the accused in the apprehension or conviction of others"); President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 503 (1968) (addressing narcotics laws, asserting, "The objectives of law enforcement are to reach the highest possible sources of drug supply . . . .").

298. Essentially this type of consideration, coupled with such other concerns as the availability of evidence, guided the Allied nations' selection of defendants prosecuted at Nuremberg. *See* TAYLOR REPORT, *supra* note 32, at 73-85. A study prepared by a U.N. Special Rapporteur suggests that amnesties should not be available for torture, involuntary disappearances and summary executions committed in a systematic fashion, and adds: "At the very least the authority granting amnesty, drawing on the legal theory of conspiracy, can exclude the instigators and higher officials from amnesty, particularly those in charge of agencies responsible for organizing and carrying out . . . 'administrative practices'." *U.N. Study on Amnesty Laws*, *supra* note 26, at 13, para. 63.

on the most notorious crimes[299] ould best comport with common standards of justice.

Although a thorough consideration of appropriate selection criteria is beyond the scope of this Article, several negative criteria should be noted. First, consistent with universally accepted principles of law, individuals should never be exonerated or exempted from prosecution for grave human rights violations on the ground that they were "following orders," although this circumstance can be considered in mitigation of punishment.[300] While a prosecution program may in fact allow low-level officers and soldiers to escape punishment, that result should never be achieved by endorsing a "superior orders" justification for committing atrocious crimes.[301]

Second, as suggested earlier, a government should not cynically prosecute a group of scapegoats. This might happen, for example, if prosecutions were directed against only low-level participants in a system of past atrocities or if patently political considerations infected the determination of defendants.[302] Such prosecutions would vitiate the authority of the law and thereby deprive the prosecutions of their deterrent power.

299. The U.N. Special Rapporteur on Chile has urged Chilean authorities to make especially concerted efforts to prosecute several exemplary cases that "have shocked Chilean society." *Report prepared by Professor Fernando Volio Jiménez (Costa Rica), Special Rapporteur on the situation of human rights in Chile, in accordance with paragraph 12 of Commission on Human Rights resolution 1987/60 of 12 March 1987*, U.N. Doc. A/42/556, para. 106 (1987); *see also id.*, para. 126; *Report on the question of human rights in Chile submitted by Mr. Fernando Volio Jiménez (Costa Rica), Special Rapporteur, pursuant to the mandate conferred under resolution 1988/78 of the Commission on Human Rights*, 45 U.N. ESCOR Comm'n on Hum. Rts., paras. 54, 63, U.N. Doc. E/CN.4/1989/7.

300. The Nuremberg Charter provided that the fact that a defendant "acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment . . . ." Nuremberg Charter, *supra* note 83, art. 8. This principle was subsequently ratified by the United Nations General Assembly, *Principle IV, Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR Supp. (No. 12) at 11-14, U.N. Doc. A/1316 (1950), and has been absorbed into virtually all major legal systems. The principle has been incorporated, as well, in numerous international instruments. *See, e.g.*, Convention Against Torture, *supra* note 67, art. 2(3); Inter-American Convention to Prevent and Punish Torture, *supra* note 92, art. 4; Draft Inter-American Convention on Forced Disappearances, *supra* note 210, art. 9; Code of Conduct for Law Enforcement Officials, art. 5, G.A. Res. 34/169, Annex (1979); Draft Declaration on Disappearances, *supra* note 208, art. 6(1); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, *supra* note 211, Principle 19 (each asserting that acting pursuant to superior orders is no defense to proscribed conduct).

301. The "due obedience" law enacted in Argentina, *see supra* note 265, has appropriately been criticized because it contravenes the Nuremberg principle regarding the invalidity of a superior orders defense. *See, e.g.*, Rogers, *supra* note 5, at 274; *see also* AMERICAS WATCH ARGENTINA REPORT, *supra* note 214, at 82 ("due obedience" law contravenes Argentina's obligations under Convention Against Torture, which bars superior orders defense).

302. An apparent example of the latter is the program of prosecutions undertaken by the Romanian government in the aftermath of the December 1989 uprising against Nicolae Ceausescu. Trials of former Ceausescu aides undertaken shortly after the revolution focused on the defendants' conduct during the five days of the revolution itself, and did not cover abuses during the previous twenty-five years of Ceausescu rule. This narrow focus apparently allowed former members of the Ceausescu regime who were also members of the successor government to escape accountability for their participation in past abuses. *See* HELSINKI WATCH, TRIALS IN ROMANIA 1 (March 1990).

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4. *Amnesty vs. Pardon*

Some analysts[303] have suggested that a pardon that spares a convicted human rights offender from serving his sentence or from completing the full term is less objectionable than an amnesty that forecloses prosecutions, consigning past crimes to oblivion.[304] This claim has intuitive appeal: In many countries, democracy has been secured with the blood of men and women whose suffering an amnesty would entomb forever in a grave of silence and denial. A pardon, in contrast, would leave the judgment of guilt intact.

But if the moral distinction between amnesty and pardon seems clear, the legal distinction is less so. On the one hand, the language of two conventions examined in Part II seems to support the claim that a post-conviction pardon might be permissible where an amnesty is not. As noted earlier, the Convention Against Torture requires States Parties to "submit" cases involving allegations of torture to the "competent authorities for the purpose of prosecution"; it does not explicitly require that a prosecution take place,[305] let alone that punishment be imposed and served.[306] And while the Genocide Convention explicitly provides that persons who commit genocide "shall be punished," a criminal conviction conceivably might satisfy this duty. For, as one writer has observed, "[t]he essence of punishment for moral delinquency lies in the criminal conviction itself."[307] Similar reasoning would apply to the comprehensive human rights conventions that have been interpreted to require States Parties to investigate grave abuses and to "hold responsible" or "bring to justice" those who are guilty. Even when international law establishes a duty to prosecute particular offenses, it generally leaves the determination of penalties to the discretion of national governments.[308]

Still, it would be a mistake to conclude that international law is indifferent to the use of pardons. The conventions on genocide and torture evince concern that appropriately severe penalties be imposed on persons convicted of those crimes: Article V of the Genocide Convention requires Contracting Parties to enact legislation providing "effective penalties for persons guilty of genocide," while Article 4 of the Convention Against Torture requires States Parties to make acts of torture "punishable by appropriate penalties which take into account their grave nature." Although these conventions do not prescribe

303. *E.g.*, Rogers, *supra* note 5, at 304.

304. *See supra* note 14.

305. *See* J. BURGERS & H. DANELIUS, *supra* note 92, at 138.

306. The drafters presumably recognized that there might be legitimate reasons to terminate an investigation without proceeding to trial, such as lack of necessary evidence. They also apparently sought to respect the independence of national courts and the procedural rights of defendants by avoiding language that suggested that a particular outcome of prosecutions was required.

307. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176, 193 (1953); *see also* H. PACKER, *supra* note 12, at 36 (identifying formal judgment of guilt as the crucial element of punishment).

308. *See* Dinstein, *supra* note 57, at 224.

specific penalties, their mani intent is that persons convicted of genocide and torture serve sentences that reflect the gravity of the offenses.[309] And the duty to punish grave violations of comprehensive human rights treaties surely would be breached by a State Party's consistent failure to impose punishment commensurate with the gravity of the crimes.[310]

309. Commenting on Article V of the Genocide Convention, one writer has asserted that "insufficient . . . penalties may well be construed as representing a violation of this obligation." N. ROBINSON, *supra* note 106, at 77. In practice, states have tended to prescribe severe penalties for genocide. *See U.N. Study on Punishment of War Criminals*, *supra* note 91, at 78, paras. 264-65; *id.* at 106, para. 383. In the view of two men who participated in drafting the Convention Against Torture, Article 4 "means that torture must be punishable by severe penalties." J. BURGERS & H. DANELIUS, *supra* note 92, at 129. Messrs. Burgers and Danelius note that

> it was not possible to indicate in the *Convention* any particular penalty which should be applied, such as imprisonment above a certain minimum [since] the practice with regard to criminal sanctions differs very much from country to country, and the severity of a penalty must therefore be assessed in relation to the severity of the sanctions which are generally applied in a particular country. . . . In applying article 4 it seems reasonable to require, however, that the punishment for torture should be close to the penalties applied to the most serious offences under the domestic legal system.

Id. Whatever latitude these provisions allow, both would be violated by pardons that spared torturers or persons responsible for genocide from serving any sentence or that rendered their punishment patently inadequate.

During drafting of the International Covenant on Civil and Political Rights, delegates repeatedly insisted that a draft provision that entitled criminal defendants to benefit from changes in law establishing lighter penalties should not apply to persons who committed genocide or other crimes against humanity; several delegates stressed, in particular, that such criminals should not be allowed to benefit from an amnesty. *See, e.g.*, 15 U.N. GAOR C.3 at 131, paras. 20, 24, U.N. Doc. A/C.3/SR.1007 (1960) (remarks of delegate from the United Kingdom).

310. This view is supported by the judgment in the *Velásquez Rodríguez Case*, in which the Inter-American Court stated that States Parties must impose "appropriate punishment" for violations of the American Convention. *See supra* text accompanying note 167. The Inter-American Convention to Prevent and Punish Torture, *supra* note 92, requires States Parties to make acts of torture "punishable by severe penalties that take into account their serious nature." *Id.*, art. 6. States could commit the customary law violation of "denial of justice" to aliens not only by failing to prosecute and punish persons who committed crimes against aliens, but also by "prosecution and light punishment; prosecution, punishment and pardon; [and] prosecution and release. . . ." *In re Janes* (U.S. v. Mex.), 4 REP. INT'L ARB. AWARDS 32, 90 (1926). A number of United Nations documents support the view that appropriately severe penalties are necessary to ensure the right to physical integrity. *See, e.g.*, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, *supra* note 211, Principle 1 (extra-legal executions shall be punishable by "appropriate penalties which take into account the seriousness of such offences"); Draft Declaration on Disappearances, *supra* note 208, art. 4 (each state shall ensure that all forms of participaion in disappearances "are specific crimes of the gravest kind under its criminal law"); *Report on the question of human rights in Chile submitted by Mr. Fernando Volio Jiménez (Costa Rica), Special Rapporteur, pursuant to the mandate conferred under resolution 1989/62 of the Commission on Human Rights*, 46 U.N. ESCOR Comm'n on Hum. Rts. at 20, para. 23, U.N. Doc. E/CN.4/1990/5 (although conviction was rendered in case involving the burning of two student demonstrators, defendant's "penalty was light in relation to the seriousness of the acts, thereby depriving the ruling of any exemplary value"); *see also* 42 U.N. ESCOR Comm'n on Hum. Rts., para. 156, U.N. Doc. E/CN.4/2 (1986) (governments must make every effort to investigate allegations of complaints of physical abuse of detainees "so that those who turn out to be responsible may be punished harshly and without any lenience"); *id.*, para. 52 (torture should be punishable "by appropriate penalties which take into account their grave nature"); *Report of the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human on Human Rights resolution 1989/33*, 46 U.N. ESCOR Comm'n on Hum. Rts. at 84, para. 272(i), U.N. Doc. E/CN.4/1990/17 (whenever a person is found guilty of torture, "he should be severely punished"); *Report by the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1987/29*, 45 U.N. ESCOR Comm'n on Hum. Rts., para. 50, U.N. Doc. E/CN.4/17 (1989) ("heavy penalties whenever torture occurs are vitally necessary" in countries where elected governments have replaced repressive regimes); *Report of the Working Group on*

That abuse of the pardon power can undermine states' duty to protect citizens from harm has long been recognized. The eighteenth century Italian criminologist Cesare Beccaria made the point this way: "To shew mankind, that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity . . ."[311] Bentham saw in the pardon power the potential for lawlessness:

> From pardon power unrestricted, comes impunity to delinquency in all shapes: from impunity to delinquency in all shapes, impunity to maleficence in all shapes: from impunity to maleficence in all shapes, dissolution of government: from dissolution of government, dissolution of political society.[312]

The harmful effects of pardons are compounded when they are granted in response to military demands, thereby undermining the authority of civilian institutions reestablished by prosecutions.[313]

B. *Derogation*

Throughout this Article I have answered the claim that prosecutions are destabilizing by asserting: They need not be. The threat of instability is minimized when prosecutions are backed by unambiguous international law whose requirements are confined within principled limits. Still, there may be times when a fragile government lacks the power to comply with even the modest requirements of international law outlined in Section II.A. The situation I have in mind, of course, is one in which the military retains de facto power after relinquishing office, and will not abide a legal accounting for its depredations. When instituting prosecutions would pose a serious threat to vital interests—and not merely provoke military disaffection—can a government be excused from

Enforced or Involuntary Disappearances, 47 U.N. ESCOR Comm'n on Hum. Rts. at 86, para. 408, U.N. Doc. E/CN.4/1991/20 (problem of impunity is compounded by "reticence in the administration of justice"—particularly on the part of military courts—characterized by rare prosecutions, few convictions, and, when violators are convicted, "sentences that, by any standard, are grossly disproportionate to the crime committed."). These views comport with common conceptions of justice. In H.L.A. Hart's words, disproportionate sanctions pose the risk "of either confusing common morality or flouting it and bringing the law into contempt." H.L.A. HART, *supra* note 296, at 25.

311. C. BECCARIA, *supra* note 296, at 158-59.

312. *Quoted in* K. MOORE, *supra* note 5, at 35.

313. *See* Timerman, *Fear Returns to Argentina*, N.Y. Times, Jan. 5, 1991, at 21, col. 1 (opinion piece); *Pardoning Mass Murder in Argentina*, N.Y. Times, Jan. 3, 1991, at A20, col. 1 (editorial) (both asserting that Argentine President Saul Menem's pardon of convicted military leaders for human rights crimes will embolden military to place itself above the law). Professor Moore has argued that, "[b]ecause pardons single people out for special treatment, every pardon is potentially a comparative injustice, a violation of the principle of equal treatment under the law." Moore, *When Mercy Weakens Justice*, N.Y. Times, Aug. 10, 1989, at A23, col. 1 (opinion piece). She argues that the only legitimate use of pardons is to prevent punishment of an innocent person or to "impose" the sentence that the offender deserves, on retributivist grounds, for her offense—in effect, to correct a sentence that was (or has become) inappropriate in light of retributivist-based criteria—and not to serve political or other interests. *See* K. MOORE, *supra* note 14.

its general duty to punish atrocious crimes? The answers provided by international law are, in some respects, unsatisfactory. For as the following analysis makes clear, relevant law may not make adequate provision for situations in which the military occupies an autonomous realm of power.

The three comprehensive conventions analyzed in Part II allow States Parties to derogate from their duties in time of public emergency that threatens the life of the nation when various conditions are satisfied.[314] Under no circumstances, however, are derogations from the rights to life and freedom from torture permitted.[315] When applicable, the customary doctrines of state of necessity and *force majeure* similarly preclude the wrongfulness of a state's failure to comply with its international obligations in exceptional circumstances.[316] But the prohibitions of torture, disappearances, and extra-legal executions have the status of peremptory norms:[317] they can never be abrogated.[318]

The question arises, then, whether states' duty to prosecute these crimes should also be treated as nonderogable on the basis that prosecution of violators is necessary to secure the peremptory rights. Authoritative interpretations of the conventions analyzed in Part II offer no clear guidance on this question; the issue has never been squarely addressed. A plausible case can be made in support of either possible position.

While similar considerations would apply to all three comprehensive treaties, the issue is framed most sharply under the American Convention. Article 27(2) provides both that several substantive rights are nonderogable and that "the judicial guarantees essential for the protection of such rights" are likewise nonderogable.[319] Interpreting this provision, the Inter-American Court

314. International Covenant, *supra* note 54, art. 4(1); American Convention, *supra* note 92, art. 27(1); European Convention, *supra* note 34, art. 15(1).

315. International Covenant, *supra* note 54, art. 4(2); American Convention, *supra* note 92, art. 27(2); European Convention, *supra* note 34, art. 15(2). As noted earlier, none of these conventions explicitly proscribes disappearances as such. Accordingly, the right against forced disappearances is not explicitly made non-derogable. The draft Inter-American Convention on the Forced Disappearance of Persons, *supra* note 210, explicitly prohibits suspension of judicial guarantees necessary to secure protection from forced disappearances. *See infra* note 324.

316. These doctrines apply to obligations imposed both by customary law and by conventions that do not have an explicit derogation clause or a provision governing States Parties' obligations in the event of *force majeure*. *See* T. MERON, *supra* note 57, at 219 n.261; [1978] 2 Y.B. INT'L L. COMM'N (pt. 1), at 74, para. 32; 77, para. 39, U.N. Doc. A/CN.4/315 (1977) (*force majeure*). Their application to conventions that have derogation clauses is addressed in [1980] 2 Y.B. INT'L L. COMM'N (pt. 1) at 45, para. 67; 51, *Draft Article 33* (state of necessity), U.N. Doc. A/CN.4/318/Add.5-7 (1980).

317. *See supra* text accompanying note 195.

318. Although the principal effect of a rule's status as *jus cogens* is that it "cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect," I. BROWNLIE, *supra* note 57, at 513, a peremptory norm's non-derogability in this sense also connotes its non-derogability for purposes of applying doctrines of exception, such as state of necessity. *See* T. MERON, *supra* note 60, at 60.

319. Although the other comprehensive treaties do not explicitly provide that judicial guarantees cannot be suspended if they are essential to the protection of non-derogable rights, it is implicit in the conventions' recognition of rights as non-derogable that States Parties must do that which is necessary to secure the rights.

has concluded that States Parties to the American Convention cannot suspend individuals' right to seek *habeas corpus*.[320] Since the Court has found punishment to be a necessary part of States Parties' duty to ensure rights under the Convention,[321] States Parties arguably may not be able to derogate from their duty to prosecute violations of nonderogable rights.

Although plausible, this interpretation of the American Convention is not inevitable. *Habeas corpus* and criminal prosecution could be distinguished for purposes of determining whether derogation is permissible. *Habeas corpus* can avert imminent or further harm; it can, for example, be used to locate a person who has "disappeared" and thus secure her from physical danger, or to prevent a detainee who has been tortured from suffering further abuse.[322] In contrast, criminal prosecution cannot prevent the specific act for which punishment is sought; it can only deter future instances of the offense.[323] Thus, while prosecutions play a necessary part in States Parties' fulfillment of their duty to ensure fundamental rights, they may not be deemed "essential" for the protection of those rights for purposes of Article 27(2). Applying similar logic, the duty to institute criminal proceedings pursuant to other conventions may be derogable, at least in principle.[324]

Still, in view of the consistent recognition by international bodies that prosecution is necessary to secure certain nonderogable rights, a rule of law allowing states to derogate from the duty to prosecute violations of those rights would produce untenable results. Such a rule would have international law assert on the one hand that the rights to life, freedom from torture, and freedom from forced disappearances are nonderogable, and on the other hand that, under certain circumstances, states need not do that which is necessary to secure the rights.

Similar issues arise in applying the customary doctrine of state of necessity.[325] The International Law Commission's draft articles on state responsibility

320. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8, American Convention on Hum. Rts.), Inter-Am. Ct. H.R. (advisory opinion), O.A.S. Doc. OC-9/87 (ser. A) No. 9 (1987).

321. *See* Part II, § C.2.

322. *See* Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8, American Convention on Hum. Rts.), Inter-Am. Ct. H.R. (advisory opinion), O.A.S. Doc. OC-9/87 (ser. A) No. 9, para. 35 (1987).

323. It is precisely this function that underlies the duty to punish certain human rights violations. *See supra* text accompanying note 285.

324. The draft Inter-American Convention on the Forced Disappearance of Persons, *supra* note 210, which requires States Parties to prosecute persons responsible for forced disappearances, provides that "States Parties shall not suspend any judicial guarantee including *habeas corpus* as a means of determining the whereabouts of a detainee, his or her state of health or the warrant from the authority leading to the arrest," even during a state of emergency. *Id.* art. 15. It does not, however, explicitly prohibit suspension of criminal prosecutions. Similarly, while the Convention Against Torture, *supra* note 92, requires States Parties to prosecute torture, its non-derogation provision does not explicitly address the duty to prosecute, providing only that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture." *Id.*, art. 2(2). Article 5 of the Inter-American Convention to Prevent and Punish Torture, *supra* note 92, establishes a similar rule.

325. Although circumstances in which the state of necessity doctrine applies are similar to those in which derogation is permitted under the comprehensive human rights treaties, the parameters of the conventional rules of derogation and the customary state of necessity doctrine may not be identical. *See*

frame the doctrine this way: the state of necessity doctrine precludes the wrongfulness of an act of a state "not in conformity with an international obligation" if "the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril."[326] This justification is not available, however, "if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law."[327] As the earlier discussion makes clear, the customary duty to prosecute torture, disappearances, and extra-legal executions "arises out of" rights that have the status of peremptory norms.[328]

Even if the duty to prosecute certain human rights crimes were derogable in principle, states could rarely justify suspension of prosecutions. Both the state of necessity doctrine and the derogation provisions of human rights treaties establish a high threshold for application, requiring a grave and imminent threat to an essential state interest.[329] And when the applicable threshold is established, States Parties to the comprehensive treaties may derogate only "to the extent strictly required by the exigencies of the situation."[330] As noted, the state of necessity doctrine justifies noncompliance with international obligations only if the state's action "was the only means" of safeguarding an essential state interest against grave and imminent peril.[331] The *force majeure* doctrine also has a high threshold of application. The ILC's draft articles on state responsibility frame the *force majeure* rule in the following terms: "The wrongfulness of an act of a State not in conformity with an international obligation . . . is precluded if the act was due to an irresistible force . . . which made it materially impossible for the State to act in conformity with that obligation . . . ."[332] Under each of these standards, governments would not be excused

Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 20 (1986).

326. *Draft article 33(1)*, [1980] 2 Y.B. INT'L L. COMM'N (pt. 2) at 33, U.N. Doc. A/35/10 (1980).

327. *Id.*, *Draft article 33(2)(a)*. Although the ILC does not specify what it means by "arises out of," a common sense interpretation is that which "is reasonably necessary to secure the observance of."

328. *See supra* text accompanying notes 195, 198-99. As noted earlier, that duty is significantly less exacting than the corresponding duty established by various human rights conventions—except, perhaps, in the special circumstances surrounding political transitions. *See supra* Part III, A.2.

329. See *supra* text accompanying notes 314, 326. Bodies responsible for supervising compliance with the comprehensive human rights conventions have made clear that derogation is not justified if a threat is not sufficiently imminent or grave, even if it has some basis in fact. *See, e.g.*, The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 71-76, paras. 152-65 (Eur. Comm'n of Hum. Rts.).

330. International Covenant, *supra* note 54, art. 4(1); European Convention, *supra* note 34, art. 15(1). The corresponding language in Article 27(1) of the American Convention, *supra* note 92, is: "to the extent and for the period of time strictly required by the exigencies of the situation . . . ." *See* Jorge Landinelli Silva v. Uruguay, Comm. No. R.8/34, 36 U.N. GAOR Supp. (No. 40) Annex XII, para. 8.4, U.N. Doc. A/36/40 (1981) (Human Rights Committee asserts that, even if situation of emergency existed in Uruguay, measures taken by government exceeded those that could be justified as necessary to restore peace and order).

331. *See supra* text accompanying note 326.

332. *Draft article 31(1)*, [1980] 2 Y.B. INT'L L. COMM'N (pt. 2) at 33, U.N. Doc. A/35/10 (1980). Although more commonly applied to acts of nature rendering compliance with international duties impossible, the *force majeure* doctrine has sometimes been applied to situations of insurrection causing injury to aliens. *See* I. BROWNLIE, *supra* note 57, at 466; [1978] 2 Y.B. INT'L L. COMM'N (pt. 1) at 106-24, paras. 162-246, U.N. Doc. A/CN.4/315 (1977). The appropriateness of the latter application has been questioned

from their duty to prosecute human rights violations merely to placate restive military forces; the excuses are available only to avert a threat to the life of a nation or, in the case of *force majeure*, when compliance is rendered materially impossible.

It is unclear, moreover, whether various excuses for noncompliance would apply even if military conduct imperiled an essential state interest. The ILC's draft articles on state responsibility assert that a state of necessity may not be invoked to justify a breach of an international duty "if the State in question has contributed to the occurrence of the state of necessity."[333] Similarly, the ILC asserts that the *force majeure* rule does not apply "if the State in question has contributed to the occurrence of the situation of material impossibility."[334] Under the law of state responsibility, conduct of a state organ—including the military—is attributable to the state.[335] Thus if a state failed *because of military intimidation* to punish atrocious crimes that it was otherwise required to prosecute, the state would be in breach of its international obligations.[336]

A decision of the European Commission of Human Rights suggests a different approach under the derogation clause of the European Convention. In *The Greek Case*, the Commission rejected the applicant states' argument that the revolutionary military government of Greece could not invoke the Convention's derogation provision because it had, by overthrowing the previous government, brought about the revolutionary situation upon which it based its claim of entitlement to derogate.[337]

One can fairly question whether the widely recognized rules formulated by the ILC are appropriate in the circumstances prevailing in many transitional societies. Legal rules attributing military conduct to the state presuppose the government's ability to control its armed forces.[338] But when countries emerge from a protracted period of military rule, the armed forces often continue to occupy a large realm of autonomous power, exerting more control over the civilian government than it asserts over them.[339] In these circumstances, a rule requiring civilian authorities to prosecute armed forces may seem inappropriate, and even nonsensical—if not downright dangerous.

Yet the alternative—excusing states from compliance with their human rights obligations—also poses troubling prospects. If transitional governments were excused from their international duties when military obstruction accounts for their noncompliance, international law would effectively reward the military's behavior.[340] Also, a formal recognition that the civilian government is, in effect, rendered powerless by the armed forces would undercut the legitimacy of the elected government when its authority is already imperiled.[341]

While applicable rules are probably best clarified on a case-by-case basis, future legal developments should be guided by one overarching concern: rules governing derogation should be fashioned to provide incentives for governments to assert control over their armed forces. Customary law governing state responsibility for injury to aliens caused by insurgent forces may offer a productive analogy. International arbitral tribunals have found or intimated that the wrongfulness of a state's noncompliance with international duties toward

on the basis that general rules governing state responsibility for injury to aliens caused by non-state actors, such as those requiring states to exercise due diligence, determine the responsibility of the state without having to resort to such doctrines as *force majeure*. *See* C. EAGLETON, *supra* note 95, at 125-26.

333. *Draft article 33(2)(c)*, [1980] 2 Y.B. INT'L L. COMM'N (pt. 2) at 33, U.N. Doc. A/35/10 (1980). *See also* [1978] 2 Y.B. INT'L L. COMM'N (pt. 1) at 73, para. 29, U.N. Doc. A/CN.4/315 (1977).

334. *Draft article 31(2)*, [1980] 2 Y.B. INT'L L. COMM'N (pt. 1) at 33, U.N. Doc. A/35/10 (1980); *see also* [1978] 2 Y.B. INT'L L. COMM'N (pt. 1) at 69, para. 15, U.N. Doc. A/CN.4/315 (1977). Indeed, publicists have distinguished the *force majeure* and state of necessity doctrines on the basis that the former involves conduct that is "involuntary," having been brought about by an external and irresistible force, while the latter involves a deliberate course of state action chosen to avert imminent harm to the life of the state. *See* [1978] 2 Y.B. INT'L L. COMM'N (pt. 1) at 72-74, paras. 25-30, U.N. Doc. A/CN.4/315 (1977); [1980] 2 Y.B. INT'L L. COMM'N (pt. 1) at 14, paras. 1-2, U.N. Doc. A/CN.4/318/Add.5-7 (1980).

335. T. MERON, *supra* note 57, at 155-56. This is true even if the state organ exceeded its competence or contravened its instructions pursuant to national law. *Id.* at 156-57; *Draft article 10*, [1975] 2 Y.B. INT'L L. COMM'N 60, U.N. Doc. A/10010/Rev.1 (1975); *see also id.* at 66, para. 15.

336. *See* [1980] 2 Y.B. INT'L L. COMM'N (pt. 1), at 111-112, para. 20, U.N. Doc. A/CN.4/330 (1980) (noting similarity of rules of attribution for purposes of establishing state responsibility and determining whether conduct "contributing to" material impossibility restores full responsibility when *force majeure* doctrine would otherwise preclude the wrongfulness of a state's conduct). This interpretation of international law is reinforced by the views of several U.N. Rapporteurs and Representatives. For example, the Special Representative on El Salvador has repeatedly faulted the Salvadoran judiciary for failing to pursue prosecutions of military personnel who committed extra-legal executions—despite his acknowledgment that Salvadoran judges face a serious threat of assassination and other forms of intimidation by Salvadoran armed forces. *See, e.g., Final report on the situation of human rights in El Salvador, submitted to the Commission on Human Rights by Professor José Antonio Pastor Ridruejo in fulfillment of the mandate conferred under Commission resolution 1982/28*, 39 U.N. ESCOR Comm'n on Hum. Rts. at 39, para. 96; 46, para. 119, U.N. Doc. E/CN.4/1983/20.

337. The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 31-32, paras. 58-60 (Eur. Comm'n of Hum. Rts.). In reaching this conclusion, the Commission also rejected the respondent's claim that the Commission could not pass judgment on its conduct since it was a revolutionary government. *See id.* at 31, para. 56. The Commission found, however, that the circumstances prevailing at the time of the Greek government's derogation did not pose a sufficiently imminent and grave threat to justify its derogations. *See id.* at 71-76, paras. 152-65; 100, paras. 206-07.

338. *Cf.* C. EAGLETON, *supra* note 96, at 26 ("When a state has been recognized by the community of nations, it is presumed to be capable of exercising the rights and duties of membership in that community."). Moreover the reasons why international law generally holds states to a high standard of accountability for the behavior of their armed forces may not be fully pertinent to the circumstances considered here. It is unclear whether standards of strict accountability designed, inter alia, to protect citizens of one state from conduct by organs of another state during international armed conflict are equally relevant when applied to protect the rights of citizens vis-a-vis their own government. *See* T. MERON, *supra* note 57, at 161-62.

339. *See supra* text accompanying notes 3, 27-32. This has been notably true of Guatemala and El Salvador since those countries' formal transition from military to civilian rule in the mid-1980's.

340. The right of derogation has been subject to substantial abuse by governments. *See* T. MERON, *supra* note 60, at 53. *See generally* N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Doc. E/CN.4/Sub.2/198-2/15.

341. *Cf.* A. JAMES, SOVEREIGN STATEHOOD 127-29 (1986) (noting reticence of other states to withdraw formal recognition from "collapsing states"). For a thoughtful analysis of these issues, see Eric Lasker, Possible Defenses to a Transitional Government's Prosecutorial Obligation Under International Human Rights Law (Jan. 17, 1989) (unpublished manuscript on file with author).

aliens might be precluded if the injury were caused by revolutionary forces over which the government could not assert control.[342] To avoid liability, a state has had to establish that it exercised due diligence in seeking to prevent the situation that made compliance with its international duties impossible.[343] This has been treated as a question of fact, to be determined on a case-by-case basis,[344] and the state's efforts to control revolutionary forces by punishing their crimes have been deemed relevant to the analysis.[345]

Although these issues merit further study,[346] the difficulty of satisfactorily addressing prosecution-related risks through doctrines of exception underscores the importance of interpreting general legal standards requiring prosecution in a manner that accommodates constraints commonly faced by transitional governments. As argued earlier, governments should be able to discharge their legal duties without provoking the type of crisis that might, under various rules of exception, justify noncompliance.

IV. Future Developments in the Law

In a period when democracies have replaced dictatorships in dozens of societies, many successor governments have failed to establish criminal accountability for violations of the recent past.[347] This sobering pattern raises the question whether further elaboration of international standards is desirable[348]

342. *E.g.*, J.N. Henriquez (Netherlands/Venezuela), Mixed Claims Comm'n (1903), 10 REP. INT'L ARB. AWARDS 714-17 (1903); *In re* Gill (Great Britain v. Mexico), 6 Ann. Dig. 203 (British-Mexican Claims Tribunal 1931-32), 5 REP. INT'L ARB. AWARDS 157, 159 (1931).

343. *See* C. EAGLETON, *supra* note 96, at 146.

344. *Id.*

345. According to Eagleton, "the grant of amnesty to insurgents . . . has sometimes been regarded [by arbitral tribunals] as revealing the lack of a sufficient desire on the part of the government to repress the rebellion." *Id.* at 151; *see also* I. BROWNLIE, *supra* note 57, at 454. In the *Gill* case, the British-Mexican Claims Tribunal asserted that, when conduct of revolutionaries causing injury to aliens was brought to a government's attention, or was so notorious that the government could presume to have known of it, and it was not shown that the government "took any steps to suppress the acts or to punish those responsible," the Commission could assume "that strong *prima facie* evidence exists of a fault on the part of the authorities." *In re* Gill, *supra* note 342, at 158. Others have suggested that states can be presumed to have exercised due diligence to supress an insurrection, though such a presumption can be overcome by evidence to the contrary. *See* I. BROWNLIE, *supra*.

346. While troubling, the concerns addressed in this section would rarely be determinative of a state's legal duties. The derogation clauses of conventions and the doctrines of necessity and *force majeure* justify non-fulfillment of an international obligation only during the period of actual emergency or impossibility. *See* [1978] 2 Y.B. INT'L L. COMM'N (pt. 1) at 69, para. 13, U.N. Doc. A/CN.4/315 (1977) (*force majeure*); [1980] 2 Y.B. INT'L L. COMM'N (pt. 1) at 20, para. 14, U.N. Doc. A/CN.4/318/Add.5-7 (1980) (state of necessity). Since criminal prosecutions often extend over protracted periods, it should rarely, if ever, be necessary for a government formally to suspend implementation of a duty to prosecute human rights offenders. Instead, by their nature criminal proceedings allow governments the flexibility they may need to adjust the timing of prosecutions to avoid exacerbating political tensions.

347. *See supra* note 36.

348. Problems relating to implementation of human rights conventions have often been addressed by developing new declarations and conventions designed to improve compliance with duties that have been inadequately implemented. For example, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *adopted* Nov. 26, 1987, E.T.S. 126, Misc. 5 (1988), *reprinted in* 27 I.L.M. 1152 (1988) (*entered into force* Feb. 1, 1989), establishes obligations designed to

or, instead, whether the gap between duty and compliance can effectively be narrowed by invigorating efforts to implement current law.[349]

The two options are not mutually exclusive, and the values promoted by prosecutions[350] may be best served if both approaches are pursued. Efforts to secure compliance with current law can only be strengthened by states' adherence to conventions that render explicit the duty to prosecute grave violations of physical integrity.[351]

While the Convention Against Torture serves this function, similar international conventions on extra-legal executions and disappearances should be adopted.[352] Like the Convention Against Torture, the new conventions should define the conduct that States Parties must criminalize; explicitly require States Parties to investigate credible allegations that the crimes have occurred, even if no formal complaint has been filed, and to prosecute those implicated by the investigation or extradite them for trial in another country; and require that national legislation provide for appropriately severe penalties.

The proposed treaties should include provisions designed to ensure prosecution in the event that a State Party abrogates the duties it has undertaken. To this end, future conventions should require States Parties to afford victims, their survivors, or their legal representatives a means of initiating a criminal proceeding in the event that the state fails to do so, or of seeking review of a prosecutor's determination not to press charges.[353] The conventions should also estab-

eradicate torture—a practice prohibited by the European Convention, *supra* note 34, which was adopted in 1950. For other examples, *see supra* note 92. The newer instruments have generally been thought to reinforce the earlier-established legal norms, and not implicitly to call their validity into question. The reiteration of a rule in numerous international instruments has, in fact, often been cited as evidence that the rule has acquired the status of customary law. *See, e.g.*, Filartiga v. Peña-Irala, 630 F.2d 876, 882-84 (2d Cir. 1980).

349. A case involving a challenge to Suriname's amnesty law, referred to the Inter-American Court in August 1990, will afford the Court an important opportunity to affirm the duty to punish extra-legal executions pursuant to the American Convention. *See supra* note 5.

350. *See* Part I, A.

351. Proposed rules of international law that would secure important values should not be rejected because they would require some governments to aspire to standards they have generally failed to satisfy —an argument advanced by some opponents of new law requiring prosecution. It is precisely the point of human rights law to promote a higher standard of conduct than that which prevails in many countries when the law comes into force. *Cf.* W. MOBERLY, RESPONSIBILITY: THE CONCEPT IN PSYCHOLOGY, IN THE LAW, AND IN THE CHRISTIAN FAITH 23 (1956) ("In many circumstances to expect and to exact a high standard is the most likely way to get it."). Ideally, new legal norms should raise standards of conduct prevailing in countries where generally-accepted principles are routinely violated, without establishing standards that cannot reasonably be satisfied by those subject to the law. I am indebted to Professor Henry B. Hansmann for this insight.

352. The following discussion considers only provisions relating to investigation, prosecution and punishment that should be included in future conventions. Any specialized conventions concerned with extra-legal executions or disappearances should, of course, set forth other means of preventing and remedying these abuses, including the assurance of effective civil remedies.

353. Many countries' legal systems enable individuals who have a direct interest in a case to initiate criminal proceedings or to challenge the public prosecutor's decision not to press charges, and these procedures help check abuses of prosecutorial discretion. *See* Damaška, *supra* note 264, at 135. Some potential adherents to the proposed conventions—particularly countries whose legal systems allow broad prosecutorial discretion and do not enable private parties to initiate criminal proceedings—may, of course, be unwilling to accept the proposed provision. This possibility should not, however, deter its inclusion in

lish an oversight body that is empowered, inter alia, to receive complaints from, or on behalf of, individuals who claim that their convention-based rights have been violated. Together, these provisions would enable victims to seek the assistance of an international body to press their governments to initiate prosecutions when malfeasance accounts for a state's failure to do so.[354]

The proposed conventions should also authorize the oversight body to 1) initiate an investigation of apparently well-founded reports that a State Party has systematically violated the convention and failed to prosecute the offenders, even if no complaint has been received;[355] and 2) receive inter-state complaints alleging such a pattern.[356] While the first power is not yet common among bodies that monitor compliance with human rights conventions, it would not be exceptional. The Committee that monitors compliance with the Convention Against Torture can initiate investigations of this sort;[357] this approach signals the direction that should be taken in future conventions. By declaring a state to be in breach of its treaty obligations and urging corrective action, the oversight body would provide a measure of accountability and build international pressure in support of prosecutions that is now lacking.[358]

The proposed conventions should also explicitly require States Parties to ensure protection of complainants and witnesses, to investigate allegations of intimidation of participants in legal proceedings, and to prosecute those who are responsible. Future conventions should also explicitly prohibit States Parties from adopting laws or issuing decrees that preclude criminal punishment of persons who commit atrocious crimes.[359] Following the example of the Convention Against Torture, future specialized treaties should establish universal jurisdiction over the proscribed conduct.[360] Finally, the conventions should provide that the crimes they define shall not be considered "political offenses" for purposes of extradition.

Never has the time been more auspicious to develop such conventions. As countries emerge from periods of sweeping state violence, many of the new governments are assuming international commitments to help assure that their nations never again descend into an all too familiar chasm of lawlessness and repression.[361]

CONCLUSION

In a wide array of countries the specter of torture, political murder, and forced disappearance has been dispelled by the dawning of freedom and the revival of judicial process. But the transitions have rarely been smooth, and the fledgling democracies face formidable challenges as they seek to balance the demands of justice against the continuing threat of destabilizing force.

In these circumstances, can the insertion of this or that provision in an international treaty possibly make a difference? For a new government precariously perched atop a restless and long-oppressed polity, with the torturers still controlling the guns, the threat of a coup may seem all too real. International law seems not so much remote as beside the point.

And yet. If the international community cannot prevent, at least it must not condone. Its words of censure or approval eventually filter through. For over a decade the dissidents of Eastern Europe recited the human rights promises of the Helsinki Final Act. With every recital the legitimacy of the governments that had made and broken those promises crumbled a little more.

a convention; States Parties unwilling to accept the obligation could enter a reservation to the relevant article.

354. The practice of such bodies as the Human Rights Committee and the Inter-American Commission of urging states to investigate particular human rights violations and to bring to justice those who are responsible, *see supra* text accompanying notes 147-60, 176-77, establishes a foundation for allowing individuals to seek the assistance of an international body in compelling governments to initiate criminal proceedings in particular cases. Such a body would, of course, only be able to accept complaints from victims alleging a violation by a State Party that had recognized the body's competence.

355. Because many governments have been more inclined to ratify than to comply fully with human rights conventions, adherents to the proposed conventions would likely include some governments that systematically commit serious violations.

356. If there were any viable prospect of the creation of an international criminal court, it would also be desirable to include a provision recognizing the tribunal's competence over systematic violations of the conduct proscribed in the proposed conventions. As noted earlier, however, proposals to establish such a court have languished at the United Nations. *See supra* note 86.

357. Article 20 of the Convention Against Torture, *supra* note 67, authorizes the Committee Against Torture to initiate an investigation when it "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."

358. *Cf.* T. MERON, *supra* note 57, at 205-07 (declaratory judgment is an especially appropriate form of relief in cases initiated by inter-state petitions alleging a system or pattern of human rights violations; "[a] clear declaration that a government's conduct violates human rights sensitizes national and international public opinion, thus bringing pressure to bear on the government to conform its conduct to international standards."). Although the "sanction" of publicity may seem limp, it has in fact proved to be one of the most effective means of promoting state compliance with internationally-recognized human rights standards. *See* Orentlicher, *supra* note 93, at 84.

359. The draft Inter-American Convention on the Forced Disappearance of Persons, *supra* note 210, contains such a provision. *Id.*, art. 8.

360. While states have been reluctant to assert universal jurisdiction to punish human rights crimes committed in another country, it is conceivable that prosecution of some crimes by a "foreign" government would be acceptable to both the prosecuting state and the government of the state where the crime occurred. The Panamanian government of Guillermo Endara supported prosecution of General Manuel Antonio Noriega (on drug-trafficking charges) in the United States, while the Philippine government of Corazon Aquino supported the prosecution (on corruption charges) of former President Ferdinand Marcos—who died before his case went to trial—and his wife Imelda in the United States. Still, enduring concerns about sovereignty are likely to prevent frequent resort to universal jurisdiction as a basis for prosecuting human rights crimes. It is noteworthy that, despite the Aquino government's support for the U.S. prosecution of Imelda Marcos, the presiding judge questioned the propriety of prosecuting Mrs. Marcos in a U.S. court for malfeasance allegedly committed in the Philippines, and jurors who acquitted Mrs. Marcos indicated that they shared this concern. *See The 'Wrong' Court: Marcos Acquittal Is Seen as Reaction of Jury to Hearing Manila Case in U.S.*, N.Y. Times, July 3, 1990, at B3, col. 5.

361. Among the first acts of governments that have replaced dictatorships in such countries as Argentina, the Philippines and Uruguay has been adherence to international human rights conventions. *See* Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 YALE J. INT'L L. 217, 220-21 (1986); LAWYERS COMMITTEE FOR HUMAN RIGHTS, VIGILANTES IN THE PHILIPPINES: A THREAT TO DEMOCRATIC RULE x (1988); Zalaquett, *supra* note 8, at 38, 66 n.16.

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

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

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

1. INTRODUCTION

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

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2. AMNESTY, PROSECUTION OR TRUTH COMMISSION?

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

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

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

Support for this argument is to be found in the Genocide Convention of 1948, which contains an absolute obligation to prosecute offenders;[1] in decisions of the Inter-American Court and Commission of Human Rights[2] holding that amnesties granted by Argentina and Uruguay were incompatible with the American Convention on Human Rights; in the decision of the American Court of Human Rights in the *Velasquez Rodriguez Case*[3] holding, in respect of Honduras, that Article 1 (1) of the Convention, requiring states to "ensure the rights set forth in the Convention", obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights; in a comment by the UN Human Rights Committee that amnesties covering acts of torture are "generally incompatible with the duty of states to investigate such acts";[4] in the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, which obliges states to try or extradite those alleged to have committed crimes against humanity;[5] in the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights[6] calling on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes; in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968;[7] and in the Statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY)[8] and the International Criminal Tribunal for Rwanda (ICTR)[9] which require prosecution of those responsible for the crimes punishable under these statutes. Support for prosecution is also derived from the obligation to prosecute or extradite those guilty of grave breaches of the 1949 Geneva Conventions.[10] Here it is argued that the distinction between international and non-international armed conflicts has largely disappeared and that the obligation to prosecute grave breaches or similar war crimes extends to internal conflicts. Finally, of course, there is a substantial body of academic writing to support this argument.[11]

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

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

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

1. Art. 4 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).
2. Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) 82nd session OEA/LV/11.82.Doc. 25 (2 Oct. 1992); *id.*, Report No. 24/92 (Argentina), Doc. 24.
3. 1988 IACHR (Ser. C), No. 4, para. 165.
4. General Comment No. 20 (44), (Art. 7), UN Doc. CCPR/C21/Rev. 1/Add 3., para 15 (1992).
5. Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission of the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1966).
6. Part II, para. 60, UN Doc. A/Conf/57/24 (1993); 32 ILM 166 (1992).
7. 8 ILM 68 (1969).
8. Security Council Resolution 827 (1993); 32 ILM 1192 (1993).
9. Security Council Resolution 955; 33 ILM 1598 (1994).
10. *See, for example*, Arts.146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
11. *See, for example*, M Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law and Contemporary Problems 9 (1996); D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537, 2568 (1991); C. Edelenbos, *Human Rights Violations; A Duty to Prosecute?* 7 Leiden Journal of International Law 5, 15 (1994).
12. Case No. IT-95-17/1-T (10 December 1998); (1999) 39 ILM, at paras. 151-157 (1999).
13. *See* M. Scharf, *The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 41, 47 (1996).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. THE *PINOCHET* CASE

What are the lessons to be learned from the *Pinochet* case – comprising two judgments[24] of the House of Lords – for the purpose of the present thesis?

Augusto Pinochet was granted amnesty by a military decree of 1978, which granted unconditional, total amnesty for crimes committed between 1973 and 1978.[25] He was also entitled to immunity from prosecution in Chile by virtue of his office of senator. Yet neither his lawyers nor the Chilean government raised this amnesty in the legal proceedings. No doubt, this was because it was realized that a foreign court was unlikely to give serious consideration to an amnesty decree in effect granted by Pinochet to himself.

The Law Lords, with two exceptions,[26] failed even to mention the question of amnesty. This does not, however, mean that they were unsympathetic to the view that the treatment of a former head of state is best left to the territorial state, the state in which the crimes were committed. Although there is no express approval of this view, it may be suggested that support for such a solution is implicit in the reasoning and decision of the House of Lords. Two reasons may be advanced for this proposition.

First, although both judgments may be labelled as progressive by reason of their refusal to accord immunity to a former head of state in respect of international crimes (*in casu* torture), the second and decisive judgment was hardly progressive in its reasoning or effect. Only one judge (Lord Millett) was prepared to accept that torture was an international crime with universal jurisdiction under customary international law before 1988, with the result that the double criminality requirement was met in respect of acts of torture committed from 1973 onwards.[27] The other judges insisted that only the enactment of the Torture Convention of 1984 into English law in 1988 made the international crime of torture punishable under English law in fulfilment of the double criminality requirement.

24. R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte, [1998] 4 All ER 897 (HL) and R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No. 3), [1993] 2 All ER 97 (HL). The rehearing was occasioned by the fact that the first judgment was set aside on the ground of irregularity because one of the members of the House of Lords (Lord Hoffmann) was found to have close ties with Amnesty International, an intervening party in the proceedings: reported in R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No 2), [1999] 1 All ER 577 (HL).
25. *See* N.J. Kritz (Ed.), Transitional Justice. How Emerging Democracies Deal With Former Regimes, Vol. 2, at 500 (1995).
26. Lord Lloyd in the first judgment, [1998] 4 All ER, at 929, h-i. Lord Goff in the second judgment, [1999] 2 All ER, at 127-128.
27. [1999] 2 All ER, at 178 b-c.

The concept of double criminality too was restrictively interpreted. Instead of following the normal practice, supported by the Netherlands,[28] of requiring the extraditable crime to be a crime in the requested state (the United Kingdom) at the time of the extradition request, it held that it should be a crime in the United Kingdom at the time the alleged offence was committed in the foreign state.[29] This finding was based on a highly restrictive interpretation of the Extradition Act of 1989, which reads a requirement under the old Extradition Act of 1870 into treaty arrangements between European states, which finds no basis in the European Convention on Extradition of 1957.[30] This is not to suggest that it is an untenable interpretation. However, it is not the only possible interpretation, as is shown by the fact that the Chief Justice, Lord Bingham C.J., and Lord Lloyd had rejected this interpretation in earlier judgments in this matter,[31] in which they relied on the plain language of the extradition statute.

The judicial decision is an exercise in choice, particularly in the field of statutory interpretation. It is trite that the judges are frequently influenced by extra-legal factors in their choice – and properly so because judges are not bricklayers of the law but architects. They must interpret the law in its political and social context. In the *Pinochet* case it is not improbable that judges were influenced by the argument strongly advanced by the government of Chile in its public utterances that it should be left to Chile to deal with Pinochet, if necessary by trying him itself, and that the extradition of Pinochet to Spain would endanger the fragile peace between army and civilian government in that country.

This view receives support from the second reason for suggesting that the judgment gives implied support to the view that Pinochet should be returned to Chile. Five judges (all except Lords Goff and Phillips) attached a codicil to their speeches exhorting the Secretary of State to reconsider his decision to allow the extradition hearing to proceed in the light of the substantial reduction in the number of charges against Pinochet. This recommendation, which is more political than judicial in character, strongly suggests that the House of Lords was of the mind that the extradition proceedings should be discontinued. (On 15 April the Secretary of State decided that the extradition proceedings should continue.)

This assessment of judicial behaviour in the realist tradition is not intended to imply a lack of integrity on the part of the Law Lords. Like many they seem to have been unsure about the best way to deal with an ex-dictator whose punishment abroad might disturb the peace at home. Their judgment, which some may interpret as Solomonic in effect, provides testimony of their doubts.

28. *See* the decisions of the Hoge Raad of 16 Januari 1973 (*NJ*, 1973, no. 281) and 28 June 1977 (*NJ*, 1978, no. 438). This is also the position in Germany, *see* W. Schomberg & O. Lagodny, Internationale Rechtshilfe in Strafsachen 52 (1998).
29. *See* the speech of Lord Browne-Wilkinson, [1999] 2 All ER, at 104-107.
30. Art. 2 European Convention on Extradition 1957, (ETS No. 24), opened for signature 13 December 1957, entered into force 18 April 1960 (ECEx).
31. [1999] 2 All ER, at 105.

4. PERMISSIBLE AND IMPERMISSIBLE AMNESTIES. THE CASE OF SOUTH AFRICA

A solution must be made to reconcile the competing needs and interests of the territorial state and the international community. In practice this means that an attempt must be made to provide for the legitimation of amnesty, and for its recognition by foreign and international courts.

Obviously not all amnesties should be recognized abroad. The kind of blanket, unconditional amnesty given by Pinochet and his regime to themselves cannot hope to receive international recognition. But does this apply to conditional amnesty, accompanied by a thorough investigation by a truth and reconciliation commission, of the South African kind? The South African Truth and Reconciliation Commission (TRC) obviously believed it was entitled to more favourable treatment as in its final Report it appealed to the international community for recognition of its process. The Report states:

> The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.[32]

Reconciliation between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can best be achieved by drawing a distinction between permissible and impermissible amnesties, and by limiting international recognition to the former.

Here it is instructive to compare and contrast the experiences of Chile and South Africa.

The *Reports* of the Chilean National Commission on Truth and Reconciliation (1991)[33] and the South African Truth and Reconciliation Commission (1998)[34] have much in common. This is no surprise as the South African process was inspired by and modelled on that of Chile. Both *Reports* seek to provide a full picture of the gross violations of human rights that occurred in their countries; both examine the role of the judiciary, media and churches; both list the

32. Truth and Reconciliation Commission Report, Vol. 5, at 349 (1998).
33. Report of the Chilean National Commission on Truth and Reconciliation, translated by P.E. Berryman (1993); excerpts *in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, at 105 (1995).
34. *Supra* note 32.

names of victims; both recommend reparations and measures to prevent a recurrence of the past.

But there are important differences:

1. The Chilean Commission confined its investigations to the dead; the South African TRC investigated all gross human rights violations, involving killing, abduction, torture or severe ill-treatment, even where death did not result. Thus the former did not investigate torture where the victim had survived; the latter did.
2. The Chilean Commission had no subpoena powers to compel witnesses to testify, which meant in practice that members of the security forces refused to co-operate. The South African TRC had such powers and used them to ensure that reluctant witnesses testified.
3. The Chilean Commission had no power to name the names of perpetrators. The South African TRC had such a power, to be executed after giving notice to the person to be named, and in its final report it makes important findings on individual responsibility. Thus it finds that former State President P.W. Botha facilitated gross violations of human rights and was accountable;[35] that P.W. Botha, Magnus Malan (Minister of Defence) and Chief Mangosuthu Buthelezi were accountable for the gross human rights violations committed by paramilitary units in KwaZulu;[36] and that Winnie Madikizela-Mandela was accountable for the acts of murder, torture and assaults committed by the Mandela Football Club.[37]
4. In Chile the National Commission operated in the shadow of its former dictator, Augusto Pinochet, who remained Commander-in-Chief of the Army. No such threat existed in South Africa and many members of the security forces testified before the TRC.
5. The most important difference related to amnesty. The Chilean National Commission was bound by the 1978 Amnesty Decree in which the armed forces under Pinochet had given themselves immunity from prosecution for crimes committed between 1973 and 1978. The Commission therefore had no competence to pronounce on matters of amnesty. In contrast amnesty was (and still is) an integral part of the South African truth and reconciliation process.

Amnesty was one of the most difficult issues that faced negotiators after the abandonment of apartheid. Prosecution *à la* Nuremberg that had been threatened by the African National Congress (ANC) while engaged in the armed struggle was clearly impossible in a situation in which there was no victor. On the other

35. *Supra* note 32, Vol. 5, at 225.
36. *Id.*, at 235.
37. *Id.*, at 243.

hand, absolute, unconditional amnesty, of the kind favoured by the retiring apartheid regime, was unacceptable to the ANC. The compromise was conditional amnesty on application. This was given legislative effect by the 1993[38] and 1996[39] Constitutions and the Promotion of National Unity and Reconciliation Act of 1995.[40]

The Promotion of National Unity and Reconciliation Act established a Truth and Reconciliation Commission with a dual task: the compilation of a complete picture of the human rights violations of the past; and the facilitation of amnesty. For the latter purpose a quasi-judicial Amnesty Committee was established comprising judges and senior lawyers. Although this Committee – later extended to several committees to cope with an expanded workload – operated (and still operates) separately from the TRC, it was part of the TRC structure.[41]

An Amnesty Committee considers applications for amnesty and may grant amnesty if it is satisfied that the applicant has committed an act constituting "a gross violation of human rights", made "a full disclosure of all relevant facts", and that the act to which the application relates is "an act associated with a political objective committed in the course of conflicts of the past".[42] The criteria to be employed for deciding whether the act is one "associated with a political objective" are drawn from the principles used in extradition law for deciding whether the offence in respect of which extradition is sought is a political offence. These criteria include, *inter alia*, the motive of the offender; the context in which the act took place and, in particular, whether it was committed "in the course of or as part of a political uprising, disturbance or event";[43] the gravity of the act; the objective of the act, and in particular, whether it was "primarily directed at a political opponent or State property or personnel or against private property or individuals";[44] and the relationship between the act and the political objective pursued, and "in particular the directness and proximity of the relationship and the proportionality of the act to the objective pursued".[45] A person granted amnesty shall not be criminally or civilly liable in respect of the act in question.[46] Amnesty Committees conduct their hearings in public; and both applicants and victims are permitted legal representation.

While the TRC has completed its work the Amnesty Committees are unlikely to complete their task before the end of 1999. Of the over 7000 applications received, 150 have been granted, almost 5000 dismissed and 2000 remain to be

38. Act 200 of 1993.
39. Act 108 of 1996.
40. Act 34 of 1995.
41. Sections 10(1), 19(3)(b)(iii) of Act 34 of 1995.
42. Section 20 of Act 34 of 1995.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

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dealt with. These applications, mainly from members of the police force, and not the army, have provided, and continue to provide, a horrifying picture of brutality by the security forces, involving torture, murder, disappearances and repression.

Those who have failed to obtain amnesty from an amnesty committee, or who failed to apply for amnesty, are exposed to prosecution. Some prosecutions have been completed, others are under way, and no doubt there will be more to come as evidence of complicity in human rights violations becomes available. A special unit within the Prosecutor's office has been established for this purpose. This serves to emphasize that amnesty in South Africa is conditional.

At present, there are serious attempts to prepare guidelines[47] for the operation of truth commissions, which will provide assistance in determining the minimum requirements for acceptable truth commissions. On the basis of these guidelines and the experience of truth commissions from different parts of the world, it is suggested that the following minimum requirements be met:

1. The Commission should be established by the legislature or executive of a democratically elected regime;
2. The Commission should be a representative and independent body;
3. The Commission should have a broad mandate to enable it to make a thorough investigation. It should not, for example, be restricted to deaths and disappearances (as with Chile) but should be permitted instead to investigate all forms of gross human rights violations;
4. The Commission should hold public hearings at which victims of human rights abuses are permitted to testify;
5. The perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission;
6. The Commission should be required to submit a comprehensive report and recommendations within a reasonable time;
7. The Commission should be empowered to recommend reparations for victims of gross human rights violations; and
8. Amnesty should be denied to perpetrators of gross human rights abuses who refuse to co-operate with the Commission or who refuse to make a full disclosure of their crimes.

47. *See* the Report by Louis Joinet on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1997/20/Rev 1 (1997); N.J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 Law and Contemporary Problems 127 (1996); P. Hayner, *International Guidelines for the Location and Operation of Truth Commissions: A Preliminary Proposal*, *id.*, at 173; S. Landsman, *id.*, at 81.

If a state follows these guidelines – as has South Africa – will its amnesties receive recognition by foreign courts? Or will its amnesties be ignored, as has happened in the case of Augusto Pinochet?

5. THE INTERNATIONAL CRIMINAL COURT AND AMNESTY

Amnesty was on the agenda of the Rome Diplomatic Conference as it had been considered in the *travaux préparatoires*.[48] The final text of the Rome Statute is, however, silent on the subject.

How is this silence to be interpreted? One view[49] holds that the omission of amnesty is deliberate. Support for this position is to be found in the Preamble which affirms that "serious crimes of concern to the international community as a whole must not go unpunished" and expresses the determination "to put an end to impunity for the perpetrators of these crimes".[50] Moreover genocide and 'grave breaches' of the Geneva Conventions, which feature prominently among the crimes falling within the jurisdiction of the Court, are crimes in respect of which states are obliged to prosecute. Had the Rome Statute intended amnesty to be a defence, it is argued, special provision would have been made for it in the clauses dealing with the defence of *ne bis in idem* and surrender to the Court (extradition). However, Article 20 on *ne bis in idem* allows this defence only where a person has been 'tried' by another court, and the *travaux préparatoires* show that the exclusion of amnesty and pardon was deliberate.[51] "Surrender" to the Court is to be distinguished from 'extradition'.[52] Consequently the fact that amnesty may be a bar to extradition between states[53] is irrelevant in respect of 'surrender' to the Court.

48. Both amnesty and pardon were considered and rejected in the context of the defence of *ne bis in idem*: *see* Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, at 40 (para. 174) (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Session, Supplement No 22 (UN Doc. A/51/22); UN Doc. A/CONF./283/2/Add. 1 (1998), Art. 19. Ruth Wedgwood reports that in August 1997 the United States circulated a 'non paper' to the Preparatory Committee suggesting that a responsible decision by a democratic regime to allow an amnesty should be taken into account in judging the admissibility of a case, *see* R. Wedgwood, *The International Criminal Court: An American View*, 10 European Journal of International Law 93, at 96 (1999).
49. *See* G. Hafner, K. Boon, A. Rubesame & J. Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 European Journal of International Law 108, at 109-113 (1999).
50. Paras. 4 and 5.
51. *Supra* note 44.
52. Art. 102.
53. The 1990 UN Model Treaty on Extradition lists amnesty granted by either requesting or requested state as a mandatory ground for the refusal of extradition: General Assembly Resolution 45/116 of 14 December; 30 ILM 1407 (1991). Art. 3(e). The 1996 European Union Extradition Agreement allows the requested state to refuse extradition where it has granted amnesty and was competent to prosecute the offence under its own criminal law, *see* OJEC, No. 313/12 of 23 October 1996.

Another view[54] holds that the Rome Statute contains provisions which allow amnesty to be recognized indirectly.

First, it is suggested that the Security Council, acting under Article 16, may order the deferral of a prosecution for twelve months (or more) where amnesty has been granted. This is difficult to accept, however, as such a deferral must be made in a resolution under Chapter VII and it is difficult to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.

Secondly, it is argued that Article 17(1)(b) of the Rome Statute contemplates recognition of amnesty. It provides that the International Criminal Court will declare that a case is inadmissible where

> the case has been investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

While the first part of the provision might be imaginatively interpreted to cover South Africa-style amnesty – that is the decision not to prosecute and instead to grant amnesty after an investigation – it is difficult to maintain such an interpretation against the qualification as in such a case the amnesty will result from an 'unwillingness' on the part of the State to prosecute.

Thirdly, and more plausibly, it is suggested that amnesty may be dealt with by prosecutorial discretion. Article 53(2)(c) allows the Prosecutor to refuse prosecution at the instance of a state or the Security Council where, after investigation, she or he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'. This decision is subject to review by the Pre-Trial Chamber. Similarly the Prosecutor may decline to exercise her or his direction to prosecute *proprio motu* under Article 15 on the ground that the suspect has been granted amnesty.

Finally it may be suggested that the Court itself might have regard to an amnesty, if only as a factor in mitigation of sentence.

From the United States come pleas for a re-opening of the Rome Statute, which might allow reconsideration of the question of amnesty. This is highly unlikely. The Rome Statute is a compromise package of provisions reached after intense negotiations. There is no serious prospect of the Statute being re-opened for amendment or for an Amending Protocol. In these circumstances it seems clear that amnesty can only be accommodated within the existing text. Prosecutorial discretion alone offers a real opportunity for the recognition of amnesty. If a set of guidelines is drawn up for the exercise of prosecutorial discretion – as has been proposed – it is suggested that amnesty should be addressed in these guidelines. This would go some way towards curing an omission in the Statute.

54. M. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell International Law Journal (1999) (not yet published).

What such guidelines to the Prosecutor might include is another matter. Some international crimes, notably genocide, are not appropriate for the grant of amnesty and this should be made clear. War crimes or 'grave breaches' of the Geneva Conventions committed in international armed conflicts are also not capable of amnesty as they have an international dimension that demands extradition or prosecution. Difficulties arise in respect of torture and crimes against humanity committed by a repressive regime or in the course of an internal conflict. Ideally the perpetrators of such crimes should be tried before a national or international court, as stressed by the ICTY in *Furundžija*.[55] Where, however, a state opts for amnesty in order to achieve reconciliation and requires amnesty seekers to undergo the type of screening process involved in the South African model, it is difficult for foreign and international courts simply to ignore these amnesties.

6. CONCLUSION

The present state of international law on the issue of amnesty is, to put it mildly, unsettled. While amnesty is prohibited in the case of genocide and war crimes committed in international armed conflicts, there are no clear rules prohibiting amnesty in the case of other international crimes. This uncertainty has a major advantage: it allows prosecutions to proceed where they will not impede peace, but at the same time permits societies to 'trade' amnesty for peace where there is no alternative. Unconditional amnesty for atrocious crimes is, however, no longer generally accepted by the international community. Here the Truth and Reconciliation Commission may serve as a useful compromise to ensure that justice is not entirely sacrificed to the cause of peace.

55. *Supra* note 12.

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without plundering.'[10] Caesar apparently wrote in the third book of the *Civil War* that the Roman commanders made an agreement with the brigands and deserters who were in the Pyrenees mountains.[11] Julius Caesar, as dictator of the Roman Republic, often granted amnesty to his former political enemies,[12] possibly to his peril.[13] His successors were more wary of the practice.

The strategy, however, thrived as a means of maintaining peace between former warring states. It became a strong feature of peace settlements. Wolff notes that when parties conclude a peace treaty, amnesty is provided for in the first article of the treaty and, even where not expressly mentioned, is tacitly agreed to.[14]

2. *Development of the Use of Amnesty*

A. *European wars*

The institution of amnesty retained its traditional form as a component of peace settlements as long as inter-state wars were prominent in international relations. Here we shall focus on European developments in the use of amnesty, which were pronounced and well recorded. European state-practice, from its inception some 500 years ago, heralded the development of modern international law. From this grew a trend of incorporating amnesties in peace treaties, following a number of European wars. Given the European nature of the early international law that developed into the modern regime for international relations, a close analysis of the European practice of amnesty will also inform our later discussion of custom.[15]

The Thirty Years War was one of the worst in the modern history of Europe, engulfing the Holy Roman Empire and its neighbours.[16] It arose out of the Revolt of Bohemia,[17] which had been rooted in

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[10] Grotius, *De Jure Belli ac Pacis*, 1652, 794.
[11] Ceasar, the Civil War III.xix.2, cited by Grotius *idem*.
[12] See Michael Grant, *The Twelve Caesars*, 1975, at 45.
[13] See Michael Grant, *Julius Caesar*, 1969, at 227-8.
[14] See Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1764, V. II, para. 989.
[15] See chapter 8 *infra*.
[16] See generally G. Pagès, *The Thirty Years War 1618-48*, 1939 (1970 translation).
[17] Ibid., at 41-67.

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religious tensions exacerbated by the Peace of Augsburg of 1555.[18] For Germany, it was the last of a series of civil wars stretching back nearly 150 years.[19] The circumstances required a radical oblivion of the war's offences if a sustainable peace was to be achieved, and this led to an amnesty being agreed as a component of the Peace at Westphalia. Article II of the Treaty of Westphalia of 1648 provided:

> That there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd, in such manner, that no body, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any Trouble to each other; neither as to Persons, Effects and Securitys, neither of themselves or by others, neither privately nor openly, neither directly nor indirectly, neither under the colour of Right, nor by way of Deed, either within or without the extent of the Empire, notwithstanding all Covenants made before to the contrary: That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well as before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.[20]

It is not clear what was thought at the time to be the distinction between oblivion, amnesty and pardon. However, if one assumes that this is an accurate representation of the clause, then the use of the co-ordinating conjunction 'or', as opposed to 'and', suggests a belief that the words could be interchanged, but that each had a distinct nuance and therefore should be individually expressed. In the 17th century the word 'pardon' was probably specifically associated with the power of kings and emperors. Amnesty and oblivion may have been practically synonymous, except that an amnesty would have been understood to be a specific form of oblivion in the context of war.[21]

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[18] Ibid., at 36.

[19] Ibid., at 239 and 237.

[20] *http://www.yale.edu/lawweb/avalon/westphal.htm.*

[21] Cf. the 18th-century amnesty clause in the Treaty With the Delawares of 1778, at 16 *supra*, where the word oblivion but not amnesty is used.

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This was an amnesty from both criminal and civil liabilities and incorporated a prohibition on all acts of retribution. There was here, as with the Athenian amnesty, an emphasis on preventing acts of retribution by any person, including a private citizen. As was previously indicated in addressing the definition of amnesty, with time this emphasis seems to have petered out of the practice of amnesty and amnesties since have generally focused on immunity from legal process. It is difficult to judge the contribution of the amnesty to this, but the Peace of Westphalia appears to have worked. Pages remarks that 'they were strongly attached to the peace, and it lasted'.[22] The provisions of the Treaty of Westphalia were later incorporated into the peace settlement between Britain and Spain, to which Portugal acceded, as expressed in the Treaty of Paris of 1763.[23]

The Treaty of Westphalia set the stage for a regular inclusion of amnesty clauses in European peace treaties throughout the 17th and 18th centuries. France appears to have adopted a penchant for amnesty clauses after its wars of the 17th century, during the reign of Louis XIV. Three major peace treaties between France and other European powers during this period incorporate amnesty clauses. Article IV of the Treaty of the Pyrenees of 1659 between France and Spain provided that, 'whatsoever hath been done, or hath happen'd, upon occasion of the present Wars, or during the same, shall be put into perpetual oblivion'.[24]

After Louis XIV's failed attempts to conquer the northern (United) Netherlands, although he was successful in expanding France's frontiers, a peace was concluded at Nijmegen (Nimeguen) in 1678. In terms of article III of the Treaty of Nijmegen, 'There shall be perpetual friendship between the said king and states, and their subjects, and no resenting of damages, or offences, during the war.'[25]

The Grand Alliance of 1689 spearheaded by William of Orange, who had succeeded to the English throne in 1688, marked the frustration of Louis XIV's ambitions and the beginning of a century of Anglo-French rivalry for European and global conquest. The Treaty of Ryswick of 1697 removed much of France's conquests from its

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[22] See Pagès, note 16 *supra*, at 247.
[23] See *infra*.
[24] Arnold Toynbee, *Major Treaties of Modern History, 1648 - 1967*, Vol. 1, at 55.
[25] Ibid., at 129.

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sovereign control[26] and article III contained an amnesty clause to the effect:

> That all Offences, Injuries, Damages, which the said King of Great Britain and his Subjects, or the said most Christian King and his Subjects have suffered from each other during this War, shall be forgotten, so that neither on account of them, or for any other cause or pretence, neither Party, or the Subjects of either, shall hereafter do, cause or suffer to be done any Hostility, Enmity, Molestation or Hindrance to the other, by himself or others, secretly or openly, directly or indirectly, by colour by Right or way of Fact.

Some significant 18th-century peace treaties contained amnesty clauses, but the first important and successful peace treaty of the period, notably, did not. The debilitation of the Spanish Empire led to the War of Spanish Succession (1702-13), concluded by the Treaty of Utrecht of 1713. This treaty contained no amnesty clause and, bar relatively minor conflicts,[27] the Peace at Utrecht inaugurated a period of stability in Europe until 1740.

In that year, the death of Emperor Charles VI without male heir and the invasion of the Austrian Silesia by Frederick II, King of Prussia, ignited the War of Austrian Succession, which was ended in 1748 by the Peace of Aix-la-Chapelle concluded between Great Britain, France, Spain, Sardinia, Hungary, Modena, the Republic of Genoa and the United Provinces. Article II of the Treaty of Aix-La-Chapelle of 1748 stipulated that 'There shall be a general oblivion of whatever may have been done or committed during the war, now ended.'[28]

The next major conflict in Europe was the Seven Years War, which started in 1756 as a result of alliances made through Austria's desire to recover Silesia, and the Anglo-French conflict over North America. This war was concluded with the Treaty of Hubertsburg and the Treaty of Paris, respectively, of 1763. Both treaties contained amnesty clauses. Article II of the Treaty of Hubertsburg contained one of the most detailed and extensive amnesty clauses since the Treaty of Westphalia of 1648. It read:

> Both sides shall grant a general amnesty and totally wipe from their memory all hostilities, losses, damages and injuries whatever their nature, committed or sustained on either side during the recent

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[26] See Daniel Riviere, *Histoire de La France*, 1986, at 166.
[27] Spanish incursions into Italy and the War of Polish Succession (1733-35).
[28] Toynbee, note 24 *supra*, at 272.

> disturbances. Hostilities shall nevermore be alluded to nor shall any compensation be claimed under any pretext or in any name. No subject on either side shall ever be troubled but shall enjoy this amnesty and all its effects to the full, despite the decrees sent out and published; all orders for confiscation shall be withdrawn and goods confiscated or sequestrated shall be returned to their owners, from whom they were taken during the recent disturbances.[29]

The Treaty of Paris provided more generally that 'there shall be a general oblivion of every thing that may have been done or committed before, or since the commencement of the war, which is just ended'.[30] It additionally renewed the Treaty of Westphalia of 1648 as between the parties.

The remainder of the 18th century was marked by a brief change in the dynamics of European politics. The Eastern powers were preoccupied with the partition of Poland, while national revolutions became the preoccupation of kings. France's revolution gave new fervour to its desire to expand but its conquests were initially simple and peace treaties with amnesties were not the order of the day. The Treaty of Campo Formio of 1797 confirmed France's rapid victory over Italy but contained no amnesty clause.

Nineteenth-century European conflict and peace negotiations are most remembered for the struggle against French hegemony under the emperor Napoleon, Russia's wars with the Ottoman Empire (especially the Crimean War), and Prussia's wars with Denmark, Austria and France. The peace treaties of the early years of the 19th century, associated with the second and third coalitions against Napoleon, did not contain amnesty clauses, in contrast to the older treaties signed by Louis XIV. One must clearly distinguish the amnesty clause, which promoted oblivion of the conflict and an absolute bar on punishing past offences, from clauses requiring the exchange of prisoners of war, which involved a practical measure for the return of combatants, forming part of almost every peace treaty ever signed.

Given former French practice, and since these peace negotiations involved no clear victor, one cannot help wondering why amnesty appears to have formed no part of the negotiations. Some historians might answer, particularly in relation to the Treaties of Luneville and Amiens, concluded respectively between Austria and France in 1801

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[29] Ibid., at 330.
[30] Ibid., at 307.

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and Britain and France in 1802, that there was no real desire on either side to establish a lasting peace. One current historian refutes this in a fascinating work on 19th-century European politics.[31] Schroeder accepts Austria's surprising persistence in the war,[32] as well as the fact that, after Luneville, Austria retained its territorial integrity and nominal position as a great power.[33] However, he asserts that Austria saw Luneville, unlike Campo Formio, as a final peace by which it wished to live.[34] Similarly, while Amiens was severely criticised in Britain and very one-sided, the British government wanted the settlement to last.[35]

On the other hand, Napoleon's appetite for expansion would not easily be satisfied and lasting peace was certainly no priority for him. The other great powers must have known this. War, especially with France, was in a sense inevitable and a tool of 19th-century politics. The Anglo-Russian plans of 1804-5 of co-ordinating a war and peace with France, which would be fought by Austria, showed that the great powers believed wars could benefit them, sometimes without cost. Moreover, individually, the Napoleonic wars were not of such great length as to lead to a determined quest for lasting peace, as opposed to momentary truce. This could explain why amnesty clauses did not, initially, really feature, since these were designed to extinguish all enmity. Neither the Treaty of Pressburg of 1805 nor that of Tilsit of 1807 contained an amnesty clause. The Treaty of Vienna of 1809 did include a clause of pardon for those involved in the insurrection of the inhabitants of Tyrol and Vorarlburg.[36]

It is not easy to discern the consequences of the non-inclusion of amnesty in the negotiations of the period. However, given the warlike character of Napoleon and the nature of the politics of the time one can hardly attribute the failure of the peace initiatives to the absence of amnesty clauses.

For a real desire for lasting peace to emerge, some years of war would need to pass and Napoleon's advantage would have to abate.

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[31] Paul W. Schroeder, *The Transformation of European Politics: 1763-1848*, 1994 (part of the series *The Oxford History of Modern Europe*, edited by Alan Bullock and F.W.D. Deakin)

[32] Ibid., at 210.

[33] Ibid., at 213.

[34] Ibid., at 213.

[35] Ibid., at 228.

[36] Toynbee, note 24 *supra*, vol. 2, at 492.

This happened in time for the First Peace of Paris of 1814, where the desire for genuine peace is reflected in article xiv, which declares that,

> The High Contracting Parties, desirous to bury in entire oblivion the dissensions which have agitated Europe, declare and promise that no Individual, of whatever rank or condition he may be, in the countries restored and ceded by the present Treaty, shall be prosecuted, disturbed or molested, in his person or property, under any pretext whatsoever, either on account of his conduct or political to opinions, his attachment either to any of the Contracting Parties, or to any government which has ceased exist, or for any other reason, except for debts contracted towards Individuals, or acts posterior to the date of the present Treaty.[37]

As with previous amnesties, this one was agreed in circumstances where there was no absolute victor. France could still fight and remained in control of most of France and important areas outside of it.[38] The Congress of Vienna 1815 was the follow up to the First Peace of Paris and confirmed in its article xi, a 'full, general, and special Amnesty' for all individuals.[39]

The independence of Greece from the Ottoman Empire gave rise to conflict between the Turks and Russians, culminating in the Russo-Turkish War of 1828-9 and concluded by the Treaty of Adrianople of 1829. Despite the short duration of the war and the Turkish defeat, the fate of the Ottoman Empire was of crucial importance to Russia and the other great powers. The Greek question had also been resolved in favour of Greek independence. Accordingly, both sides genuinely desired lasting peace. It was in this context that the treaty contained a clause granting:

> a general pardon and full and entire amnesty to all those of their subjects of whatever condition they might be who in the course of the war, luckily terminated today, should have taken part in the military operations or manifested either by their conduct or by their opinions their attachment to one or the other of the Contracting Powers.[40]

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[37] Toynbee, note 24 *supra*, at 509.
[38] Schroeder, note 31 *supra*, at 477.
[39] Toynbee, note 24 *supra*, at 523.
[40] Ibid., at 938.

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Russia again found itself at war with the Turks, after the Turks made concessions to France over the Holy Places.[41] No state except France (Napoleon III needed to break Russo-British relations to upset the prevailing international order, enabling him, or so he thought, to restore France to its former glory[42]) wanted this conflict, not even Russia. It is also clear that no state really gained from it.[43] It is understandable, therefore, that the Treaty of Paris of 1856 should include an amnesty clause for the belligerents.[44] Amnesties made sense in both these Russo-Turkish wars within the framework of a new international order that gave priority to durable peace, after the competitive fatigue produced by the Napoleonic wars.

The second half of the nineteenth century marks the glory of the Prussian army under Otto von Bismarck in decisive victories against Denmark,[45] Austria[46] and France,[47] culminating, in 1871, in the foundation of the German 'empire' at Versailles. It is perhaps the decisive nature of these victories that explains the absence of amnesty as a component of the peace with Denmark at Vienna in 1864,[48] that with Austria at Prague in 1867[49] and that with France at Frankfurt-on-Main in 1871.[50] Germany had secured its position as a great power and after the fall of Bismarck in 1890 events in Germany built up to the First World War (1914-18).[51] This war would change the European attitude to war and to peace treaties indefinitely.[52]

The Treaty of San Stefano of 1878 and the Treaty of Constantinople of 1879 ended Russia's final conflict with the Ottoman Empire. Both contained amnesty clauses[53] in the same spirit, although potentially

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[41] See generally Norman Rich. *Why the Crimean War - A Cautionary Tale*. 1991.
[42] Ibid., at 6-7.
[43] Ibid., at 182-209.
[44] See Article v: Toynbee, note 24 *supra*, at 948.
[45] See Tenbrock, *A History of Germany*, 1968, at 202-3.
[46] Ibid., at 204.
[47] Ibid., at 206-9.
[48] See Toynbee, note 24 *supra*, at 611 *et seq*.
[49] See Tenbrook, note 45 *supra*, at 205.
[50] Ibid., at 208.
[51] Ibid., at 233-42.
[52] See page 15 *infra*.
[53] Article xvii of the Treaty of San Stefano and Article ix of the Treaty of Constantinople: see Toynbee, note 24 *supra*, at 968 and 1001, respectively.

broader in that they applied not only to combatants and supporters but to all those compromised by the war.

The European experience of the seventeenth to nineteenth centuries appears to demonstrate that amnesty was most likely to be adopted as a measure when there was no clear victor, and where the negotiating parties had a firm and genuine determination to establish a lasting peace.

Twentieth-century Europe was characterized by two major international conflicts involving ultimate victory for one side. While both conflicts ended with the search for justice through prosecution, the final outcome differed in each case depending on the political feasibility of criminal proceedings. The Treaty of Versailles contained provisions for the prosecution of the Kaiser. Article 227 of the Treaty of Versailles of 1919, provided that:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused...

The treaty failed in its objective owing to the refusal of The Netherlands to grant his extradition. The Treaty of Sevres of 1920[54] envisaged the prosecution of Turks for the massacre of Armenians but was terminated by the Treaty of Lausanne of 1923,[55] which provided for a general amnesty. This is a notable example of amnesty being granted for the worst excesses of inhumanity. The Peace of Brest-Litovsk of 1918 between Russia and Germany also incorporated an amnesty provision.[56]

After the prohibition of the use of force found its place in international law, principally by virtue of the Kellogg-Briand Pact of 1928, and especially since it became an established norm of international law, the perceived need for amnesty provisions in peace treaties appears to have gradually subsided. One example, during this period, of amnesty agreed between states was the informal understanding linked to the accord between Germany and Austria of 11 July 1936, which promised amnesty to all Nazis, save those convicted

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[54] (1920) *UKTS* No 11.
[55] (1923) *UKTS* No 16.
[56] Articles 23-7 of the supplementary agreement: See 3 *Encyclopedia of Public International Law* 79.

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of the most serious offences.[57] The Austrian government subsequently announced the amnesty on 15 January 1937. Further to this, in February 1938, Hitler summoned Chancellor Kurt von Schuschnigg to Berchtesgarden to demand the appointment of a Nazi sympathiser to the Austrian government and the release imprisoned Nazis. Four days later Schusschnigg announced the amnesty. Inside of a month Hitler had invaded Austria which became part of the Third Reich.[58]

Amnesty as a means of reconciliation with the enemy did not form a major component of the ending of the Second World War. The victors deliberately sought the international prosecution of those who had waged the war of aggression. The allies concluded the Agreement for the Prosecution and Punishment of Nazi War Criminals of the European Axis of 1945. The armistice agreements with Italy in 1943,[59] Rumania in 1944,[60] Bulgaria in 1944[61] and Hungary in 1945[62] contained no amnesty provisions. In fact, in the case of the agreements with Bulgaria, Rumania and Hungary, they required collaboration in the apprehension and trial of alleged war criminals.[63]

In contrast and exceptionally, General Douglas MacArthur, Supreme Commander of the Allied Occupation Forces in Japan, granted amnesties to some Japanese officials, after they had been sentenced to death. He also exempted the Emperor of Japan from any punishment.[64] This move appears to have done much to reconcile the Japanese with the Americans.

By contrast to the treatment of the enemy, the Allies of both the major wars ensured complete amnesty for those who acted in support of the war effort against the enemy. This was achieved through clauses in

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[57] Nuremberg Trial Proceedings, Vol. 1, Indictment, Count One at IV (F) 3 (b).

[58] In relation to the sequence of these events, see Philip Waller and John Rowett, *Chronology of the 20th Century*, 1995, at 172, 174 and 180.

[59] *www.yale.edu/lawweb/avalon/wwii*.

[60] *Idem*.

[61] *Idem*.

[62] *Idem*.

[63] See Article six of the Armistice Agreement with Bulgaria and article 14 of the respective armistice agreements with Hungary and Rumania.

[64] See Frank E. Smitha, *World History*, Chapter 23: 'Hate, Spiritualism and the Conclusion of World War II' (*http://www.eurekanet.cau/~fesmitha/*)

peace settlements[65] and national legislation.[66] Not being the aggressors and emerging as victors, the Allies undoubtedly felt at the time that it was unnecessary and undesirable for such persons to be punished for their political offences.

B. *Non-European Conflicts*

This study has not embraced a comprehensive survey of world history. The emphasis has been laid on European historical developments. Nonetheless, a limited search outside Europe has revealed that it is difficult to identify recorded examples of peace treaties involving non-European powers where amnesty was part of the settlement. The conception of amnesty to secure durable peace may have been a peculiarly European trend. It may be that the perceived need for amnesty, and indeed to some extent a peace treaty, was most evident when there was no clear victor. This was common in European wars owing to the balance of power politics, which militated against total defeat and encouraged the negotiation of peace before that point could be reached.

Peace treaties concluded in the context of two famous pre-20th-century non-European conflict situations, not surprisingly, generally fail to include amnesty. The Treaty of Shimonoseki of 1895,[67] between the Emperor of Japan and the Emperor of China, had no amnesty provision. Likewise, most of the peace treaties concluded between the United States government and the indigenous Indians of the territory of the present-day United States contained no such clause. One may include in this list the Treaty With the Cherokee of 1785;[68] the Treaty With the Chocktaw of 1786;[69] the Treaty With the Shawnee of 1786;[70] the Treaty With the Wyandot and others of 1789;[71] the Treaty With the

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[65] See Armistice Agreement with Germany of 1918: (1919) 13 *AJIL*, Supp., 97 (1919); Paris Peace Treaty of 1947: Toynbee, note 24 *supra*, at 2421; Bulgarian Peace Treaty of 1947: ibid., at 2525; Hungarian Peace Treaty of 1947: ibid., at 2553; Romanian Peace Treaty of 1947: ibid., at 2585; Finnish Peace Treaty of 1947: ibid., at 2615.

[66] See e.g. 1951 French amnesty law, cited by De Zayas, in 3 *Encyclopedia of Public International Law* 14, at 15.

[67] See Toynbee, note 24 *supra*, at 1101 *et seq.*

[68] See www.yale.edu/lawweb/avalon/intreaty

[69] *Idem.*

[70] *Idem.*

[71] *Idem.*

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Cherokee of 1794;[72] the Treaty With the Comanche, Kiowa, and Apache of 1853;[73] and the Treaty of the Little Arkansas of 1865, concluded with the Cheyenne and Arapaho. The Treaty With the Creeks of 1790[74] and the Treaty With the Cherokee of 1791[75] both provided that ' ... all animosities for past grievances shall henceforth cease',[76] but stopped short of an amnesty.

The early government of the United States of America, however, could not completely escape its European heritage, as illustrated by one of the first peace treaties to be concluded with the indigenous groups. Article I of the Treaty with the Delawares of 1778 provided,

> That all offences or acts of hostilities by one, or either of the contracting parties against the other, be mutually forgiven, and buried in the depths of oblivion, never more to be had remembrance.

It was implied that no criminal or civil proceedings could emanate from past offences.

It was to be expected that the European powers would export their amnesty tradition in peace treaties. The Treaty of Nanking of 1842,[77] between the Emperor of China and the Queen of Great Britain, incorporated an amnesty clause for Chinese subjects in Her Majesty's service during the preceding hostilities.[78] On the other hand, the Treaty of Addis Ababa of 1896[79] was between one European and one non-European power, that is Ethiopia and Italy, but had no such provision.

Article VII of the Treaty of Peace between the United States and Spain of 1898[80] provides an example of an amnesty involving one non-European power, but it is also an early example of an amnesty confined to civil liability. Article VII provides that:

> The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, or either Government, or of its citizens or subjects, against the other

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[72] *Idem.*
[73] *Idem.*
[74] *Idem.*
[75] *Idem.*
[76] Articles XI and XIII, respectively.
[77] Ibid. at 1059 et *seq.*
[78] Article ix.
[79] Ibid., at 1111 *et seq.*
[80] *http://www.yale.edu/lawweb/avalon/sp1898.htm.*

> Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

This provision further envisages an alternative mechanism for the reparation of American citizens. It states that:

> The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

The Treaty of Vereeniging of 1902 ended the war in South Africa between the burgher [Boer] forces and Britain. It contained a broad and progressive amnesty clause, which not only covered criminal and civil liability, but also exempted acts contrary to the usages of war from the protection of the amnesty. It provided,

> No proceedings, civil or criminal, will be taken against any of the burghers so surrendering or so returning for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts contrary to the usage of war which have been notified by the Commander-in-Chief to the Boer generals, and which shall be tried by court-martial immediately after the close of hostilities.[81]

Notwithstanding the European notion that Africa was uncivilised and therefore *terra nullius*,[82] it would appear that European colonial powers, and especially Britain, made regular use of treaties to subjugate local tribes,[83] not always, however, with the intention of honouring them. Few of the recorded examples of treaties relate to peace treaties following upon hostilities. However, Omer-Cooper appears to make reference to a form of amnesty component in a peace agreement between the Sotho of Moshoeshoe (founder of the Basutho nation, present-day Lesotho) and the British. The British attacked the Sotho

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[81] Toynbee, note 24 *supra*, at 1146.

[82] This doctrine, meaning 'land belonging to no-one', formed the legal and political justification of colonialism.

[83] See John Flint (ed.), *The Cambridge History of Africa*, from c. 1790 to c. 1870, vol. 5, at 15, 19, 25, 28, 41, 110, 121, 122, 174-5, 178, 179, 180, 181, 184, 192, 208, 218, 219, 275, 381, 390, 402, 408, 413, 452, 275; David Kimble, *A Political History of Ghana, 1850-1928*, 1963, at 11-12, 268, 269 n., 272, 272 n., 273, 275, 280-2, 290, 292, 297-8, 316, 323 n.

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after an ultimatum demanding compensation in cattle and horses for losses caused by past hostilities and retreated with some captured cattle. An agreement was reached to the effect that the captured animals would be 'adequate punishment for past misdeeds'.[84]

C. *Civil wars*

There are recorded examples of amnesty after civil rebellion dating back to the 18th century. The American war of independence is a prominent revolution of the period that was characterized by successful rebellion and ended in a peace treaty that incorporated an amnesty provision. Article 6 of the Paris Peace Treaty of 1783[85] stipulated:

> That there shall be no future confiscations made nor any prosecutions commenced against any person or persons for, or by reason of, the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Just a year later, in 1784, in another part of the world, modern-day Romania, emperor Joseph II granted a general amnesty to all the participants in a feudal rebellion except certain leaders. These leaders were tortured and publicly executed. The context of this amnesty differed from that of the American Civil War where amnesty followed an unsuccessful rebellion.

In contrast to the constant practice of including amnesty in peace treaties following international war, the practice in internal conflicts has been more varied. Revolutions have possessed their own unique characteristics depending on the particular country and setting of civil unrest. Two famous early civil wars culminated in quite different approaches to dealing with the former enemy. The French Revolution was marked by the brutal execution of the French royal family. The American Civil War was concluded with a proclamation of amnesty in

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[84] See J.D. Omer-Cooper in Flint, ibid., at 381.

[85] *http://www.yale.edu/lawweb/avalon/paris.htm.*

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CRIMINAL LAW – Trial – Stay of proceedings – Abuse of process – CPS deciding to prosecute applicant after he had received promise from police that he would not be prosecuted
R v Croydon Justices, ex p Dean .. .. QBD DC 129

EXTRADITION – Disguised extradition – Deportation to United Kingdom – Court's power to inquire into circumstances in which applicant brought within jurisdiction
Bennett v Horseferry Road Magistrates' Court .. .. HL 138

MENTAL HEALTH – Mental health review tribunal – Conditional discharge of restricted patient – Direction subject to arrangements being made for support of patient – Whether health authority under duty to supply psychiatric supervision for patient if released into community
R v Ealing District Health Authority, ex p Fox .. .. Otton J 170

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R v Croydon Justices, ex parte Dean

QUEEN'S BENCH DIVISION

STAUGHTON LJ AND BUCKLEY J

17, 18, 19 FEBRUARY 1993

Criminal law – Trial – Stay of proceedings – Abuse of process – Police investigating murder – Applicant assisting in destroying victim's car – Applicant interviewed by police – Applicant making statements containing evidence against person charged with the murder – Applicant admitting offence of doing acts with intent to impede the apprehension of another – Applicant receiving promise from police that he would not be prosecuted – Applicant agreeing to be prosecution witness – Crown Prosecution Service deciding to prosecute applicant – Whether decision to prosecute reviewable – Whether prosecution capable of being an abuse of process.

The applicant, together with two other men, was arrested on suspicion of murdering a man who had been stabbed and killed in woodland. The applicant did not take part in the actual killing but after it had taken place he went to the scene of the crime with the other two men and assisted in destroying the victim's car. He was subsequently interviewed by the police and made statements containing potentially important evidence against the principal offender who was subsequently charged with murder. The applicant agreed to be a prosecution witness and was then released. By the time he left the police station he had in effect admitted doing acts with intent to impede the apprehension of the other defendants but he was nevertheless not charged at that stage. In a subsequent interview the police officers interviewing him stated that he was a prosecution witness and had the protection of the police. He later went to the scene of the crime with the police and described how the victim's car had been destroyed. After a conference with the police the Crown Prosecution Service decided that the applicant should be charged under s 4(1) of the Criminal Law Act 1967 with assisting in the destruction of the victim's car, knowing it was evidence, with intent to impede the apprehension or the prosecution of the other defendants knowing or believing that they were guilty of murder or some other arrestable offence. However, before he was charged he made further statements to the police identifying articles belonging to the other defendants which he had seen on the floor of the victim's car. He was then charged and committed for trial. He applied for judicial review to quash his committal to the Crown Court.

Held – The prosecution of a person who had received a promise, undertaking or representation from the police that he would not be prosecuted was capable of being an abuse of process and his committal to the Crown Court to stand trial in breach of such a promise, undertaking or representation could be quashed in judicial review proceedings in exceptional circumstances, for example where on the undisputed facts of the case there had been an abuse of process. However, ordinarily an application to quash a committal ought to be made to the Crown Court before the start of a trial. Since the defendant had clearly been given the impression, for a period of over five weeks, that he was not going to be prosecuted for the offence with which he was charged, it was clearly an abuse of process for him to be prosecuted subsequently (see p 135*d* and 137*bc*, *g* to *j*, post).

there was a tape recorded interview of Dean under caution in the presence of his solicitor's representative. In the first part of the interview Dean said very little of significance, but in the second part he was somewhat more forthcoming, and admitted taking part in the destruction of the Scorpio car.

Later in the day Dean was again interviewed under caution, from 1.19 pm to 2.03 pm, from 2.21 pm to 3.06 pm, from 3.15 pm to 3.45 pm, and from 4.29 pm to 4.51 pm, in the presence of a representative of his solicitors. Some of what he said was untrue. That was put to him on more than one occasion, and he acknowledged that he had not told the truth. He still did not tell the whole truth; what he did say was potentially important evidence against Gallagher, but was of less significance as to the part played by Benham.

Dean was then released from arrest and made a witness statement, which again contained important evidence against Gallagher. It concluded: 'I am willing to assist police in whatever way I can with regard to this matter.'

In the custody record at the police station there are these concluding remarks:

> 'As a result of enquiries into a murder in Shirley Hills (ZN section) this prisoner was arrested as a possible accomplice. He has been interviewed by ZN officers regarding this and has subsequently been eliminated as a suspect and has provided a statement to act as a prosecution witness ... No further action was taken regarding the murder enquiry and he was bailed until 15/4/92 at 3 pm. Form 60 served.'

By the time that he left the police station Dean had in effect admitted the offence with which he is now charged. He was nevertheless not charged but released. Gallagher and Benham were charged with murder that evening.

Five days later, on Monday, 23 March Dean again went to the police station with his solicitor's representative, and there were three further periods of interview. He was told at the start that he was not under arrest and was free to leave at any stage. There are a number of important features in the interview that day. First, the officers told him on a number of occasions that they did not think that he was telling the truth, but was telling lies, or at any rate not the whole truth. Secondly, he certainly told a lie in one important respect. He was asked this:

> 'Q. You were aware that there was this thing of rolling homosexuals up at Shirley Hills, did you play a part in that? A. Yeah, I've gone up there before ...
> Q. Did you think it was a game, profit making? A. No, it wasn't. It was more like boredom just sitting around and he used to drive up there once in a while, we'd never actually done anything when I was there, we'd just drive up there, get out walk around and get in the car and end up driving off.'

He now admits, by his plea of guilty to robbery of Holland on 1 March 1992, that he had taken some part in the sort of conduct which he there denied.

Thirdly, there were a number of passages in which the police officers spoke of his role as a witness:

> 'Q. ... what we are after from you is detail, we want to know what parts you did, we can't make any promises to you, understand that, what we can say is that if your part in this offence is such that it doesn't make you an accessory to it and you understand what I mean, you're nodding your head, you know what an accessory is? A. Not to the full, no.
> Q. I mean what we're saying is that if you played a part in the murder of the men or the disposal of his body, or the movement of cars, or other things, we need to know about that now, it's no good us finding out later, it dispels your credibility we're trying to treat you as a credible witness, we need to do that now rather than later, hear what I'm saying and understand it, we're not saying you're telling lies, we're saying you're not telling the whole truth ...
> Q. ... we're not saying you're a liar, we're saying you're not telling the truth. We want you to realise how important it is for your own benefit, because we hope that you are going to assist the prosecution. Do you understand that? A. Yeah.
> Q. I don't know whether you understand the complexities of the law, a little bit? A. Yeah.
> Q. You should have nothing to fear, we are here representing the victim and the victim's family ...
> Q. ... we want you to help us, you're going to be a prosecution witness at this stage; we believe. If you have done anything which you think is out of order, let us decide ...'

At the end of the interview Det Con Appleby explains to Dean that he is a prosecution witness and has protection of the police.

On the following day, Tuesday, 24 March, Dean prepared a statement with his solicitor, which formed the basis of a further witness statement which he made to the police that day. In it he admitted for the first time that on the night of the murder Gallagher and Benham had driven him to the scene of the crime and shown him the body. He then drove Gallagher's Panda away from where it was nearby.

On Wednesday, 1 April, at the invitation of the police, Dean went to the scene of the crime with his solicitor's representative and a video film was made. He says:

> '... I was introduced to Detective Superintendent Bassett whom I understood was the senior officer in overall charge of the murder inquiry. I am introduced on the video in his presence by D.C. Peacock as a prosecution witness. It was not under caution or arrest. I answered all the questions that were put to me and showed them everything I could, including what I had been told and shown, and where I had driven Kevin Gallagher's own car from in the nearby car park. I was personally thanked by D.S. Bassett for my help and he spoke to me about my being a witness.'

That is not denied in the affidavit of Det Supt Bassett.

On Tuesday, 9 April two police officers arrived at Dean's house and asked him to go with them and show them the route to where the Scorpio was set on fire, which he did. On the same day he made a third witness statement, about the route and the destruction of the car.

On Tuesday, 14 April Mrs Hyde of the Crown Prosecution Service had a conference with the police, and decided that Dean should be charged with robbery of Holland, with Benham and Gallagher, on 1 March, and should also be charged with the offence with which we are now concerned. Dean knew none of that at the time.

On Tuesday, 21 April Dean made two further witness statements to the police, in which he identified a knife belonging to Gallagher, and a watch (belonging to Eades) which he had seen on the floor of the Scorpio. He was not cautioned, or offered legal advice, or told that he was to be charged. The explanation offered is that Det Supt Bassett was awaiting instructions in writing from Mrs Hyde to charge Dean, and had forgotten that when he sent the two officers who took the additional statements.

On Monday, 27 April Dean was charged with the offence under s 4(1) of the 1967 Act. That was over five weeks after he first in effect admitted the offence; throughout that period he had been treated as a prosecution witness; and he had

Notes

For the scope of certiorari, see 1(1) *Halsbury's Laws* (4th edn reissue) para 111.

For the Criminal Law Act 1967, s 4, see 12 *Halsbury's Statutes* (4th edn) (1989 reissue) 330.

Cases referred to in judgments

A-G's Reference (No 1 of 1990) [1992] 3 All ER 169, [1992] 1 QB 630, [1992] 3 WLR 9, CA.

Chu Piu-wing v A-G [1984] HKLR 411, HK CA.

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.

Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

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R v Barnet Magistrates, ex p Wood [1993] Crim LR 78, DC.

R v Betesh (1976) 30 CCC (2d) 233, General Sessions of the Peace, Judicial District of York, Ont.

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R v Telford Justices ex p Badhan [1991] 2 All ER 854, [1991] 2 QB 78, [1991] 2 WLR 866, DC.

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Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210, [1881–5] All ER Rep 949, HL.

R v Abitibi Paper Co Ltd & The Queen (1979) 47 CCC (2d) 487, Ont CA.

R v Ashton-under-Lyne Magistrates' Court, ex p Potts (1984) Times, 29 March.

R v Bolton Magistrates' Court, ex p Scally [1991] 2 All ER 619, [1991] 1 QB 537, DC.

R v Crown Court at Norwich, ex p Belsham [1992] 1 All ER 394.

R v Heston-Francois [1984] 1 All ER 795, [1984] 1 QB 278, CA.

R v Maguire [1992] 2 All ER 433, CA.

R v Sang [1979] 2 All ER 1222, [1980] AC 402, HL.

R v Turner (1975) 61 Cr App R 67, CA.

R v Canterbury and St Augustine Justices, ex p Turner (1983) 147 JP 193, DC.

Application for judicial review

George Dean applied, with the leave of Brooke J given on 26 October 1992, for judicial review by way of an order of certiorari to quash the decision of the Croydon justices on 9 July 1992 to refuse an application that they should not proceed as examining justices to inquire into an allegation that the applicant committed the offence of doing acts with intent to impede the apprehension or prosecution of another contrary to s 4(1) of the Criminal Law Act 1967 and the applicant's subsequent committal for trial to the Crown Court on 14 July 1992 for the said offence. The facts are set out in the judgment of Staughton LJ.

James Wadsworth QC and *Robert Good* (instructed by *Bernstein Garcia*) for the applicant.

Andrew Collins QC and *Charles Miskin* (instructed by the *Crown Prosecution Service*, Croydon) for the respondents.

Cur adv vult

19 February 1993. The following judgments were delivered.

STAUGHTON LJ. Late in the evening of Friday, 13 March 1992 a man called Ronald Eades was stabbed and killed in woodland near Croydon. The principal offenders were, as it subsequently turned out, Kevin Gallagher and Justin Benham. Gallagher was convicted of murder and sentenced to life imprisonment; Benham pleaded guilty to manslaughter and is awaiting sentence.

The present applicant, George Dean, has been committed for trial at the Central Criminal Court on a charge of doing acts with intent to impede the apprehension of another, contrary to s 4(1) of the Criminal Law Act 1967. The particulars are that he assisted in the destruction of a Ford Granada Scorpio car, knowing it was evidence, with intent to impede the apprehension or the prosecution of Gallagher and Benham, and knowing or believing that they were guilty of murder or some other arrestable offence. The prosecution case is that the car was being driven on the night of the killing by Eades, who was a chauffeur; Gallagher and Benham subsequently drove it away, and left Gallagher's Fiat Panda near the scene of the crime. Later Dean assisted them to remove the Panda, and to destroy the Scorpio by setting it on fire.

At the committal proceedings before the Croydon justices in July 1992, counsel for Dean submitted that there was an abuse of process of the court because Dean had received an undertaking from the police that he would not be prosecuted in connection with the killing; alternatively counsel applied for an adjournment so that he could make an application to the Divisional Court for a stay of the proceedings. Both applications were refused by the justices.

Dean then sought leave to apply for judicial review of the decision of the Croydon justices to inquire into the alleged offence under s 4(1) of the 1967 Act, and also for an order quashing his committal to the Crown Court for that offence. He had in addition been committed, with Gallagher and Benham, on a charge of robbing William Holland on a separate occasion, that is to say on 1 March 1992. No remedy is sought in respect of that committal. Dean and Benham have both pleaded guilty to that offence and await sentence.

Leave to apply for judicial review was granted by Brooke J on 26 October. A subsequent application by the Director of Public Prosecutions to set aside that leave was dismissed.

Undisputed evidence

The following is an outline of the course of the police investigation, so far as it concerned Dean (who was aged 17 at the time). For the present I omit from this account anything that is disputed.

On Tuesday, 17 March 1992, four days after the killing, Gallagher, Benham and Dean were each arrested on suspicion of murdering Ronald Eades. Dean's parents and a representative of his solicitors attended at the police station. On Wednesday, 18 March, from 1.10 am to 1.49 am and from 1.56 am to 2.25 am,

been helping the police with their inquiries to a substantial extent, although he did not at times tell them the truth or the whole truth.

Disputed evidence

There are affidavits from Dean, his father, his solicitor and the solicitor's representative. These describe occasions when rather more specific assurances are said to have been given by the police, that Dean would not be prosecuted in connection with the murder. They occurred either when the tape recorder was switched off, or when there was no occasion for tape recording. They are denied in affidavits from the police officers.

There is, however, this important passage in the affidavit of Mrs Hyde, in connection with her decision, taken after a conference with Det Supt Bassett and Det Insp Newton, that Dean should be charged:

> 'In issuing instructions to charge and giving the Director's consent to that charge, I was aware of the actions the Police had taken, and I was informed of the contents of the video recording referred to in paragraph 24 of the applicant's affidavit dated the 7th October 1992. I had read the statements of evidence and records of interviews and I knew that the police wished to use the applicant as a prosecution witness and had stated to him that he would not be prosecuted for offences associated with the murder of Ronald Eades. I saw the video recording a few days later when the police brought a copy to my office.'

Are judicial review proceedings appropriate?

In the ordinary way an application to quash a committal, particularly if an indictment has been signed (as it has in this case), should be made to the Crown Court before the start of the trial. That is even more appropriate if there is disputed evidence to consider. It is true that in *R v Telford Justices, ex p Badhan* [1991] 2 All ER 854, [1991] 2 QB 78 this court held that it was appropriate to make an order prohibiting the justices from continuing committal proceedings. That was a case of very substantial delay, and the prosecution was held to be an abuse of the process of the court. In answer to a suggestion that a more appropriate remedy was for the Crown Court to hear a plea in bar, Mann LJ said in delivering the judgment of the court ([1991] 2 All ER 854 at 862, [1991] 2 QB 78 at 90):

> 'We disagree. We think that a plea of abuse should be open to the accused subject at the earliest opportunity.'

However, there is also the decision of the Court of Appeal in *A-G's Reference (No 1 of 1990)* [1992] 3 All ER 169, [1992] 1 QB 630, another case of delay. The opinion of the court was delivered by Lord Lane CJ, who said ([1992] 3 All ER 169 at 175, [1992] 1 QB 630 at 642):

> 'We would like to add to that statement of principle by stressing a point which is sometimes overlooked, namely that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay.'

No doubt many of the complaints which Lord Lane CJ there referred to related to the admission or rejection of evidence and similar matters. But I do not regard his ruling as limited in that way. The case itself was, as I have said, concerned with delay.

Lord Lane CJ said later ([1992] 3 All ER 169 at 176, [1992] 1 QB 630 at 643):

> 'Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances.'

I accept and follow those principles without question, as we are bound to do. Indeed I consider that the application in the present case should almost certainly have been made to the Crown Court at trial, rather than by way of judicial review. In addition to the cases already cited, there is support for that view in *R v Barnet Magistrates, ex p Wood* [1993] Crim LR 78, where it was said that only in exceptional cases should committal proceedings be quashed once an indictment has been signed and the defendant arraigned. (Dean has not yet been arraigned on the s 4(1) of the 1967 Act charge in the present case.) I do not overlook the fact that the application to set aside leave to apply for judicial review in these proceedings was dismissed. But that did not occur until 13 November 1992, by which time the judicial review process was well under way.

If it is necessary for the disputed issues of fact in this case to be resolved by oral evidence, I consider that we should decline to deal with it by way of judicial review, and should leave it to the Crown Court to decide whether there is abuse of process. It is only if we can decide the point on the undisputed facts, together with any other facts that we feel bound to accept as true, that we should undertake the task. But if that is indeed the situation, I consider that quite exceptionally we ought to reach a decision. Otherwise there will be an unnecessary inquiry, probably lasting several days, in the Crown Court and yet further delay. That may well be combined with or followed by a similar enquiry as to how much of Dean's statements should be treated as inadmissible by reason of the provisions of the Police and Criminal Evidence Act 1984.

Abuse of process

It is submitted on behalf of the Crown Prosecution Service that they alone are entitled, and bound, to decide who shall be prosecuted, at any rate in this category of case; and that the police had no authority and no right to tell Dean that he would not be prosecuted for any offence in connection with the murder: see the Prosecution of Offences Act 1985, s 3(2). I can readily accept that. I also accept that the point is one of constitutional importance. But I cannot accept the submission of Mr Collins that, in consequence, no such conduct by the police can ever give rise to an abuse of process. The effect on George Dean, or for that matter on his father, of an undertaking or promise or representation by the police was likely to have been the same in this case whether it was or was not authorised by the Crown Prosecution Service. It is true that they might have asked their solicitor whether an undertaking, promise or representation by the police was binding; and he might have asked the Crown Prosecution Service whether it was made with their authority. But it seems unreasonable to expect that in this case. If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage.

We were referred to three cases which suggest that abuse of process in this context can only exist where there is (i) delay or (ii) manipulation or misuse of the rules of procedure: see *R v Crown Court at Derby, ex p Brooks* (1985) 80 Cr App R 164 at 168, *R v Rotherham Justices, ex p Brough* [1991] Crim LR 522 and *R v Redbridge Justices, ex p Whitehouse* (1992) 94 Cr App R 332 at 336. But there is high authority that the concept is wider than that. In *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 Lord Diplock spoke of—

> 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the

literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied.'

In *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354, Lord Devlin said:

'Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer.'

Against that there is the decision of the New Zealand Court of Appeal in *Moevao v Dept of Labour* [1980] 1 NZLR 464. There it was held that a magistrate had no jurisdiction to examine the exercise of the decision to prosecute, for an immigration offence. Richardson J said (at 482):

'The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.'

Other Commonwealth cases have considered whether there should be a stay when the defendant has been promised immunity or something of that sort. In *R v Milnes and Green* (1983) 33 SASR 211 the Supreme Court of South Australia held that a stay would not be granted, because an implied condition of the promise of a pardon, that the defendant would give truthful information, had been broken. But Cox J, whose judgment was approved on appeal, accepted (at 225–226) that there should be a stay when the grounds for one were clearly made out.

In the Supreme Court of Victoria Ormiston J was apparently disposed to grant a stay in *R v Georgiadis* [1984] VR 1030. In *R v Betesh* (1976) 30 CCC (3d) 233 a stay was granted by a county court judge in Ontario. In *R v Crneck, Bradley and Shelley* (1980) 55 CCC (2d) 1 Krever J granted a stay to one defendant, but refused a stay to another.

Most significant, to my mind, is *Chu Piu-wing v A-G* [1984] HKLR 411. There the Hong Kong Court of Appeal set aside a subpoena to a witness, as an abuse of process, and the consequent conviction of the witness for contempt of court. The ground was that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, although the subpoena was in the event obtained by the police. Both were held to be 'arms of the Executive in its investigation function'. McMullen V-P said (at 417–418):

'... there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'

In my judgment the prosecution of a person who had received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. Mr Collins was eventually disposed to concede as much, provided (i) that the promisor had power to decide, and (ii) that the case was one of bad faith or something akin to that. I do not accept either of those requirements as essential.

Conclusion

The undisputed evidence shows that George Dean was given to understand, over a considerable period, that he was to be a prosecution witness, from which it almost certainly followed that he was not himself to be prosecuted for any offence in connection with the murder. But the undisputed evidence does not show that he received any express promise, undertaking or offer of immunity.

It is at this point that I must return to the affidavit of Mrs Hyde of the Crown Prosecution Service. After her conference with police officers, she knew—

'that the police wished to use the applicant as a prosecution witness and had stated to him that he would not be prosecuted for offences associated with the murder of Ronald Eades.'

In my judgment, we are entitled to treat that evidence as true and should do so. We should disregard the evidence of the police officers to the contrary.

It is then necessary to see how far the disputed evidence on behalf of the applicant supports Mrs Hyde's statement. Perhaps the high point is in the affidavit of Dean's father. He says that, in the early evening of 18 March, Pc O'Brien told him—

'that George would be released later on after he had made a voluntary statement concerning the matter, and that he was not going to be charged with anything because he was going to be their main prosecution witness.'

Dean himself says in this statement that on that day he was told, 'We're definitely going to have you on our side.'

It is those passages which I think we are entitled to treat as truthful in the light of Mrs Hyde's affidavit. In my judgment, particularly having regard to the fact that Dean was only 17 at the time (although not, as he has since admitted, a stranger to crime), it was clearly an abuse of process for him to be prosecuted subsequently. The impression created was not dispelled for over five weeks, during which period he gave repeated assistance to the police. This case can, I think, be regarded as quite exceptional. The justices were bound to treat it as one of abuse of process.

I would quash the committal of George Dean for the s 4(1) of the 1967 Act offence.

BUCKLEY J. I agree.

Application allowed. Leave to appeal to the House of Lords refused.

Dilys Tausz Barrister.